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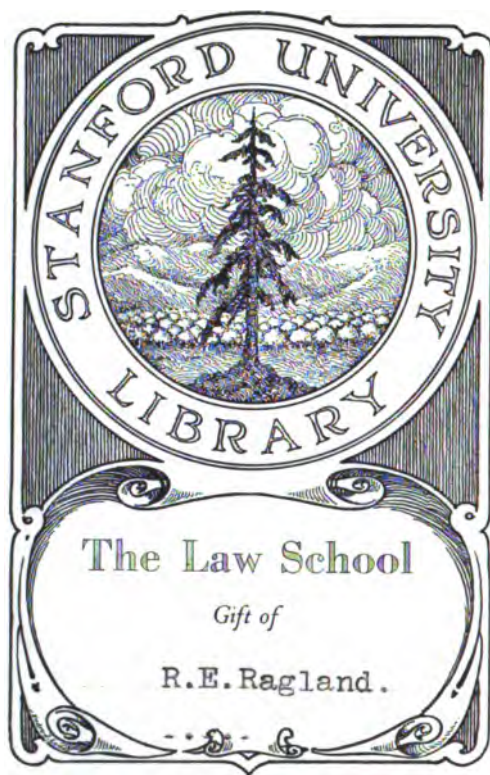
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STANDARD ENCYCLOPÆDIA *of* PROCEDURE

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II. CHANGE OF VENUE IN CIVIL ACTIONS. — A. WHAT THE TERM MEANS. — At common law change of venue did not effect a removal of the record, but only a change in the place of trial.¹ But modern statutes make no distinction between the terms "change of venue" and "removal of cause."² And though the term imports

1. *Shannon v. Smith*, 31 Mich. 451.
2. *State ex rel. Vickery v. Wofford*, 119 Mo. 375, 24 S. W. 764.

"Venue," says Bouvier, "is the county in which the facts are alleged to have occurred, and from which the jury are to come to try the issue." Change of venue might mean two things, therefore, first, a change of the county in which the facts are alleged to have occurred, or, secondly, a change in the county from which the jury is to be drawn. If it must include both, there could be no change of venue, unless it had been improperly laid in the first instance; but now it is also used generally, as including only the second meaning, and hence, equivalent to change of place of trial. Bouvier, Law Dict. title "Venue."

"A change of venue in this state, where we have no *nisi prius* system, is to all intents and purposes beyond mere

form, a transfer of causes." *People v. Hurst*, 41 Mich. 328, 1 N. W. 1027.

"The term [change of venue] has, in some way, crept into the books, and into legislative acts, and, when used, means no more than a change of the trial from the county in which the bill was found, to some other within the jurisdiction of the court. The words . . . propose no more than to confer on the circuit judges in the cases, and subject to the provision therein mentioned, authority to direct the trial elsewhere than in the county where the bill is found, or the action brought. In fact the language of the act gives the construction which it intends, by the use of the words 'to change the venue,' for it authorizes the change to be made 'by ordering the record to be removed, for trial, to some other county within the Circuit.'" *State v. Addison*, 2 S. C. 356.

primarily a change of the county where the proceedings are to be had,³ statutes relating thereto are construed to include a change to another division of the same circuit, and in some states even to a change of judge.⁵

B. BASIS OF RIGHT.—I. At Common Law.—a. In England. The practice of granting a change of venue from one county to another is said to have been derived from the statute 6, Rich. 2, ch. 2, and to have been resorted to first in the reign of James I.⁶

The form of the common rule and affidavit were established in 23 Car. 1, but change by motion and affidavit did not become general until after the Statute of Jeofails, 16 and 17 Car. 2, ch. 8, which abolished the practice of waiting till after the verdict, and then applying for an arrest of judgment because of the improper venue.⁷

b. In the United States.—This practice has been held to be a part of the common law in force at the time of the revolution, and applicable to the colonial courts and their successors, except as modified by statute.⁸

2. By Statute.—a. In General.—The courts of many states, however, have denied any such authority springing from the common law, and have limited the power solely to the scope specified by statute,⁹

3. *Hutts v. Hutts*, 62 Ind. 240.

4. *Priddy v. Boice*, 201 Mo. 309, 99 S. W. 1055; *Leslie v. G. W. Chase & Son M. Co.*, 200 Mo. 363, 98 S. W. 523.

5. In *Perrin v. State*, 81 Wis. 135, 50 N. W. 516, it was held that "the words 'change of venue,' as used in sec. 4680 R. S., refer as well to the calling in of another judge, as to the actual change of the place of trial." For, "although the calling in of another judge is not strictly a change of venue, because it does not change the place of trial, still, it accomplishes all the purposes legitimately aimed at by a change of venue for prejudice of the judge. It furnishes another presiding judge as effectually as if the place of trial was in fact changed."

Contra.—*Hutts v. Hutts*, 62 Ind. 240; *Schriver v. Bowen*, 57 Ind. 266; *Leary v. Ebert*, 57 Ind. 415.

"The election of the special judge when the first publication was made, was not a 'change of venue,' within the meaning of the act of 1881, which prohibits more than one change of venue in the same case (Ses. Acts 1881, p. 176), though it was a substitute allowed by statute for a change of venue, and either might have been granted without error." *Suddoth v. Bryan*, 30 Mo. App. 37.

6. Will's Gould Pl. 292; 1 Tidd's Pr. 544; 3 Bl. Com. 294; 1 Bac. Abr. B. 35, and the following: Fla.—*Hewitt v. State*, 43 Fla. 194, 30 So. 795. N. H. *Cochecho R. v. Farrington*, 26 N. H. 428. Eng.—*Foster v. Taylor*, 1 T. R. 781, 99 Eng. Reprint 1376; *Santler v. Heard*, 2 W. Bl. 1031, 98 Eng. Reprint 605; *Godfrey v. Philpot*, 2 Ld. Raym. 1418, 92 Eng. Reprint 423; *Heathcoat's Case*, 2 Salk. 670, 91 Eng. Reprint 570.

7. *Santler v. Heard*, 2 W. Bl. 1031, 96 Eng. Reprint 605.

8. *Cooke v. Cooke*, 41 Md. 362; *Cochecho R. v. Farrington*, 26 N. H. 428.

9. Idaho.—*Bell v. Bell*, 18 Idaho 636, 111 Pac. 1074. Mass.—*Hawkes v. Kennebeck County*, 7 Mass. 461; *Cleveland v. Welch*, 4 Mass. 591; *Lincoln County v. Prince*, 2 Mass. 544. Mich. *Grand Rapids & I. R. Co. v. Kalamazoo Circuit Judge*, 154 Mich. 493, 117 N. W. 1050; *Shannon v. Smith*, 31 Mich. 451. Mo.—*State v. Denton*, 107 S. W. 446; *State v. Headrick*, 149 Mo. 396, 51 S. W. 99; *State ex rel. Cottrell v. Wofford*, 119 Mo. 408, 24 S. W. 1009. Mont. *Winlen v. Heinze*, 32 Mont. 354, 80 Pac. 918. Ora.—*Elliott v. Wallowa County*, 109 Pac. 130 (change limited to grounds enumerated in B. & C. Comp. §45); *Commercial Nat. Bank v. Davidson*, 18

but have construed such statutes liberally as being in furtherance of justice.¹⁰

b. *What Is a Civil Action.*—The wording of the statutes, therefore, determines under what circumstances the right exists. It may be exercised in all "civil actions," under most of the statutes.¹¹

A civil action is held to mean any "action wherein an issue is presented for trial, formed by the averments of the complaint, and the denials of the answer, or the replication to new matter, and the trial takes place by the introduction of legal evidence in support of the allegations of the pleadings, and a judgment in such an action is conclusive upon the rights of the parties, and could be pleaded in bar."¹²

Illustrations.—The right has thus been recognized in condemnation proceedings,¹³ in suits where an injunction is sought,¹⁴ in an application for mandamus,¹⁵ or certiorari,¹⁶ in a contest of an application for a liquor license,¹⁷ in a suit to set aside a lease,¹⁸ or a conveyance of land,¹⁹ in a claim against the estate of a decedent,²⁰ in an election contest,²¹ in a trial of the right of property incident to attachment,²² in garnishment proceedings,²³ in disbarment proceed-

Ore. 57, 22 Pac. 517. *S. C.*—*Raffield v. Atlantic Coast L. R. Co.*, 86 S. C. 324, 68 S. E. 631, C. C. P. 190, §147.

Idaho.—Change for disqualification of judge held authorized under Const. Sec. 18, Art. 1, even though not included in Rev. Codes, §3900. *Day v. Day*, 12 Idaho 556, 86 Pac. 531.

Wisconsin.—Pub. Acts, 1907, p. 212, No. 161, does not enlarge the scope of Pub. Acts, 1905, p. 483, No. 309, allowing change of venue only in criminal or civil actions. *Goyke v. State*, 136 Wis. 557, 117 N. W. 1027.

10. *Cal.*—*Buck v. Eureka*, 97 Cal. 135, 31 Pac. 845. *Ky.*—*Riggen v. Com.*, 3 Bush 493. *Md.*—*Gardner v. State*, 25 Md. 146. *Mo.*—*State v. Noland*, 111 Mo. 473, 19 S. W. 715. *Wash.*—*State v. Superior Court*, 40 Wash. 443, 82 Pac. 875. *Wyo.*—*Barkwell v. Chatterton*, 4 Wyo. 307, 33 Pac. 940.

Contra, *State v. Denton* (Mo.), 107 S. W. 446, where the court said: "We agree with him [the respondent] that the statute is to be strictly construed."

11. See cases following.

12. *Berry v. Berry*, 147 Ind. 176, 46 N. E. 470, citing *Evans v. Evans*, 105 Ind. 204, 5 N. E. 24,768; *Deer Lodge Co. v. Kohrs*, 2 Mont. 66, 70.

The fact that a jury may not be required will not bar the right (*Scanlon v. Deuel* (Ind.), 94 N. E. 561), unless the grounds on which the application are based are applicable only

to a jury trial (*Wolff v. Ward*, 104 Mo. 127, 16 S. W. 161).

13. *State v. Rowe*, 69 Ark. 642, 65 S. W. 463; *Sand. & H. Dig.* §7379.

14. *Yuba County v. North Am. Cons. G. M. Co.*, 12 Cal. 121, 107 Pac. 138.

15. *Woodworth v. Old Second Nat. Bank*, 144 Mich. 338, 107 N. W. 905.

16. *Rev. St. (Mo.)*, 1899, §818; *State v. Denton* (Mo.), 107 S. W. 446.

But this right does not extend to the members of the court. *State v. Martin* (Mo.), 74 S. W. 886.

17. *Scanlon v. Deuel* (Ind.), 94 N. E. 561; *Burns' Ann. St. (Ind.)*, 1908, 422.

18. *Walker v. Ellis*, 146 Mo. 327, 48 S. W. 457.

19. *Henderson v. Henderson*, 55 Mo. 534.

20. *Daniels v. Bruce* (Ind.), 95 N. E. 569; *Scherer v. Ingerman*, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304.

21. *Weakley v. Wolff*, 149 Ind. 208, 47 N. E. 466, holding that a statute allowing a change of venue "of any civil action," covers special proceedings.

22. *First Nat. Bank v. Levinson*, 129 Ill. App. 173, citing *Sellers v. Thomas*, 185 Ill. 384, 57 N. E. 10, and holding that such a trial is a "proceeding at law."

23. *State v. Spokane County Supreme Court*, 40 Wash. 443, 82 Pac. 875,

ings,²⁴ in drainage proceedings,²⁵ and to relocate a highway,²⁶ in proceedings for the appointment of a guardian for a person of unsound mind,²⁷ or to determine the sanity of a prisoner,²⁸ and in proceedings supplementary to execution.²⁹ It has been allowed also to an interpleader,³⁰ and on exceptions to the report of an assignee administering the estate of an insolvent.³¹

The right to a change has been denied in a suit to condemn realty,³² to probate a will,³³ and to locate the point of crossing of one steam railroad over another.³⁴ Nor will a change be granted in proceedings on the judgment of another court.³⁵

c. *Nature of Action Fixed by the Complaint.*—The complaint fixes the nature of the action for the purpose of determining the question of the right to a change of venue.³⁶

citing *Rood on Garnishment*, §327; *Westphal, Hinds & Co. v. Clark*, 42 Iowa 371; *Hewitt v. Follett*, 51 Wis. 264, 8 N. W. 177, and saying: "A garnishment proceeding is neither more nor less than an action by the defendant against the garnishee for the use of the plaintiff. It possesses all the elements of any other action. The law contemplates that contingencies will arise where the ends of justice demand a change in the place of trial. A garnishment proceeding comes within the spirit of this law and is not excluded by the letter."

24. *Burns' Ann. St. (Ind.)*, 1901, §988; *In re Darrow (Ind.)*, 83 N. E. 1026; *In re Griffin*, 33 Ind. App. 153, 69 N. E. 192; *Peyton's Appeal*, 12 Kan. 398.

25. *Bass v. Elliott*, 105 Ind. 517, 5 N. E. 663; *State v. Riley (Mo.)*, 101 S. W. 567; *Ann. St. (Mo.)*, 1906, p. 789.

26. *Schmied v. Keeney*, 72 Ind. 309.

27. *Berry v. Berry*, 147 Ind. 176, 46 N. E. 470, the statute providing that in such proceedings "the issue shall be tried as the issues in civil actions, are tried." This case held that such proceedings fall within the meaning of "civil action."

28. *People v. Chanler*, 116 N. Y. Supp. 62, where, however, change was refused.

29. *Burkett v. Bowen*, 104 Ind. 184, 3 N. E. 768, holding that such a proceeding is a civil action.

30. *Gielt v. McGannon Merc. Co.*, 74 Mo. App. 209, holding that an interplea is a "civil cause," and is in no sense part of the cause of action but the assertion of an independent right to be tried and determined separately,

upon what is virtually a separate record.

31. *In re Heath's Assignment*, 136 Mo. App. 347, 117 S. W. 125, construing *Rev. St. (Mo.)*, 1899, §818; *Ann. St.*, 1906, p. 789.

32. *Pub. Acts (Mich.)*, 1907, p. 212, No. 161; *Grand Rapids & I. R. Co. v. Kalamazoo Circ. Judge*, 154 Mich. 493, 117 N. W. 1050; *Michigan, etc. R. Co. v. Monroe, C. J.*, 144 Mich. 44, 107 N. W. 704.

33. *Byram's Exrs. v. Holliday*, 84 Ky. 18, saying that "such proceedings are purely local."

34. *Vandalia R. Co. v. La Fayette & L. Tract. Co. (Ind.)*, 94 N. E. 483, pointing out that this provision of the statute applies only to the "special and summary proceeding."

35. *Hawkeye Ins. Co. v. Huston*, 115 Iowa 621, 89 N. W. 29; *Gratton v. Matteson*, 51 Iowa 622, 2 N. W. 432; *Lockwood v. Kitteringham*, 42 Iowa 257; *Small v. Reeves (Ky.)*, 37 S. W. 682; *Jacobson v. Wernert*, 19 Ky. L. Rep. 662, 41 S. W. 281; *McConnell v. Rowe*, 8 Ky. L. Rep. 343, 1 S. W. 582.

36. *Cal.*—*Bartley v. Fraser*, 117 Pac. 683; *Murphy v. Crowley*, 140 Cal. 144, 73 Pac. 820; *Southern Pac. Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272; *Eddy v. Houghton*, 6 Cal. App. 85, 91 Pac. 397. *Colo.*—*Colorado Fuel & Iron Co. v. Four Mile R. Co.*, 29 Colo. 90, 66 Pac. 902; *Updegraff v. Lessem*, 15 Colo. App. 297, 62 Pac. 342. *Idaho.*—*Murphy v. Russell*, 8 Idaho 151, 67 Pac. 427. *Minn.* *Jones v. District Court*, 99 N. W. 806. *N. Y.*—*Tolhurst v. Howard*, 94 App. Div. 439, 88 N. Y. Supp. 235; *Jacobs v. Callan*, 128 N. Y. Supp. 295. *N. D.* *Viets v. Silver*, 126 N. W. 239. *S. C.*

d. *Number of Changes.*—Under ordinary circumstances only one change of venue is allowable at the instance of the same party.³⁷ But a second change may be had if the first was effected by operation of law and not merely as a privilege of the moving party.³⁸

e. *Waiver of Right.*—The right to have a change of venue may be waived by appearing before the court designated and proceeding with the trial without questioning its jurisdiction,³⁹ or by taking such other steps as would amount to an acknowledgment thereof,⁴⁰ or by failure to object to a *pro tem.* judge,⁴¹ or by laches.⁴² But appearing and

Strain v. Babb, 30 S. C. 342, 9 S. E. 271.

37. Ill.—American Car & F. Co. v. Hill, 226 Ill. 227, 80 N. E. 784. Ind. Dill v. Frazee, 77 N. E. 1147; Willard v. Ames, 130 Ind. 351, 30 N. E. 210; Griffith v. Dickerman, 123 Ind. 247, 24 N. E. 237; Evansville Metal Bed Co. v. Loge, 42 Ind. App. 461, 85 N. E. 979. Mo.—Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055 (a change to another division of the same circuit counts as one change); St. Louis, etc. R. Co. v. Holladay, 131 Mo. 440, 33 S. W. 49; Rev. St., 1889, §2258.

38. Graham v. People, 111 Ill. 253; Roberson v. Tipple, 126 Ill. App. 579.

39. Cal.—Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190. Colo.—Forbes v. Board of Comrs., 23 Colo. 344, 47 Pac. 388. Ill.—Theobald v. Chicago, etc. R. Co., 75 Ill. App. 208. Ind. Ter. Ellis v. Fitzpatrick, 3 Ind. Ter. 656, 64 S. W. 567, change had been granted previously but not perfected. Ia.—Fred Miller B. Co. v. Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023. Minn.—Nystrom v. Quimby, 68 Minn. 4, 70 N. W. 777, change granted but not perfected. N. Y.—Bodie v. Verdon, 22 Misc. 409, 49 N. Y. Supp. 178, *affirmed*, 62 N. Y. Supp. 1146. N. C.—McArthur v. Griffith, 147 N. C. 545, 61 S. E. 519; Garrett & Co. v. Bear, 144 N. C. 23, 56 S. E. 479. Wash.—State v. Superior Court, 112 Pac. 927.

40. Kan.—Isenhart v. Hazen, 63 Pac. 451, party consented to a hearing before a referee. Md.—Caledonia Fire Ins. Co. v. Traub, 86 Md. 86, 37 Atl. 782. Mich.—Grand Rapids & I. R. Co. v. Cheboygan, C. J., 159 Mich. 210, 123 N. W. 591. Mont.—Bean v. Missoula L. Co., 40 Mont. 31, 104 Pac. 869. N. Y.—Schaaf v. Denniston, 121 App. Div. 504, 106 N. Y. Supp. 168; Coleman v. Hayes, 92 App. Div. 575, 87 N. Y. Supp. 12.

Securing an extension of time to answer does not constitute waiver under California Code Civ. Proc. §396, requiring application for change to be filed at the time when the defendant appears and answers or demurs. Grant v. Bannister, 145 Cal. 219, 78 Pac. 653. But the contrary is held in South Dakota where the demand must be made within thirty days. Laws, 1909, ch. 283; Irwin v. Taubman (S. D.), 128 N. W. 617.

41. Missouri Pac. R. Co. v. Preston (Kan.), 63 Pac. 444.

42. Ill.—Haley v. City of Alton, 152 Ill. 113, 38 N. E. 750 (all the case had been heard); Hudson v. Hanson, 75 Ill. 198 (application filed on June 3, not brought up for hearing until October). Ind.—Whitcomb v. Stringer, 160 Ind. 82, 66 N. E. 443 (trial had been in progress thirty days); Jones v. Dipert, 123 Ind. 594, 23 N. E. 944 (tardy application, without justification for delay); Smith v. Amis, 30 Ind. App. 530, 66 N. E. 501 (after decision rendered); Brow v. Levy, 3 Ind. App. 464, 29 N. E. 417 (to justify a late application party must show that he exercised reasonable diligence). Ky. Louisville & E. R. Co. v. Poulter's Admr., 119 Ky. 558, 84 S. W. 576, application not made at appearance term, but at subsequent term. Mich.—State Road Bridge Co. v. Saginaw, 148 Mich. 396, 111 N. W. 1084 (delay beyond the ten days allowed by rule of court); Detroit Portland C. Co. v. Genesee Circuit Judge, 148 Mich. 286, 111 N. W. 744 (if there are several defendants application is in time if made within ten days after the filing of the last pleading). Minn.—Waldron v. City of St. Paul, 33 Minn. 87, 22 N. W. 4, application seven months after issues joined. Mo.—Priddy v. MacKenzie, 205 Mo. 181, 103 S. W. 968 (undue delay after knowledge of facts acquired); McArthur v.

answering does not waive the right if the court has no jurisdiction over the subject-matter of the suit.⁴³

Application and Exception.—Proceeding to trial does not waive the right, however, if proper application was made and exception taken to its denial.⁴⁴

III. GROUNDS FOR DEMANDING CHANGE.—A. SUIT BROUGHT IN WRONG COUNTY.—1. Local Actions.—a. Involving Realty.—A change of venue will be granted if the action is brought in the wrong county. This right exists in local actions involving realty by reason of the nature of the subject-matter, the defendant having a *prima facie* right to have a question concerning real property adjudicated by the courts of the county where that property is situated.⁴⁵ If by a change of boundaries the property is placed in another county pending trial, the right to a change to that county at once attaches.⁴⁶

b. Against Municipal or Political Bodies.—Some actions are local by reason of the nature of the parties. So generally as to municipal

Kansas City E. R. Co., 100 S. W. 62 (application too late after jury sworn); St. Louis, etc. R. Co. v. Holladay, 131 Mo. 440, 33 S. W. 49 (applicant did not show clearly that he had acted promptly); State v. Matlock, 82 Mo. 455. N. Y.—Becker v. Town of Cherry Creek, 77 Hun 11, 28 N. Y. Supp. 279 (over a year had elapsed since the joining of issue when the motion was noticed for hearing); Hoffman v. Sparling, 12 Hun 83. S. C.—Blakely v. Frazier, 11 S. C. 122, application should be made before the cause is reached on the docket.

43. Nixon & Danforth v. Piedmont Mut. Ins. Co., 74 S. C. 438, 54 S. E. 657, citing and relying upon Ware v. Henderson, 25 S. C. 385.

44. Miehle Printing & Mfg. Co. v. Arkulas, 131 Ill. App. 461. Ia.—Foss v. Cobler, 105 Iowa 728, 75 N. W. 516. Kan.—Jones v. Williamsburg etc. Ins. Co., 83 Kan. 682, 112 Pac. 826. Tex. Wolf v. Sahm (Tex. Civ. App.), 120 S. W. 1114 (rehearing denied, 121 S. W. 561), petition to vacate default judgment does not amount to a waiver of the venue. Wis.—Franke v. Neisler, 96 Wis. 364, 72 N. W. 887.

Demurring to the complaint (Smith v. Post Prtg. & Pub. Co. (Colo.), 68 Pac. 119), or making a motion to strike parts of the complaint, does not waive the right where a demand for change is made at the same time (Wood, Curtis & Co. v. Herman Min. Co., 139 Cal. 713, 73 Pac. 588).

45. Ark.—State v. Rowe, 69 Ark. 642, 65 S. W. 463; Const., Art. 6, §58

Code Civ. Proc., §§392, 396. Cal.—Bartley v. Fraser, 117 Pac. 683; Sloss v. De Toro, 77 Cal. 129, 19 Pac. 233. Colo. Smith v. People, 2 Colo. App. 99, 29 Pac. 924, distinguishing Fletcher v. Stowell, 17 Colo. 94, 28 Pac. 326. Ind. Du Breuil v. Pennsylvania R. Co., 130 Ind. 137, 29 N. E. 909. Ia.—Sketchley v. Smith, 73 Iowa 542, 43 N. W. 524. Miss. Baum v. Burns, 66 Miss. 124, 5 So. 697. N. Y.—Dexter v. Alfred, 128 N. Y. 618, 28 N. E. 253; Kearn v. Bartlett, 47 Hun 245. N. C.—Falls, etc. Mfg. Co. v. Brower, 105 N. C. 440, 11 S. E. 313. N. D.—Viets v. Silver, 126 N. W. 239.

An action relating partly to real property and partly to personalty will be transferred to the county where the realty lies. Fletcher v. Cooper, 59 How. Pr. (N. Y.) 373.

46. Knight v. Knight, 27 Ga. 633; Murdock v. Little, 18 Ga. 719; Bookwalter v. Conrade, 15 Mont. 464, 39 Pac. 573, rehearing denied, 39 Pac. 851.

The right to a change under such circumstances has been denied in the absence of special legislation. McNew v. Williams, 18 Ky. L. Rep. 364, 36 S. W. 687; Blake v. Freeman, 13 Me. 130.

A change in the boundary of a previously existing county does not give a defendant residing in the added territory a right to a change of venue under Rev. St. (Tex.), art. 1274, for there is no "new county." Dodson v. Bunton, 81 Tex. 655, 17 S. W. 507.

If another county is the plaintiff the case may be removed to a county not

and political bodies.⁴⁷ If sued by a city in the county where it is located or by a county in its own courts the defendant may have a change of venue as a matter of right.⁴⁸

c. *Against Public Officers as Such.*—A similar privilege exists in regard to public officers when sued in their official capacity.⁴⁹

d. *To Recover Penalties.*—In a suit for a penalty, under statutes, the action should be tried in the county where the cause of action arose.⁵⁰

2. **Transitory Actions.**—a. *Locus of Cause of Action.*—Transitory actions should generally be removed to the county "where the transactions involved in the controversy took place,"⁵¹ but the defendant may not have the action removed there as of right if it was properly brought in another county.⁵²

b. *Residence of Defendant.*—If not sued where the cause of action arose the defendant may demand a change to the county of his residence.⁵³ But if there are several defendants, one who is a non-resi-

a party to the action. Cal. Code Civ. Proc., §394.

47. See *Forbes v. Board of Comrs.*, 23 Colo. 344, 47 Pac. 388 (where there was a waiver); *Town of Knox v. Golding* (Ind. App.), 91 N. E. 857.

48. Cal. Code Civ. Proc., §394; *Yuba County v. North American Consol. Gold Min. Co.*, 12 Cal. App. 223, 107 Pac. 139, but not necessarily to the county of its residence.

The right does not attach in an action by the state although the county may benefit. *State v. Stewart*, 74 Iowa 336, 37 N. W. 400; *State v. Merrihew*, 47 Iowa 112.

49. *Minn.*—*State v. District Court*, 92 Minn. 402, 100 N. W. 2. N. J.—*Dennis v. Ford*, 7 N. J. L. 200. N. Y.—*Morgan v. Lyon*, 12 Wend. 265; *Park v. Carley*, 7 How. Pr. 355. N. C.—Code, §193; *Sherrod v. Dawson*, 154 N. C. 525, 70 S. E. 739; *Farmers' State Alliance v. Murrell*, 119 N. C. 124, 25 S. E. 785; *Stanley v. Mason*, 69 N. C. 1.

50. Code Civ. Proc. (N. Y.) §983; *State Board of Pharmacy v. Rhinehardt*, 116 App. Div. 495, 101 N. Y. Supp. 769; *Forbes v. Davison*, 11 Vt. 660.

"In this class of cases," said Laughlin, J., in *State Board of Pharmacy v. Rhinehardt*, *supra*, "the court has inherent power, even though the motion may not have been made within the statutory time, to change the place of trial to the proper county."

51. N. J.—*Herbert v. Terhune*, 68 N. J. L. 112, 52 Atl. 241; *McMenomy v.*

Williamson, 11 N. J. L. 316. N. Y.—*Studebaker Bros. Co. v. Western N. Y. & P. Trac. Co.*, 140 App. Div. 308, 125 N. Y. Supp. 224; *Exl v. Gordon*, 124 App. Div. 932, 108 N. Y. Supp. 1062; *Archer v. Ilravy*, 86 App. Div. 512, 83 N. Y. Supp. 727; *Spanedda v. Murphy*, 128 N. Y. Supp. 884; *Lufty v. Sullivan*, 104 N. Y. Supp. 177. Tex. Rev. St., 1895, art 1194; *Cohen v. Munson*, 59 Tex. 236.

"Unless a large preponderance of the witnesses live in another county." *Jacobs v. Davis*, 65 App. Div. 144, 72 N. Y. Supp. 553; *Fluckiger v. Haber*, 128 N. Y. Supp. 739.

52. *Reed v. First Nat. Bank*, 23 Colo. 380, 48 Pac. 507.

If suit is properly brought by plaintiff in the county of his residence defendant has no right to demand change to the county where the contract sued on is to be performed, though the suit might have been brought there under the statute. *Bales v. Cannon*, 42 Colo. 275, 94 Pac. 21.

53. Ark.—*Kirby's Dig.*, §7998; *St. Louis, S. W. R. Co. v. Furlow*, 81 Ark. 496, 99 S. W. 689. Cal.—*Bartley v. Fraser*, 117 Pac. 683; *Wong Fung Hing v. San Francisco, etc. Funds*, 115 Pac. 331; *Byran v. Pigott*, 89 Pac. 809; *Bailey v. Sloan*, 2 Pac. 44; *Pascoe v. Baker*, 158 Cal. 232, 110 Pac. 815; *McKenzie v. Barling*, 101 Cal. 459, 36 Pac. 8; *Pittman v. Carstenbrook*, 11 Cal. App. 224, 104 Pac. 699. Ia.—*Kell v. Lund*, 99 Iowa 153, 68 N. W. 593. Miss.—*Spain v. Winter, Walk*, 152. Nev.—*Williams*

dent cannot demand a change for that reason if the venue is proper as to any of his co-defendants.⁵⁴

B. CHANGE FROM THE PROPER COUNTY. — 1. Prejudice or Interest of Judge.—A change may be had from the county which was the proper one in which to bring the action, when certain other conditions exist. One of these conditions is that the qualifications of the trial judge are not such as to guarantee an impartial trial of the

v. Keller, 6 Nev. 141. **N. J.**—*Dauchy v. Taylor*, 9 N. J. L. 96. **N. Y.**—*Barnard v. Wheeler*, 3 How. Pr. 71; *Jacobson v. German American Button Co.*, 124 App. Div. 251, 108 N. Y. Supp. 795; *Jacobs v. Callan*, 128 N. Y. Supp. 295; *Thompson v. MacKinnon*, 67 N. Y. Supp. 1106. **S. C.**—*Steele v. Exum*, 22 S. C. 276. **Tex.**—*Moorhouse v. King County L. & C. Co.* (Tex. Civ. App.), 139 S. W. 883. **Wis.**—*Meineers v. Loeb*, 64 Wis. 343, 25 N. W. 216, *overruling Couillard v. Johnson*, 24 Wis. 533; *Foster v. Bacon*, 9 Wis. 345.

The residence of a party not of record has no weight in determining a change. *Lane v. Bochlowitz*, 78 N. Y. Supp. 1072.

The county of his residence is where his permanent home is located and is not affected by his business interests or official position elsewhere. *People v. Platt*, 117 N. Y. Supp. 166; *Washington v. Thomas*, 92 N. Y. Supp. 994.

The residence of a corporation is the county where its principal place of business is located. *Cohn v. Central Pac. R. Co.*, 71 Cal. 488, 12 Pac. 498; *Jenkins v. California Stage Co.*, 22 Cal. 537.

A change of residence after the action is begun does not confer the right. *Kilburz v. Jacobs*, 104 Iowa 580, 73 N. W. 1069; *Hollowell v. Dickerson*, 46 Iowa 569.

A temporary residence in another place will not effect a change of domicile unless made with the intention of abandoning the former domicile. *De Meli v. De Meli*, 120 N. Y. 485, 24 N. E. 996; *Dresser v. Mercantile Tr. Co.*, 102 N. Y. Supp. 569.

Suit by Foreign Corporation.—The county in which one of the defendants resides is the proper county in a suit brought by a foreign corporation in New York. Code Civ. Proc. §984, subject to Code Civ. Proc. §§982, 983; *Shepard & Morse Lumb. Co. v. Burleigh*, 50 N. Y. Supp. 135.

Where the rights of a non-resident

corporation were assigned to plaintiff merely for the purposes of trial, the cause should be tried where it arose and where the witnesses are. *Belden v. Schapiro*, 138 App. Div. 669, 123 N. Y. Supp. 53.

Nominal Party.—A statement by a co-defendant that he is only a nominal party is not conclusive and does not exclude his residence from consideration. *O'Brien v. O'Brien* (Cal.), 116 Pac. 692.

Defendants improperly joined may demand a change. *Moorhouse v. King County L. & C. Co.* (Tex. Civ. App.), 139 S. W. 883.

In Oregon, the defendant in a transitory action may be sued in any county in which he can be served with process. *Brown v. Deschuttes Bridge Co.* (Ore.), 35 Pac. 177. And under Mill's Ann. Code, §27, plaintiff may bring suit in county of his residence if defendant is served there. *Bales v. Cannon*, 42 Colo. 275, 94 Pac. 21. And see *Simanton v. Moore*, 65 N. J. L. 530, 51 Atl. 621.

54. *Sullivan v. Lusk*, 7 Cal. App. 186, 94 Pac. 92; *Diamond State Tel. Co. v. Blake*, 105 Md. 570, 66 Atl. 631.

Where several defendants are properly joined they may be sued in county where any of them reside (*O'Brien v. O'Brien* (Cal.), 116 Pac. 696; *Hellman v. Logan*, 148 Cal. 58, 82 Pac. 848; *Greenleaf v. Jacks*, 135 Cal. 154, 67 Pac. 17; *Updegraff v. Lesem*, 15 Colo. App. 297, 62 Pac. 342), and the joinder of the resident defendant in the application for change does not change the right of the plaintiff in this respect (*Hellman v. Logan*, *supra*; *Hearne v. De Young*, 111 Cal. 373, 43 Pac. 1108; *Senn v. Connelly*, 23 S. D. 158, 120 N. W. 1097).

If all defendants are non-residents the suit may be brought in any county. *Ivanusch v. Great Northern R. Co.* (S. D.), 128 N. W. 333.

case.⁵⁵ Most frequently such disqualification arises from prejudice of the judge against the applicant,⁵⁶ or in favor of the opposite party;⁵⁷ or from interest in the outcome of the suit;⁵⁸ or from his former employment or consultation in the case as counsel for either party,⁵⁹ or

✓ 55. **Cal.**—Krumdick v. Crump, 98 Cal. 117, 32 Pac. 800. **Colo.**—People v. District Court, 71 Pac. 388. **Idaho** Bell v. Bell, 18 Idaho 636, 111 Pac. 1074; Day v. Day, 12 Idaho 556, 86 Pac. 531. **Tex.**—Dewitt v. Herron, 39 Tex. 675; Murray v. Broughton, 46 Tex. 351 (contra, as to district judges).

The parties must agree on the transfer. *State ex rel. Hughes v. Walker*, 25 Fla. 561, 6 So. 169.

✓ The disqualification must be touching the judge who is to try the case. **Cal.**—Paige v. Carroll, 61 Cal. 215. **Ind.**—Bash v. Evans, 40 Ind. 256; Morris v. Graves, 2 Ind. 354. **Pa.**—Barnes v. Com., 11 W. N. C. 375.

56. **Colo.**—People v. District Court, 71 Pac. 388. **Idaho.**—Day v. Day, 12 Idaho 556, 86 Pac. 531. **Mo.**—State v. Dabbs, 118 Mo. App. 663, 95 S. W. 275; Leise v. Mitchell, 53 Mo. App. 563. **Ohio.**—Hunt v. State, 27 Ohio C. C. 16. **Okla.**—*In re Brown*, 2 Okla. 590, 39 Pac. 469. **Wis.**—Fatt v. Fatt, 78 Wis. 633, 48 N. W. 52.

There is no right to a change where the judge has merely to enter a decree in conformity with the instructions of a higher court. *Reeves v. Reeves*, 50 Ill. 203.

Contra, In re Davis' Estate, 11 Mont. 1, 27 Pac. 342, where it was held that Code Civ. Proc. §62 and Prob. Prac. Act §110 did not authorize change for prejudice of judge.

But a statute allowing a change in the place of trial does not justify the judge in retaining a cause for the disposition of preliminary questions. *Allerton v. Edgerton*, 56 Iowa 709, 10 N. W. 252.

Mere apprehension that the judge is prejudiced is not sufficient. *Purvis v. Frink*, 55 Fla. 715, 46 So. 171; *In re Smith*, 73 Kan. 743, 85 Pac. 584.

Personal Prejudice.—The prejudice must be against the applicant personally and not merely against the kind of action he brings (**Cal.**—*In re Dolbeer's Estate*, 153 Cal. 652, 96 Pac. 266. **Fla.**—Gen. St., 1906, §1471; *Purvis v. Frink*, 55 Fla. 715, 46 So. 171. **Mo.**—*Bent v. Lewis*, 15 Mo. App. 40), nor

in regard to a question of law (*Western Bank v. Tallman*, 15 Wis. 92).

Erroneous rulings against a party are not conclusive of prejudice. *Estudillo v. Security Loan & Tr. Co.*, 158 Cal. 66, 109 Pac. 884; *Burke v. Mayall*, 10 Minn. 287.

57. *Keen v. Brown*, 46 Fla. 487, 35 So. 401, holding that the order need not state the ground of the transfer if this sufficiently appears from the record.

58. **Cal.**—*Livermore v. Brundage*, 30 Pac. 848; *In re White's Estate*, 37 Cal. 190; *Parrish v. Riverside Tr. Co.*, 6 Cal. App. 95, 93 Pac. 685. **Fla.**—*Williams v. Robles*, 22 Fla. 95; *McCl. Dig.*, p. 337. **N. C.**—*Carter v. Western N. C. R. Co.*, 68 N. C. 346. **Ohio.**—*State v. Winget*, 37 Ohio St. 153. **Pa.**—*Brittain v. Monroe Co.*, 214 Pa. 648, 63 Atl. 1076. **Tex.**—*Hawpe v. Smith*, 22 Tex. 410. **Wash.**—*Barnett v. Ashmore*, 5 Wash. 163, 31 Pac. 466. **Wis.**—*Jefferson County v. Milwaukee Co.*, 20 Wis. 139.

The interest must be in the pending suit (**Cal.**—*Southern Cal. M. R. Co. v. Merrill* (Cal.), 34 Pac. 712. **Tex.**—*Warren v. Kelly*, 17 Tex. 544. **Wis.**—*Brown v. La Crosse City*, etc. Co., 21 Wis. 51), and must be pecuniary (*State v. Winget*, 37 Ohio St. 153; *Hungerford v. Cushing*, 2 Wis. 397).

59. **Mich.**—*Curtis v. Wilcox*, 74 Mich. 69, 41 N. W. 863; *Stimson v. Michigan Shingle Co.*, 71 Mich. 374, 39 N. W. 14; *People v. Judge of Saginaw Circ. Ct.*, 26 Mich. 342. **Mo.**—*Bailey v. Kimbrough*, 37 Mo. 182. **Nev.**—*Gamble v. First Judicial Dist. Ct.*, 27 Nev. 233, 74 Pac. 530. **N. Y.**—*Van Rensselaer v. Douglas*, 2 Wend. 290. **Tex.**—*Houston & Texas R. Co. v. Ryan*, 44 Tex. 426.

Former Employment.—Employment as counsel in a former suit does not disqualify him from sitting in a suit to enforce rights thereby acquired. *Kerr v. Burns*, 42 Colo. 285, 93 Pac. 1120. And see *Karcher v. Pearce*, 14 Colo. 557, 24 Pac. 568 (where it was held that previous employment by the same plaintiff in a suit against the same defendant did not disqualify); *Hungerford v. Cushing*, 2 Wis. 397

his relationship to one of the parties;⁶⁰ or from the fact that he is a material witness.⁶¹

2. Undue Influence Over Citizens of County.—Undue influence of one of the parties or his attorney over the people of the district is also good cause for changing the place of trial.⁶²

3. Prejudice in the County.—A party is entitled to a change of venue if the inhabitants of the county are prejudiced against him.⁶³

The prejudice must be so general that a fair and impartial jury cannot be gathered and a fair trial had.⁶⁴

(holding that the judge was not disqualified by employment by plaintiff in another connection).

A general retainer by one of the parties will disqualify the judge from sitting. *Lux v. Haggin* (Cal.), 13 Pac. 654; *Kern Val. W. Co. v. McCord*, 70 Cal. 646, 11 Pac. 798; *Jones v. Williamsburg City Fire Ins. Co.*, 83 Kan. 682, 111 Pac. 826; *Jones v. American Cent. Ins. Co.*, 83 Kan. 44, 109 Pac. 1077.

60. The relationship must be to one of the parties to the pending action. *Cal. De La Guerra v. Burton*, 23 Cal. 592. *Fla.*—*Williams v. Robles*, 22 Fla. 95. *Ind.*—*Smith v. Amiss*, 30 Ind. App. 530, 66 N. E. 501.

61. *Ill.*—*Roberson v. Tipple*, 126 Ill. App. 579. *Kan.*—*Burlington Ins. Co. v. McLead*, 40 Kan. 54, 19 Pac. 354; *Spencer v. Iowa Mtg. Co.*, 6 Kan. App. 378, 50 Pac. 1094. *Miss.*—*Andrews v. Powell*, 41 Miss. 729.

62. *Ind.*—*Rout v. Ninde*, 118 Ind. 123, 20 N. E. 704; *Shaw v. Hamilton*, 10 Ind. 182. *Ia.*—*Bigelow v. Wilson*, 87 Iowa 628, 54 N. W. 465; *Deere v. Bagley*, 80 Iowa 197, 45 N. W. 557. *Ky.*—*Middlesborough W. Co. v. Neal*, 105 Ky. 586, 49 S. W. 428; *Smith v. Sisters*, etc. of Louisville, 27 Ky. L. Rep. 110, 87 S. W. 1033; *Wall v. Muster's Exrs.*, 23 Ky. L. Rep. 556, 63 S. W. 432; *Asher v. Beckner*, 19 Ky. L. Rep. 521, 41 S. W. 35. *Mo.*—*Gee v. St. Louis R. Co.*, 140 Mo. 314, 41 S. W. 796. *N. C.*—*Smith v. Hotter*, 4 N. C. 518. *Pa.*—*Little v. Wyoming Co.*, 214 Pa. 596, 63 Atl. 1039. *Tex.*—*Houston Prtg. Co. v. Mouldon*, 15 Tex. Civ. App. 574, 41 S. W. 381. *Va.*—*American Bond & Tr. Co. v. Milstead*, 102 Va. 683, 47 S. E. 853.

Prominence and influential position does not of itself establish undue influence. *Ga.*—*Roberts v. Leonard*, 62 Ga. 209. *Ky.*—*Mathis v. Bank of Taylorsville*, 36 Ky. L. Rep. 634, 124 S. W. 876. *N. Y.*—*Noonan v. Luther*, 128 App. Div. 673, 112 N. Y. Supp. 898.

Influence of the attorney is not ground for change in some states. *Dakan v. Superior Court*, 2 Cal. App. 52, 82 Pac. 1129; *Louisville & E. R. Co. v. Poulter's Admr.*, 119 Ky. 558, 84 S. W. 576.

63. *Cal.*—*People v. Almy*, 46 Cal. 245. *Idaho.*—*Gibbert v. Washington W. P. Co.*, 19 Idaho 637, 115 Pac. 924. *Ia.*—*Croft v. Chicago*, etc. R. Co., 109 N. W. 723; *Union Mill Co. v. Prenzler*, 100 Iowa 540, 69 N. W. 876. *Ky.*—*Graziani v. Burton*, 30 Ky. L. Rep. 180, 97 S. W. 800; *Smith v. Sisters*, etc. of Louisville, 27 Ky. L. Rep. 1107, 87 S. W. 1083. *Mo.*—*State v. Bryan*, 102 Mo. 256, 14 S. W. 865; *Dowling v. Allen*, 88 Mo. 293. *N. Y.*—*Moulton v. Beecher*, 52 How. Pr. 182; *Udall v. Long Isl. R. Co.*, 2 How. Pr. 138. *Ohio.*—*Snell v. Cincinnati St. R. Co.*, 60 Ohio 256, 54 N. E. 270; *Rev. St.*, §5033. *Tex.*—*Trimble v. Burroughs* (Tex. Civ. App.), 95 S. W. 614. *Vt.*—*Carpenter v. Central Vt. R. Co.*, 80 Atl. 657; *Willard v. Norcross*, 75 Atl. 269. *Wash.*—*Ward v. Moorey*, 1 Wash. Ter. 104. *W. Va.*—*Ott v. McHenry*, 2 W. Va. 73; *Ingersoll v. Wilson*, 2 W. Va. 59. *Wis.*—*Cyra v. Stewart*, 79 Wis. 72, 48 N. W. 50.

If no jury is required, local prejudice is not a ground for removal. *Dean v. Stone*, 2 Okla. 13, 35 Pac. 578.

The prejudice must be against the applicant personally. *Charlotte v. Chouteau*, 33 Mo. 194.

64. *Western C. & M. Co. v. Jones*, 75 Ark. 76, 87 S. W. 440. *Ky.*—*Beavers v. Bowen*, 24 Ky. L. Rep. 882, 70 S. W. 195. *Neb.*—*North Eastern Nebraska R. Co. v. Frazier*, 25 Neb. 42, 40 N. W. 604. *N. H.*—*Cochecho R. v. Farrington*, 26 N. H. 428. *N. Y.*—*Zobieski v. Bander*, 1 Caines 487. *Tex.*—*Trimble v. Burroughs* (Tex. Civ. App.), 95 S. W. 614.

Disagreement of the jury at a former trial of the case is not conclusive evidence of local prejudice (*Noonan v. Luther*, 112 N. Y. Supp. 898); but a

What Not Enough.—A keen public interest in the case⁶⁵ or its unbiased discussion by the press or inhabitants is not sufficient ground for removal.⁶⁶

4. Convenience of Witnesses.—A change of venue is proper if the convenience of the witnesses requires it.⁶⁷

Discretion.—A change on such ground is discretionary with the trial court,⁶⁸ and does not depend solely on where the largest number of witnesses reside,⁶⁹ but if the preponderance of material witnesses is

change was held proper after three trials in *People v. Almy*, 46 Cal. 245, and after two trials in *Messenger v. Holmes*, 12 Wend. (N. Y.) 203.

That there is reason to believe that a fair trial cannot be had is sufficient under some statutes. *Jacob v. Oyster Bay*, 119 App. Div. 503, 104 N. Y. Supp. 275.

65. Ky.—*Rand, McNally & Co. v. Com.*, 32 Ky. L. Rep. 441, 106 S. W. 238. **Nev.**—*Conley v. Chedic*, 7 Nev. 336. **N. Y.**—*Noonan v. Luthier*, 128 App. Div. 673, 112 N. Y. Supp. 898.

66. Burns v. Pennsylvania E. Co., 222 Pa. 406, 71 Atl. 1054.

67. N. J.—*Kerr v. State Bank*, 4 N. J. L. 363. **N. Y.**—*Wallace v. Manning*, 130 App. Div. 894, 114 N. Y. Supp. 972; *Shaff v. Rosenberg*, 116 App. Div. 366, 101 N. Y. Supp. 892; *Bell v. Whitehead Bros. Co.*, 5 App. Div. 555, 39 N. Y. Supp. 434; *Zenner v. Dexter*, 92 Hun 195, 36 N. Y. Supp. 590; *Brady v. Cohen*, 57 Misc. 358, 109 N. Y. Supp. 628; *Larocque v. Conhaim*, 45 Misc. 234, 92 N. Y. Supp. 99; *Newgold v. Weller Bottling Wks.*, 128 N. Y. Supp. 499; *Neeley v. Erie R. Co.*, 119 N. Y. Supp. 953; *John Hofman Co. v. Murphy*, 116 N. Y. Supp. 506; *Williams v. Westminster Kennel Club*, 113 N. Y. Supp. 313; *Aldine Mfg. Co. v. Duffy-McInerney Co.*, 109 N. Y. Supp. 596; *Hurn v. Olmstead*, 105 N. Y. Supp. 1091; *Church v. Swigert*, 90 N. Y. Supp. 939; *Groff v. Rome Met. B. Co.*, 90 N. Y. Supp. 691; *Woolworth v. Klock*, 86 N. Y. Supp. 1111; *Nelson v. Nelson*, 21 N. Y. Supp. 287; *Porter v. Lyle*, 21 N. Y. Supp. 216. **Wis.**—*Kopf v. Eneking*, 91 Wis. 15, 64 N. W. 318; *Postell v. Weinhausen*, 86 Wis. 302, 56 N. W. 913.

In New York a change will not be granted to New York county merely for the convenience of witnesses. (*Mills v. Sparrow*, 131 App. Div. 241, 115 N. Y. Supp. 629; *People v. Chanler*, 116 N. Y. Supp. 62 [nor to Kings County];

Navratil v. Bohm, 50 N. Y. Supp. 225), except under exceptional circumstances (*Shapiro v. Klar*, 136 App. Div. 91, 120 N. Y. Supp. 627; *Brady v. Hogan*, 117 App. Div. 898, 102 N. Y. Supp. 926; *Brink v. Home Ins. Co.*, 2 App. Div. 122, 37 N. Y. Supp. 628), or if imperative (*Brady v. Cohen*, 57 Misc. 358, 109 N. Y. Supp. 628, *distinguishing* *Brady v. Hogan*, *supra*).

The convenience of witnesses whose testimony was to prove the facts of a counterclaim which was not well pleaded will not be considered. *Hurley v. Roberts*, 117 App. Div. 837, 102 N. Y. Supp. 963.

Under ordinary circumstances a change for the convenience of witnesses will not be made in case of a trial seven years after the first trial. *Quinn v. Van Pelt*, 12 Hun (N. Y.) 633.

68. Cal.—*Bird v. Utica Gold Min. Co.*, 86 Pac. 509; *Clanton v. Ruffner*, 78 Cal. 268, 20 Pac. 676. **Colo.**—*DeWeir v. Osborn*, 12 Colo. 407, 21 Pac. 189. **N. J.**—*Demarest v. Hurd*, 46 N. J. L. 471. **N. Y.**—*Pattison v. Hines*, 105 App. Div. 282, 93 N. Y. Supp. 1071; *Sparks v. United Tract. Co.*, 66 App. Div. 204, 73 N. Y. Supp. 108; *O'Beirne v. Miller*, 35 Misc. 337, 71 N. Y. Supp. 946; *Mole v. New York, etc. R. Co.*, 102 N. Y. Supp. 308; *In re J. F. Pease Furnace Co.*, 13 N. Y. Supp. 654. **S. C.**—*Barfield v. J. L. Coker & Co.*, 73 S. C. 181, 53 S. E. 170.

But where greater convenience in another county is clearly shown the motion should be granted. *Thompson v. Brandt*, 98 Cal. 155, 32 Pac. 890; *Herbert v. Griffith*, 2 App. Div. 566, 37 N. Y. Supp. 1098; *Neeley v. Erie R. Co.*, 119 N. Y. Supp. 953.

69. Barnard & Greenman v. Wheeler & Niles, 3 How. Pr. (N. Y.) 71; *Weed v. Halladay*, 1 How. Pr. (N. Y.) 73; *Wallace v. Bond*, 4 Hill (N. Y.) 536.

In an action in assumpsit where plaintiff swore to three witnesses as

considerable the court, as a general rule, will grant the change.⁷⁰

When Other Considerations Control.—If the numbers are about equal other considerations will control.⁷¹ The probability of unnecessary or prejudicial delay if the change is made may be taken into consideration,⁷² as also the likelihood of securing a fair trial in the county to which it is proposed to change.⁷³

The importance and materiality of the testimony which is expected to be given by the witnesses will also be considered.⁷⁴ Hence the con-

necessary and material, and defendant swore to seventy-eight, without giving any reason for such a large number, the change was denied. *Freeman v. King*, 3 How. Pr. (N. Y.) 10.

70. *Austin v. Hinkley*, 13 How. Pr. (N. Y.) 576; *Root v. King*, 4 Cow. (N. Y.) 403; *Studebaker Bros. Co. v. Western N. Y. & P. Tract. Co.*, 140 App. Div. 302, 125 N. Y. Supp. 224; *Mills v. Sparrow*, 131 App. Div. 241, 115 N. Y. Supp. 629; *Hurley v. Roberts*, 117 App. Div. 837, 102 N. Y. Supp. 963; *Nichols v. Riley*, 112 App. Div. 102, 98 N. Y. Supp. 346; *Pattison v. Hines*, 105 App. Div. 282, 93 N. Y. Supp. 1071; *Browne v. Town of Mt. Hope*, 73 App. Div. 599, 77 N. Y. Supp. 1; *Harrington v. Village of Warsaw*, 4 App. Div. 181, 38 N. Y. Supp. 888; *People v. Smith*, 55 Hun 613, 8 N. Y. Supp. 943; *Denzel v. Grewen*, 118 N. Y. Supp. 230; *Warner v. Palmer*, 72 N. Y. Supp. 703; *Tuthill v. Long Isl. R. Co.*, 26 N. Y. Supp. 1029; *Trope v. Saratoga Assn. etc.*, 12 N. Y. Supp. 518; *Anker v. Darling*, 14 N. Y. St. 541; *Whitall v. Moshier*, 7 N. Y. St. 390.

In determining an application for the convenience of witnesses the place where the transaction arose will be taken into consideration (Supreme Court Rule No. 48), but the change will nevertheless be granted if the affidavit of convenience is overwhelming. *J. P. Lewis Co. v. Phoenix Car Co.*, 115 App. Div. 188, 100 N. Y. Supp. 669.

71. *Simanton v. Moore*, 65 N. J. L. 530, 51 Atl. 621; *Demarest v. Hurd*, 46 N. J. L. 471.

Where the cause of action arose will be considered in determining whether or not to make the change. *Brody v. C. A. Weed & Co.*, 137 App. Div. 754, 122 N. Y. Supp. 625; *Ludlow v. John Single Paper Co.*, 132 App. Div. 601, 116 N. Y. Supp. 1095; *Lambert-Snyder*

Co. v. Smith, 124 App. Div. 412, 108 N. Y. Supp. 992; *J. P. Lewis Co. v. Phoenix Car Co.*, 115 App. Div. 188, 100 N. Y. Supp. 669; *Neiman v. Gardner*, 129 N. Y. Supp. 913; *Adams Laundry Mach. Co. v. Prunier*, 126 N. Y. Supp. 867; *Hurn v. Olmstead*, 105 N. Y. Supp. 1091.

Change granted where it was also the county of the defendant's residence. *Harrison v. Holahan*, 122 App. Div. 740, 107 N. Y. Supp. 741.

Whether the ends of justice will be promoted must also be considered on such an application. *Mills v. Sparrow*, 131 App. Div. 241, 115 N. Y. Supp. 629; *Larkin v. Sheldon*, 109 N. Y. Supp. 1105 (change denied); *Brady v. Hogan*, 57 Misc. 358, 102 N. Y. Supp. 926, where a change to New York county was granted because the assignment to a non-resident was apparently not in good faith, but to embarrass the defendant. In *Brady v. Cohen*, 109 N. Y. Supp. 628, although the circumstances were very similar, a change was denied since it appeared that the assignment was bona fide and that the ends of justice would be better served by its retention in the county where brought.

72. Ia.—*Davis v. Rivers*, 49 Iowa 435. Minn.—*McNamara v. Eustis*, 46 Minn. 311, 48 N. W. 1123. N. Y. *King v. Vanderbilt*, 7 How. Pr. 385; *Miller v. Palmer*, 1 How. Pr. 385; *Garlock v. Dunkel*, 22 Wend. 615; *Smith v. Prior*, 9 Wend. 498; *Mills v. Sparrow*, 131 App. Div. 241, 115 N. Y. Supp. 629; *Brady v. Cohen*, 57 Misc. 358, 109 N. Y. Supp. 628.

73. *Tuomey v. Kingsford*, 68 App. Div. 180, 74 N. Y. Supp. 13, where it is pointed out that the statute couples convenience of witnesses and the attainment of the ends of justice.

74. *Wong Fung Hing v. San Francisco, etc. Funds (Cal.)*, 115 Pac. 331; *Miller & Lux v. Kern Co. L. Co.*, 140

venience of witnesses who are merely to give expert opinion is not given as much weight as that of those whose testimony is necessary to establish the facts.⁷⁵

Foreign Witnesses.—The same is true of foreign witnesses since they cannot be compelled to appear and their testimony may have to be taken before a commissioner.⁷⁶

Servants.—The fact that some of the witnesses are employes of a party does not exclude them from consideration, but is merely a circumstance to be considered in determining the question of convenience.⁷⁷

Facts Admitted.—And if the facts to which a witness will testify are admitted by the opposing party he is eliminated from consideration.⁷⁸

IV. CHANGE HOW EFFECTED.—A. By PETITION.—1. **The Rule.**—Generally it is necessary to file a formal application or petition, and affidavits in support thereof;⁷⁹ but a motion has been held

Cal. 132, 73 Pac. 836; Ennis-Brown Co. v. Long, 7 Cal. App. 313, 94 Pac. 250; Shaff v. Rosenberg, 116 App. Div. 386, 101 N. Y. Supp. 892; Adriance, Platt & Co. v. Coon, 115 App. Div. 92, 44 N. Y. Supp. 288; Ludlow v. John Single Paper Co., 116 N. Y. Supp. 1095; Lane v. Boohlowitz, 78 N. Y. Supp. 1072; Peck v. Will & Baumer Co., 77 N. Y. Supp. 295.

75. Schilling v. Buhne, 139 Cal. 611, 73 Pac. 431; Bushnell v. Durant, 83 Hun 32, 31 N. Y. Supp. 608; People v. Chanler, 116 N. Y. Supp. 62; Mole v. New York, etc. R. Co., 102 N. Y. Supp. 308; Groff v. Rowe Met. Bedstead Co., 90 N. Y. Supp. 691; Adriance, Platt & Co. v. Coon, 44 N. Y. Supp. 238.

76. Bowles v. Rome, etc. R. Co., 38 Hun (N. Y.) 507.

But if it is probable that they will attend, their convenience is justly entitled to consideration. Larkin v. Sheldon, 109 N. Y. Supp. 1105.

77. Miller & Lux v. Kern Co. Land Co., 140 Cal. 132, 73 Pac. 836; Sparks v. United Tract. Co., 66 App. Div. 204, 73 N. Y. Supp. 108; Burroughs v. Foster, 130 N. Y. Supp. 530; Neeley v. Erie R. Co., 119 N. Y. Supp. 953; Rieger v. Pulaski Glove Co., 99 N. Y. Supp. 558; Hays v. Faatz, Reynolds Felting Co., 98 N. Y. Supp. 386 (change not justified); Quinn v. Brooklyn H. R. Co., 84 N. Y. Supp. 738 (change not justified).

78. Stockton C. H. & Agr. Wks. v. Houser, 103 Cal. 377, 37 Pac. 179; Kurz v. Fish, 11 N. Y. Supp. 209.

Denial of a change because of an offer to stipulate for taking of testimony of defendant's witnesses before a referee is error where plaintiff has no right to demand a reference. Harrington v. Village of Warsaw, 4 App. Div. 181, 38 N. Y. Supp. 888.

An offer to stipulate what the witnesses will testify should not prevent a change. Wright v. Burritt, 17 N. Y. Supp. 645, saying: "Such a stipulation is a poor substitute for the actual presence and testimony of the witnesses before the jury." And see Cordas v. Morrison, 23 N. Y. Supp. 1076, where the evidence stipulated apparently negated the existence of any claim.

79. Ala.—*Ex parte* Rhodes, 43 Ala. 373. Cal.—McDonald v. California T. Co., 151 Cal. 159, 90 Pac. 548; Grocers' Fruit G. Union v. Kern Co. L. Co., 150 Cal. 466, 89 Pac. 120. Colo.—Woods Gold M. Co. v. Royston, 46 Colo. 191, 103 Pac. 291. Wis.—Taylor v. Lucas, 43 Wis. 155.

In New York a motion will not be entertained until after demand made on the opposite party (Whitehead Bros. Co. v. Dolan, 69 Misc. 208, 126 N. Y. Supp. 414; Phillips v. Tietjen, 103 App. Div. 9, 95 N. Y. Supp. 469), though there are cases in which it has been permitted (Cronin v. Manhattan Transit Co., 124 App. Div. 543, 108 N. Y. Supp. 963, *distinguishing* Phillips v. Tietjen, *supra*; McConihe v. Palmer, 27 N. Y. Supp. 832, *overruled* by Whitehead Bros. Co. v. Dolan, *supra*).

sufficient to present the question of the disqualification of the judge.⁸⁰

2. Who Can Ask for Change.—*a. Either Party.*—The application may be made by either party to the action. The term "party" is held to include a garnishee,⁸¹ a corporation,⁸² and the state.⁸³ It includes the real party in interest,⁸⁴ and, generally, a party of record.⁸⁵

b. All Must Join.—"Party" is a collective term applying to all who are parties plaintiff or defendant, and therefore if there are several all should join in the application,⁸⁶ though this has been held not to

In Texas, under Acts 30th Leg., p. 248, ch. 133, defendants may file pleas of personal privilege to be sued in another county, whereupon, if the plea is sustained the suit shall not be dismissed, but shall be transferred. *Pearce v. Wallis, Landes & Co.* (Tex. Civ. App.), 124 S. W. 496.

When it appears upon the face of the plaintiff's petition that the venue of a suit has been improperly laid, the question of venue can be raised by a special exception to the petition. *Townes on Texas Pleading*, 238; *Wolf v. Sahm* (Tex. Civ. App.), 120 S. W. 1114, rehearing denied, 121 S. W. 561; *Kansas City, etc. R. Co. v. Bermea L. & L. Co.* (Tex. Civ. App.), 54 S. W. 324.

80. *Barnes v. McMullins*, 78 Mo. 260. And see *O'Connell v. Gavett*, 7 Colo. 40, 1 Pac. 902.

An answer denying the jurisdiction of defendant's person because he was brother to the judge, is not proper. *Kelly v. Hockett*, 10 Ind. 299.

81. *Westphal v. Clark*, 42 Iowa 371.

82. Cal.—Code Civ. Proc., §§395, 397; Const., art. 12, §16; *McDonald v. California Timber Co.*, 151 Cal. 159, 90 Pac. 548; *Grocers' Fruit Growing Union v. Kern Co. L. Co.*, 150 Cal. 466, 89 Pac. 120; *Cohn v. Central Pac. R. Co.*, 71 Cal. 488, 12 Pac. 498. Colo. *Woods Gold M. Co. v. Royston*, 46 Colo. 191, 103 Pac. 291. Ill.—Commercial Ins. Co. v. Mehlman, 49 Ill. 313; *First Nat. Bank v. Levinson*, 129 Ill. App. 173.

83. *In re Darrow* (Ind.), 83 N. E. 1026, affirmed, 92 N. E. 369, holding that a disbarment proceeding is an adversary one.

84. Ill.—*Jenkins v. Pope*, 93 Ill. 27. Ind. Ter.—*Purcell Wholesale Groc. Co. v. Bryant*, 6 Ind. Ter. 78, 89 S. W. 662. Ia.—*Omaha, etc. R. Co. v. O'Neill*, 81 Iowa 463, 46 N. W. 1100. Mo.—*In re Whitson*, 89 Mo. 58, 1 S. W. 125.

The objection of one who is not a necessary nor proper party should not weigh against a sufficient showing in the application of the real defendant. *Eddy v. Houghton*, 6 Cal. App. 397, 91 Pac. 397.

The non-residence of the defendants does not prevent them from proceeding in the proper manner to have the place of trial changed to the proper county. *Shepard v. Squire*, 28 N. Y. Supp. 218.

Though defendant to a cross-petition is entitled to provisional remedies as though named in the original petition, he cannot have a separate trial in another county on the ground of his residence therein, as the proceedings under the cross-petition do not constitute a "separate action" within the statute. *Mahaska, etc. Bank v. Crist*, 87 Iowa 415, 54 N. W. 450.

A public officer who is interpleaded may demand a change to his own county. *Wintjen v. Verges*, 10 Hun (N. Y.) 576.

85. *Shattuck v. Myers*, 13 Ind. 46, 74 Am. Dec. 236, annotated case. The court distinguished *Sherry v. Denn*, 8 Blackf. (Ind.) 542, which held that a stranger to the record could not make the affidavit, as being decided under a slightly different statute. "Without doubt, there are cases in which persons other than parties to the record would have to make the affidavit if made at all; as in suits by or against corporations, etc. But these cases in our opinion are exceptions to the general rule: . . . We are inclined to think that the proper practice is to leave it in the sound legal discretion of the court to grant or refuse the change, upon application, etc., made by one not a party to the record."

86. Cal.—*Paxton v. Paxton*, 150 Cal. 667, 89 Pac. 1083; *McKenzie v. Barling*, 101 Cal. 459, 36 Pac. 8; *McSherry v. Pennsylvania Consol. G. M.*

apply to one who is merely a nominal defendant,⁸⁷ or is not a necessary party,⁸⁸ or is fraudulently joined merely for the purpose of preventing transfer to the proper place,⁸⁹ or has not been served,⁹⁰ or has defaulted.⁹¹

Qualification.—And the general rule is subject to the qualification

Co., 97 Cal. 637, 32 Pac. 711; Pieper v. Centinela Land Co., 56 Cal. 173; Sullivan v. Lusk, 7 Cal. App. 186, 94 Pac. 92; Mahler v. Drummer Boy Gold M. Co., 7 Cal. App. 190, 93 Pac. 1064. **Ind.**—Peters v. Banta, 120 Ind. 416, 22 N. E. 95. **Ky.**—Whitaker v. Reynolds, 14 Bush 618. **Md.**—Diamond State Tel. Co. v. Blake, 105 Md. 570, 66 Atl. 631; Cooke v. Cooke, 41 Md. 362; State v. Gore, 32 Md. 498. **Mich.**—Detroit Portland C. Co. v. Genesee Circuit Judge, 148 Mich. 286, 111 N. W. 744. **Mo.**—Holland v. Johnson, 80 Mo. 34. **N. Y.**—Sherman v. Gregory, 42 How. Pr. 481; Simmons v. McDougall, 2 How. Pr. 77; Welling v. Sweet, 1 How. Pr. 156; Legg v. Dorsheim, 19 Wend. 700; Bergman v. Noble, 10 Civ. Proc. 190. **S. D.**—Senn v. Connelly, 23 S. D. 158, 120 N. W. 1097. **Tex.**—White v. Alexander (Tex. Civ. App.), 131 S. W. 437; Mills v. Paul (Tex. Civ. App.), 30 S. W. 558. **Wis.**—Zeller v. Martin, 84 Wis. 4, 54 N. W. 330; Jacubeck v. Hewitt, 61 Wis. 96, 20 N. W. 372; Levy v. Martin, 48 Wis. 198, 4 N. W. 35; Rupp v. Swineford, 40 Wis. 28.

All defendants being non-residents, may demand a change to the county of their residence (Ludington Expl. Co. v. La Fortuna G. & S. M. Co., 4 Cal. App. 369, 88 Pac. 290), even though the application was opposed by the others (Wood, Curtis & Co. v. Herman M. Co., 139 Cal. 713, 73 Pac. 588).

Waiver by one defendant does not preclude the other from applying for a change. O'Neil v. O'Neil, 54 Cal. 187.

A foreign corporation need not join in the application. Pittman v. Carstenbrook, 11 Cal. App. 224, 104 Pac. 699.

If two causes of action are improperly joined either defendant may demand a change in his own right. Rev. St., 1895, art 1194c; Moorhouse v. King County L. & C. Co. (Tex. App.), 139 S. W. 883.

87. Anaheim Odd Fellows' Hall Assn. v. Mitchell, 6 Cal. App. 431, 92 Pac. 331; Ludington Expl. Co. v. La Fortuna G. & S. M. Co., 4 Cal. App. 369,

88 Pac. 290; Hill v. Gruell, 42 Ill. App. 411.

Residence of the necessary party determines, if there are several. Bartley v. Fraser (Cal.), 117 Pac. 683; McKenzie v. Barling, 101 Cal. 459, 36 Pac. 8.

88. Bartley v. Fraser (Cal.), 117 Pac. 683; Read v. San Diego Union Co., 133 Cal. xx, 65 Pac. 567; Bailey v. Cox, 102 Cal. 333, 36 Pac. 650; Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120; Hannon v. Nuevo Land Co., 14 Cal. App. 700, 112 Pac. 1103; Yuba Co. v. North American Consol. G. N. Co., 12 Cal. App. 223, 107 Pac. 139; Omaha, etc. R. Co. v. O'Neill, 81 Iowa 463, 46 N. W. 1100.

Who are necessary parties must be determined from the complaint, not from the affidavits (Quint v. Dimond, 135 Cal. 572, 67 Pac. 1034) or the allegations of the party (Holland v. Johnson, 80 Mo. 34).

89. McDonald v. California Timber Co., 151 Cal. 159, 90 Pac. 548; Henderson v. Cohen, 10 Cal. App. 580, 102 Pac. 826; Senn v. Connelly, 23 S. D. 158, 120 N. W. 1097.

The notice of motion must distinctly specify the alleged fraud. McDonald v. California Timber Co., *supra*.

90. Rathgeb v. Tiscornia, 66 Cal. 96, 4 Pac. 987; Eldred v. Becker, 60 Wis. 48, 18 N. W. 720.

Defendants who have appeared and answered are entitled to apply, although the judge may defer the making of an order until the case should be at issue or default entered as to all defendants over whom jurisdiction has been acquired. Detroit Portland C. Co. v. Genesee, C. J., 148 Mich. 286, 111 N. W. 774, an equity case. "Chancery cases are not in condition for hearing until all defendants over whom the court has obtained jurisdiction have either tendered an issue or been defaulted."

91. Ill.—Hitt v. Allen, 13 Ill. 592. **N. Y.**—Chace v. Benham, 12 Wend. 200. **Wis.**—Wolcott v. Wolcott, 32 Wis. 63.

that the county in which the action is brought is the proper county for the trial of the action.⁹²

One defendant may apply in behalf of all, however,⁹³ and after such change a co-defendant cannot demand a change under a statute limiting the number to one for "each party."⁹⁴

c. *As to Third Party.*—A third party cannot demand a change of venue,⁹⁵ but this does not include a defendant substituted *in invitum*,⁹⁶ an officer of a corporation,⁹⁷ the next friend of an infant plaintiff,⁹⁸ nor the attorney of a party.⁹⁹

92. *Pittman v. Carstenbrook*, 11 Cal. App. 224, 104 Pac. 699, pointing out that "this depends upon the character of the proceeding or the residence of the defendant or defendants." The applicant must establish the fact that none of the defendants are properly sued in the county. *McSherry v. Pennsylvania Consol. G. M. Co.*, 97 Cal. 637, 32 Pac. 711; *O'Neil v. O'Neil*, 54 Cal. 137; *Grangers Union v. Ashe*, 12 Cal. App. 143, 106 Pac. 889; *Bloom v. Michigan Salmon M. Co.*, 11 Cal. App. 122, 104 Pac. 324. In *Pittman v. Carstenbrook*, *supra*, the court said: "We must be governed, of course, by the showing made."

93. *McSherry v. Pennsylvania Consol. G. M. Co.*, 97 Cal. 637, 32 Pac. 711; *Dill v. Frazee* (Ind. App.), 77 N. E. 1147.

The consent of the other defendants to such application must appear independently of its recital in the petition. *Tanner v. Clapp*, 139 Ill. App. 353. "Had their signatures appeared on the petition or their consent been conveyed to the court in any direct way so as to bind them, it would have been sufficient."

94. *Willard v. Ames*, 130 Ind. 351, 30 N. E. 210; *Griffith v. Dickerman*, 123 Ind. 247, 24 N. E. 237; *Dill v. Frazee* (Ind. App.), 77 N. E. 1147.

95. Cal.—*Buell v. Dodge*, 57 Cal. 645. Ind.—*Sherry v. Denn*, 8 Blackf. 542. Mo.—*Squires v. Chillicothe*, 89 Mo. 226; *Norvell v. Porter*, 62 Mo. 310; *Huthsing v. Mans*, 36 Mo. 101. N. C.—*Rankin v. Allison*, 64 N. C. 673.

This right has been denied to the widow in a proceeding to confirm the report of her husband's administrator. *In re Whitson's Estate*, 89 Mo. 58. And to a defendant as to whom the action has been dismissed. *Reed v. Calderwood*, 22 Cal. 463. And so to the rela-

trix in a proceeding in bastardy. *State v. Smith*, 55 Ind. 385. And to one claiming to be the trustee of the lessor in an action in ejectment. *Crowell v. Maughbs*, 7 Ill. 419. And to a defendant brought in by amendment, if the venue was properly laid in the first instance. *Brierfield Coal & Iron Co. v. Gay*, 106 Ala. 615, 17 So. 618; *Healy v. Mathews*, 108 Minn. 125, 121 N. W. 428. And so to an intervening bank, not the real party in interest. *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa 530, 70 N. W. 769.

Pending Substitution.—Petition for change of venue denied pending application to be substituted as a party. *Barkdull v. Callahan*, 33 Iowa 391.

96. *Howell v. Stetefeldt F. Co.*, 69 Cal. 153, 10 Pac. 390, where it was said: "The failure of the original defendant to demand a change of venue to the county of its residence could not prejudice the right of a defendant, when upon his first appearance in the action, to which he had been made the sole substituted defendant *in invitum*, he moved for and demanded a transfer of the cause to the county where he resided."

97. Ill.—*Commercial Ins. Co. v. Mehlman*, 48 Ill. 313; *First Nat. Bank v. Levinson*, 129 Ill. App. 173. Mo.—*St. Louis, etc. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069. Wis.—*Wheeler & Wilson Mfg. Co. v. Lawson*, 57 Wis. 400, 15 N. W. 398 (holding that the general manager of a foreign corporation is not entitled to make application); *State v. Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

98. *Deford v. State*, 30 Md. 179; *Raming v. Metropolitan St. R. Co.*, 157 Mo. 477, 57 S. W. 268, *overruling* 50 S. W. 791.

99. *Wiltfong v. Schafer*, 121 Ind. 264, 23 N. E. 91; *Firestone v. Hershberger*, 121 Ind. 201, 22 N. E. 985;

In Indiana a change may be allowed, in the discretion of the court, upon application of a person not of record.¹

3. When Made.—a. *In General.*—Failure to act with promptness and diligence will bar the right to a change.² It is generally too late to apply for a change after the trial has begun,³ or after the day set for trial,⁴ or, *a fortiori*, after the issues have been made up

Stevens v. Burr, 61 Ind. 464; Rev. St. (Mo.), 1889, §2261; Raming v. Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268.

1. Shattuck v. Myers, 13 Ind. 46.

2. Ill.—Haley v. City of Alton, 152 Ill. 113, 38 N. E. 750; Hudson v. Hanson, 75 Ill. 198; Peoria & R. I. R. Co. v. Mitchell, 74 Ill. 394; Toledo, W. & W. R. Co. v. Maxfield, 72 Ill. 95; White v. Murtland, 71 Ill. 250; Kelly v. Downs, 29 Ill. 74. Ind.—Jones v. Dipert, 23 N. E. 944; Whitcomb v. Stringer, 160 Ind. 82, 66 N. E. 443; Bernhamer v. State, 123 Ind. 577, 24 N. E. 509; Witz v. Spencer, 51 Ind. 253; Smith v. Amis, 30 Ind. App. 530, 66 N. E. 501; Brow v. Levy, 3 Ind. App. 464, 29 N. E. 417. Minn.—Waldron v. City of St. Paul, 33 Minn. 87, 22 N. W. 4. Mo.—St. Louis, etc. R. Co. v. Holladay, 131 Mo. 440, 33 S. W. 49; State v. Matlock, 82 Mo. 455. N. Y. Moreland v. Sanford, 1 Denio 660; Becker v. Town of Cherry Creek, 77 Hun 11, 28 N. Y. Supp. 279. Tex. Cook v. Garza, 9 Tex. 358.

In Blakely v. Frazier, 11 S. C. 122, it was said that the application should properly "be made before the cause is reached on the docket, so that the parties may have due notice of the place of trial." But in this case it was held that the "plaintiffs assented to the time and manner in which it [the application] was made" and it should therefore have been granted upon proper grounds shown.

If no statute fixes the time when the application shall be filed the chief desideratum is that the business of the court be not unduly delayed. Ellis v. Stearns (Tex. Civ. App.), 27 S. W. 222, where the motion was made many months before the case was called for trial.

3. Ill.—Richards v. Greene, 78 Ill. 525. Ind.—Thorn v. Silver, 89 N. E. 943; Witz v. Spencer, 51 Ind. 253; Ickes v. Kelley, 21 Ind. 72. Md.—Littig v. Birkestack, 38 Md. 158; Deford v. State, 30 Md. 179. Minn.—Lueck

v. St. Paul & D. R. Co., 57 Minn. 30, 58 N. W. 821. Mo.—Fugate v. Carter, 6 Mo. 267; McArthur v. Kansas City E. R. Co., 123 Mo. App. 503, 100 S. W. 62. Wis.—Allis v. Meadow Springs Dist. Co., 67 Wis. 16, 29 N. W. 543; Swineford v. Pomeroy, 16 Wis. 553.

So held even where the knowledge of the prejudice was alleged to have been acquired on the day of the application. Crane v. Crane, 81 Ill. 165.

The trial has begun if a jury has been demanded and the case continued to the day on which the venire was returnable, and the application was therefore too late. Lueck v. St. Paul, etc. R. Co., 57 Minn. 30, 58 N. W. 821.

But where the jury could not be completed owing to an epidemic and those empaneled would have to be discharged, it was held a proper exercise of discretion for the court to grant a change of venue, notwithstanding the trial had begun. Salinas v. Stillman, 25 Tex. 12.

The venue may not be changed during the trial unless there is such showing made as to show the entire disqualification of the judge. Thorn v. Silver (Ind.), 89 N. E. 943.

4. Ill.—Haley v. City of Alton, 152 Ill. 113, 38 N. E. 750. Ind.—Moulder v. Kempff, 115 Ind. 459, 17 N. E. 906 (application must be made at least one day before the case comes on for trial); Moore v. Sargent, 112 Ind. 484, 14 N. E. 466; Hoke v. Applegate, 88 Ind. 530 (an application on the day of trial is within a rule that it should be made "not later than the day fixed for trial"); Bennett v. Ford, 47 Ind. 264. S. C.—Blakely v. Frazier, 11 S. C. 122.

Request for time to prepare an application for a change of venue after the day for trial had been set and a motion for a continuance overruled was denied in Beall v. Territory, 1 N. M. 507.

An application after the cause was set for trial was held not too late in Sheckles v. Sheckles, 3 Nev. 404. "If

and tried by the jury and a verdict found.⁵ In some states the time for making application is prescribed by statute;⁶ in others it is fixed by rule of court.⁷

it was made before the witnesses were subpoenaed and preparations for trial had been made, the motion should have been granted as well before as after the setting of the case, unless it appeared that there had been an unjustifiable delay in making it, whereby, if the change were made, the other party would be prejudiced."

After default, no change. *Northern Cent. R. Co. v. Rutledge*, 41 Md. 372; *Vale v. Brooklyn C. R. Co.*, 12 Civ. Proc. (N. Y.) 102.

5. *Ex parte Cox*, 10 Mo. 742.

A case which has been referred to a referee stands on the same footing after his report, which is equivalent to a special verdict. *Woodrow v. Younger*, 61 Mo. 395; *Duffy v. Hickey*, 68 Wis. 380, 32 N. W. 54; *Cairns v. O'Bleness*, 40 Wis. 469.

6. **Ala.**—Act. Dec. 14, 1819 (at or before the first trial term); *Innerarity v. Hitchcock*, 3 Stew. & P. 9. **Cal.** *Smith v. Pelton Water W. Co.*, 151 Cal. 394, 90 Pac. 932; Code Civ. Proc. (Cal.) §396 (at the time the defendant answers or demurs); *Cook v. Pendergast*, 61 Cal. 72; *Mahe v. Reynolds*, 38 Cal. 560 (it is sufficient if the notice of the motion is given at this time); *Union Lumb. Co. v. Metropolis Const. Co.*, 13 Cal. App. 584, 110 Pac. 329. **Ia.**—*Knott v. Dubuque*, etc. R. Co., 84 Iowa 462, 51 N. W. 57; Code 1873, §2589 (before answer). **Minn.**—*Lueck v. St. Paul*, etc. R. Co., 57 Minn. 30, 58 N. W. 821, Gen. St., 1878, ch. 65, §20 (before commencement of the trial). **Mo.**—Rev. St., 1889, §3260; Rev. St., 1899, §824 (after issues joined); *Missouri State Bank v. South St. Louis Fdry.*, 145 Mo. App. 257, 129 S. W. 433; *Berlin v. Thompson*, 61 Mo. App. 234. **N. Y.**—*Penniman v. Fuller*, 133 N. Y. 442, 31 N. E. 318; *Taylor v. Smith*, 11 N. Y. Supp. 29, Code Civ. Proc. §986. **N. C.**—*Garrett & Co. v. Bear*, 144 N. C. 23, 56 S. E. 479; *Shaver v. Huntley*, 107 N. C. 623, 12 S. E. 316; Rev. St. 1905, §425 (before the time to answer has expired); Code, §195. **S. D.** *Irwin v. Taubman*, 128 N. W. 617, before time for answering expires, which by statute is within thirty days. **Wash.** Code Proc. §162. At the time defendant appears and demurs or answers.

After Issue.—There can be no change for the convenience of witnesses until after issue joined, since on demurrer no witnesses would be necessary. *Pascoe v. Baker*, 158 Cal. 232, 110 Pac. 815; *McSherry v. Pennsylvania C. G. M. Co.*, 97 Cal. 637, 32 Pac. 711; *Armstrong v. Superior Court*, 63 Cal. 441; *Cook v. Pendergast*, 61 Cal. 72, 76.

With Answer.—The demand for a change must be served with the answer, or before service of the answer. Code Civ. Proc. (N. Y.) §986.

If plaintiff fails to consent within five days, defendant has ten days longer within which to file his motion. *Clark v. Campbell*, 54 How. Pr. (N. Y.) 166.

Under this section demand is good if made before answering an amended complaint though after the answer to the original complaint. Code Civ. Proc. (N. Y.) §986; *Shepard v. Squire*, 76 Hun 598, 28 N. Y. Supp. 218. "Where it was served the amended one became the only complaint in the action, as effectually as if none had preceded it, and for the purpose of proceeding to require and obtain a change of the place of trial, the defendants were at liberty to so treat it."

Court may grant change after such time has expired (*Clark v. Campbell*, 54 How. Pr. (N. Y.) 166), but it is then discretionary (*Taylor v. Smith*, 57 Hun 587, 11 N. Y. Supp. 29).

Under this statute an extension of time to answer is held to extend the time to apply for a change of venue. *Grant v. Bannister*, 145 Cal. 219, 78 Pac. 653.

South Dakota Laws, 1909, ch. 283, restored the rule of Code 1877, ch. 8, Code Civ. Proc. §95, Comp. Laws 1887, §4891, and Code 1903, §102, Code Civ. Proc., which had been changed to read "before answer" by Laws 1905, ch. 82. Hence it was held in *Irwin v. Taubman* (S. D.), 128 N. W. 617, that extending the time for answering did not extend the time in which to apply for a change of venue. See *Grant v. Bannister*, *supra*, for contrary rule in California.

7. **Ill.**—*McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559 (motion for a change of venue must be made at the

A statutory right thereto cannot be abridged by a rule of court as to time of making application therefor, if applicant has been reasonably diligent.⁸

Waiver of Rule.—Such rules are held to be merely for general convenience and will be waived upon good cause shown for the delay,⁹ such as that the evidence upon which the application is based was not discovered until after the prescribed time, through no lack of diligence on the part of the applicant,¹⁰ and that he acted with promptness upon ascertaining the facts,¹¹ or that he made application as soon

earliest practicable moment and not put off until just before trial); *Haley v. City of Alton*, 152 Ill. 113, 38 N. E. 750; *Crane v. Crane*, 81 Ill. 165; *Hudson v. Hanson*, 75 Ill. 198. **Ind.**—*Thorn v. Silver*, 89 N. E. 943; *Whitcomb v. Stringer*, 160 Ind. 82, 66 N. E. 443; *Moore v. Sargent*, 122 Ind. 484, 14 N. E. 466; *Hoke v. Applegate*, 88 Ind. 530 (before the case is called for trial); *Leavell v. Marsh*, 16 Ind. App. 72, 44 N. E. 687. **Mich.**—*State Road Bridge Co. v. Gage*, 148 Mich. 396, 111 N. W. 1084; *Detroit Portland C. Co. v. Genesee, C. J.*, 148 Mich. 286, 111 N. W. 744 (motion must be entered and notice served within ten days after the cause is at issue. Supreme Court Rule No. 58). **Tex.**—*Ellis v. Stearns* (Tex. Civ. App.), 27 S. W. 222, an application is in time if it does not "delay the regular and orderly proceedings of the court."

The court may refuse to stop the hearing of causes for the purpose of listening to an application, where it is a chambers motion. *Marsh v. McLaughlin* (N. J.), 51 Atl. 931.

After Issue.—An application on the ground of local prejudice or undue influence of the opposite party is premature before issues joined, since before the issues are joined it cannot be determined whether there will be any trial by jury. *Jones v. Balsley*, 27 Okla. 220, 111 Pac. 942.

8. *Thorn v. Silver* (Ind.), 89 N. E. 943; *Ogle v. Edwards*, 133 Ind. 358, 33 N. E. 95. In *Detroit Nat. Bank v. Brooke*, 147 Mich. 70, 110 N. W. 137, it was held that a rule adopted while a case was in the appellate court did not apply to prevent a motion for a change after the case was remanded to the court below for a new trial.

9. *Ogle v. Edwards*, 133 Ind. 358, 33 N. E. 95, overruling earlier cases so far as inconsistent with this holding.

Where defendant made a motion to require plaintiff to give security for costs, which had the effect of arresting the action, and upon its disposal interposed another dilatory motion, motion by plaintiff pending same for change of venue was made with reasonable diligence. *Raming v. Metropolitan St. R. Co.*, 157 Mo. 477, 57 S. W. 268.

Leave to answer after time therefor has expired does not carry with it the right to move for a change of venue which had similarly expired. *Allen v. Coates*, 29 Minn. 46, 11 N. W. 132.

Change allowed after disagreement of jury. *First Nat. Bank v. Levinson*, 129 Ill. App. 173.

10. **Ind.**—*Wilson v. Johnson*, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; *Ogle v. Edwards*, 133 Ind. 358, 33 N. E. 95; *Ringgenberg v. Hartman*, 102 Ind. 537, 26 N. E. 91; *Shoemaker v. Smith*, 74 Ind. 71; *Witz v. Spencer*, 51 Ind. 253; *Galloway v. State*, 29 Ind. 442. **Mo.**—*St. Louis, etc. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069. **Va.**—*Darmsdatt v. Wolfe*, 4 Hen. & M. 246. **Wis.**—*Schafer v. Shaw*, 87 Wis. 185, 58 N. W. 240.

11. *Spencer v. Spencer*, 136 Ind. 414, 36 N. E. 210; *Jeffersonville, etc. R. Co. v. Avery*, 31 Ind. 277; *Perdue v. Gill*, 35 Ind. App. 99, 73 N. E. 844; *Brown v. Levy*, 3 Ind. App. 464, 29 N. E. 417.

The defendant need not, however, show that he used diligence in endeavoring to ascertain the facts. *Wilson v. Johnson*, 145 Ind. 40, 38 N. E. 38; *Spencer v. Spencer*, 136 Ind. 414, 36 N. E. 210; *Ogle v. Edwards*, 133 Ind. 358, 33 N. E. 95. (overruling the contrary rule in *Ringgenberg v. Hartman*, 102 Ind. 537, 26 N. E. 91, and earlier cases).

Where by the jurat the affidavit appeared to have been sworn to one

as possible upon being brought into the case.¹²

By some statutes one who has lost his right to a change by failure to act in time may ask the court to order a change, and the court, in its discretion, will so order where the circumstances are meritorious.¹³

b. *New Trial*.—A change will not be granted pending the motion for a new trial because that is a special proceeding and not the trial of a cause.¹⁴ But it is held otherwise in states where the wording or construction of the statute is broad enough to include motions and special proceedings.¹⁵

If a motion for a new trial is sustained the right to a change attaches to it just as to the original trial, since the issues stand as though they had never been tried.¹⁶

4. *Form and Contents*.—The application should contain a sufficient statement of the grounds on which the change is demanded¹⁷ to establish the rights of the applicant under the statute,¹⁸ and should

month before the time where by the application for a change on ground of prejudice of judge, the applicant learned of the facts, the motion was properly overruled in the absence of evidence that such date was a clerical error. *North Chicago St. R. Co. v. Leonard*, 167 Ill. 618, 47 N. E. 752. "The certificate of the notary was the evidence required by the law that the affidavit was subscribed and sworn to, and at the date therein mentioned."

12. *Truitt v. Truitt*, 38 Ind. 16, where appearance was voluntary after the time fixed by rule for the motion, and the court said: "Rules of court can only operate on parties who are in court."

13. *Taylor v. Smith*, 57 Hun 587, 11 N. Y. Supp. 29, construing Code Civ. Proc. §§986, 987.

14. Ind.—*Bonham v. Doyle*, 39 Ind. App. 438, 79 N. E. 458. Ia.—*Bennett v. Carey*, 57 Iowa 221, 10 N. W. 634; *Perkins v. Jones*, 55 Iowa 211, 7 N. W. 599. Mich.—*Detroit Nat. Bank v. Brooke*, 147 Mich. 70, 110 N. W. 137. After the court has assumed jurisdiction and has proceeded to judgment jurisdiction cannot be thus ousted. *Bonham v. Doyle*, *supra*.

15. Finn v. Spagnoli, 67 Cal. 330, 7 Pac. 746; *State v. District Court*, 33 Mont. 138, 82 Pac. 789.

"A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. When a court hears and determines any issue

of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial." (*Tegambo v. Comanche M. & M. Co.*, 57 Cal. 501). Within this definition the hearing and disposition of a motion for new trial is a trial." Finn v. Spagnoli, 67 Cal. 330, 7 Pac. 746.

16. Ind.—*Compton v. Benham* (Ind. App.), 85 N. E. 365. Mich.—*Detroit Nat. Bank v. Brooke*, 147 Mich. 70, 110 N. W. 137. Pa.—*Rand v. Caflisch*, 36 W. N. C. 198.

Similarly if the jury disagrees and a retrial is necessary. Conn.—*Bell v. Ayers*, 44 Conn. 35. Idaho.—*Sommercamp v. Catlow*, 1 Idaho 716. Md.—*Deford v. State*, 30 Md. 179.

In *Ten Broeck v. Middlebrook*, 4 Wend. (N. Y.) 205, the court recognized its right to make a change after the first trial, but refused it in this case because of the opinion that a change should not be so granted "in ordinary cases."

17. Colo.—*De Walt v. Hartzell*, 7 Colo. 601, 4 Pac. 1201. Mich.—*Grostick v. Detroit, L. & N. R. Co.*, 96 Mich. 495, 56 N. W. 24. Okla.—*Horton v. Haines*, 23 Okla. 878, 102 Pac. 121. Wis.—*Dodge v. Barden*, 33 Wis. 246.

In Illinois a motion was held not equivalent to an application. *Little v. Allington*, 93 Ill. 253.

18. Colo.—*Adamson v. Bergen*, 15 Colo. App. 396, 62 Pac. 829. Md.—*Desche v. Gies*, 56 Md. 135. Neb.—*Peyton v. Johnson*, 37 Neb. 886, 56 N. W. 728. N. Y.—*Rowell v. Crofoot*, 3 How. Pr. 15; *Burke v. Frenkel*, 91 App. Div.

set out sufficient facts, as distinguished from conclusions, to enable

19, 89 N. Y. Supp. 621; *Sinnit v. Cambridge, etc. Stock Breeders' Assn.*, 27 Misc. 586, 58 N. Y. Supp. 238; *Reiger v. Pulaski Glove Co.*, 99 N. Y. Supp. 558; *Briasco v. Lawrence*, 4 N. Y. Supp. 94. **R. I.**—*Taylor v. Gardiner*, 11 R. I. 182. **Tex.**—*Mills v. Paul* (Tex. Civ. App.), 30 S. W. 558; *Houston S. T. C. R. Co. v. Ryan*, 44 Tex. 426. **Wis.** *Winn v. State*, 82 Wis. 571, 52 N. W. 775; *Smith v. Clarke*, 70 Wis. 137, 35 N. W. 318.

In *Adamson v. Berger, supra*, there was an application for a change because the county was not the county of defendant's residence. The court said: "An application to change the trial of a cause from one county to another should negative every hypothesis in favor of the county in which the action was commenced."

The residence of the parties at the time of the commencement of the suit should be alleged, under Code Civ. Proc. (N. Y.) §984. *Burke v. Frenkel*, 97 App. Div. 19, 89 N. Y. Supp. 621.

The statute entitles a party to a change only if the conditions are shown to exist at the time of the trial. *Mills v. Paul, supra*.

In *Winn v. State, supra*, a statement that the applicant "had reason" to believe the judge was prejudiced was held insufficient under a statute providing for a change if the applicant had "good reason" to believe, etc.

In *Desche v. Gies, supra*, a statement was that the "parties believe," etc., instead of that the "parties cannot have a fair and impartial trial." it was queried whether this would be a fatal objection to the judgment, but the judgment was reversed on other grounds with the suggestion that the wording of the constitution be followed.

A petition alleging that "by reason of local prejudice and the feeling entertained by the people of said county, he (the petitioner) cannot have a full, fair, and impartial trial in said county," was held sufficient against an objection that it should set forth the particular facts going to show the existence of the prejudice or feeling complained of. *Taylor v. Gardiner*, 11 R. I. 182.

A special plea of privilege must state the grounds on which it is based.

Pearce v. Wallis, Landes & Co. (Tex.), 124 S. W. 496.

Substantial Compliance.—**Ia.**—*Bixby v. Carskaddon*, 63 Iowa 164, 18 N. W. 875. **Ky.**—*Riggen v. Com.*, 3 Bush 493. **N. Y.**—*Porter v. Mann*, 4 Hill 540. **N. C.**—*Cloman v. Staton*, 78 N. C. 235. **Wash.**—*State v. Superior Court*, 9 Wash. 668, 38 Pac. 206. **Wis.**—*Risto v. Harris*, 18 Wis. 420.

A statement that the "defendants and their attorneys" had an undue influence over the inhabitants of the county, was held to comply with a statute providing for a change of the "adverse party or his attorney" had such influence. *Bixby v. Carskaddon*, 63 Iowa 164, 18 N. W. 875.

A motion to change the venue on an affidavit that without the testimony of certain witnesses, etc., defendant could not safely proceed to the trial, was held equivalent to "the trial of this cause." *Porter v. Mann*, 4 Hill (N. Y.) 540.

In *Cloman v. Staton*, 78 N. C. 235, it was held that an objection to the trial of a case in the wrong county should have been treated as a motion to remove.

In *Risto v. Harris*, 18 Wis. 400, an application in the form of an affidavit was held to fulfil the requirement of the statute providing that the party "shall apply" for a change, etc.

In discussing the right to sue the defendant in an improper county unless he demanded a change, the court in *State v. Superior Court*, 9 Wash. 668, 38 Pac. 206, said: "The proceedings by which the right to transfer is made absolute, and this exception negated, should be construed with the utmost liberality, and . . . if it appears therefrom that there is an intent on the part of the defendant to avail himself of the privileges of the statute for the purpose of negating the exception contained therein, which authorizes the court to maintain jurisdiction, it should be held sufficient, even though there has been only a substantial, and not a technical, compliance with the provisions of the statute."

Prayer for a stay in the prosecution of an action is not equivalent to a demand for its removal. *McArthur v. Griffith* (N. C.), 61 S. E. 519.

the judge to determine the truth or the falsity of the allegations.¹⁹

An oral application will not satisfy a statute providing for a change upon application in writing.²⁰

Time of Receiving Information.—Where the statute permits a change only in case the information has come to the applicant within, or since, a particular time, the application must set out that fact to justify a change.²¹ A statute requiring him to state "when" he obtained his information and knowledge is not satisfied by a statement that it was "since" the last term.²²

Verification.—It should be verified by the applicant.²³ A verification by attorney is not sufficient to satisfy a statute requiring application to be made by the party.²⁴

5. Number of Applications.—Ordinarily, only one application for a change can be made, but the court may allow the application to be renewed, upon good cause shown.²⁵

6. Notice of Application.—a. *Generally Required.*—Notice of application for a change of venue must generally be given²⁶ to the

19. Colo.—*De Walt v. Hartzell*, 7 Colo. 601, 4 Pac. 1201. Minn.—*Burke v. Mayall*, 10 Minn. 226. Wis.—*Frank v. Avery*, 21 Wis. 168.

"The facts and circumstances showing that a fair trial cannot be had, must be set forth, so as to enable the court to judge for itself whether or not the application is well founded." *Frank v. Avery*, 21 Wis. 168.

"All a petition for a change of venue need contain is a statement of the cause or causes for the application and a prayer for a change of venue." *Hanna v. People*, 86 Ill. 243, holding that the fact that the persons making the affidavits are "reputable" persons may be made known in their affidavits, the statute being silent.

20. *Pennie v. Visher*, 94 Cal. 323, 29 Pac. 711; *Purvis v. State*, 71 Miss. 706, 14 So. 268.

21. Ill.—*White v. Murtland*, 71 Ill. 250; *Hunt v. Pronger*, 126 Ill. App. 403; *Gager v. Edwards*, 26 Ill. App. 487. Ia. *Schaentgen v. Smith*, 48 Iowa 359. Mo. *State v. Boone*, 70 Mo. 649; *Corpenney v. Sedalia*, 57 Mo. 83.

22. *Raming v. Metropolitan St. R. Co. (Mo.)*, 50 S. W. 791; *Smith v. St. Louis & S. F. R. Co.*, 31 Mo. App. 135.

23. Colo.—*Miller v. Claffin*, 12 Colo. App. 192, 55 Pac. 201. Fla.—*Reddick v. Joseph*, 35 Fla. 65, 16 So. 781. Ill. *Little v. Allington*, 93 Ill. 253. Ky. *Rand, McNally & Co. v. Turner*, 29 Ky. L. Rep. 696, 94 S. W. 643. Mo.—*Norvell*

v. Porter, 62 Mo. 309. Wis.—*Western Bank v. Tallman*, 15 Wis. 101.

Verification held unnecessary in Michigan under *How. Ann. St.*, §6496. *Grostick v. Detroit, L. & N. R. Co.*, 96 Mich. 495, 56 N. W. 24.

An unverified petition was held sufficient where the judge was satisfied by the proof of the convenience of witnesses. *Cartright v. Town of Belmont*, 58 Wis. 370, 17 N. W. 237.

24. *Jaffray v. H. B. Claffin Co.*, 119 Mo. 117, 24 S. W. 761; *Huthsing v. Mans*, 36 Mo. 101; *Lewin v. Dille*, 17 Mo. 64.

But a petition verified by one defendant was held sufficient in *Ivy v. Yancey (Mo.)*, 31 S. W. 937.

25. *Cannon v. McKenzie*, 3 Cal. App. 286, 85 Pac. 130; *Jones v. American Cent. Ins. Co.*, 83 Kan. 44, 109 Pac. 1077.

The court may allow a motion to be renewed upon a new showing. *Smith v. Pelton Water W. Co.*, 151 Cal. 399, 90 Pac. 932; *Perrin v. State*, 81 Wis. 135, 50 N. W. 516.

26. Cal.—*Mahe v. Reynolds*, 38 Cal. 560. Colo.—*Fitzhugh v. Nicholas*, 20 Colo. App. 234, 77 Pac. 1092. Ill.—*Miller v. Pence*, 132 Ill. 149, 23 N. E. 1030; *Graves v. Shoefelt*, 60 Ill. 462; *Hunt v. Tinkham*, 21 Ill. 639. Ind.—*Rubottom v. Shank*, 5 Blackf. 122, in vacation. Ia.—*Loomis v. McKenzie*, 31 Iowa 425; *Preston v. Winter*, 20 Iowa 264; *Piles v. Charles*, 3 G. Gr. 109. Mich.—*State*

opposite party,²⁷ and to co-defendants not joining in the motion.²⁸

b. *What To Contain.*—The notice should state when the application will be made, and where, and the cause to which it pertains;²⁹ the nature of the motion,³⁰ and the grounds on which it will be based.³¹

c. *How Much Notice Must Be Given.*—The time of serving the notice is prescribed by statute in some states,³² and in others a reasonable notice is required.³³

What is a reasonable notice depends upon the circumstances of each case, and is for the court to determine.³⁴

Road B. Co. v. Gage, 143 Mich. 337, 106 N. W. 394; *Peterson v. St. Clair* Circ. Judge, 143 Mich. 79, 106 N. W. 394. Mo.—*Perry's Admr. v. Roberts*, 17 Mo. 36; *Walker v. Evans*, 98 Mo. App. 301, 71 S. W. 1086; *Summers v. Western H. Ins. Co.*, 45 Mo. App. 46. N. Y.—*Harmon v. Van Ness*, 56 App. Div. 160, 67 N. Y. Supp. 561; *Lesser v. Williams*, 52 Hun 610, 5 N. Y. Supp. 97, affirmed 119 N. Y. 639, 23 N. E. 1148. Tex.—*Martin v. White*, 20 Tex. 174.

Contra, *Risto v. Harris*, 18 Wis. 400.

Notice not necessary where defendant filed his affidavit of merits, and change to the county of his residence was a matter of right. Cal.—*Bohn v. Bohn* (Cal. App.), 116 Pac. 568. Mont. *State v. District Court*, 32 Mont. 595, 81 Pac. 351, citing *State v. Clancy*, 30 Mont. 529, 77 Pac. 312. N. Y.—*North Shore Industrial Co. v. Randall*, 108 App. Div. 232, 95 N. Y. Supp. 758.

The Notice Should Be Written. *Fire Assn. of Philadelphia v. Short*, 100 Ill. App. 553.

27. *Fitzhugh v. Nicholas*, 20 Colo. App. 234, 77 Pac. 1092; *Sherman v. Adirondack R. Co.*, 92 Hun 39, 36 N. Y. Supp. 692.

Notice to one not of record as a party is of no avail. *Fenn v. Ringo*, 6 J. J. Marsh (Ky.) 227.

When the judge of the court is a party notice need not be served on him, a change being imperative under the Code when the judge is so disqualified. Code Civ. Proc. (Cal.) §398; *Livermore v. Brundage*, 64 Cal. 299, 30 Pac. 848.

28. *Sherman v. Adirondack R. Co.*, 92 Hun 39, 36 N. Y. Supp. 692.

29. *Ryburn v. Pryor*, 10 Ark. 417.

30. *Ryburn v. Pryor*, 10 Ark. 417.

Notice of a motion to change the venue held insufficient to support a motion for change of the place of trial,

on the ground that the two were not necessarily the same. *Barnard v. Wheeler*, 3 How. Pr. (N. Y.) 71. But a later case holds the terms are used synonymously in the Code and therefore upheld a notice in the alternative of a motion to "change the venue or place of trial." *Hinchman v. Butler*, 7 How. Pr. (N. Y.) 462.

31. *McDonald v. California Timber Co.*, 151 Cal. 159, 90 Pac. 548; *Henderson v. Cohen*, 10 Cal. App. 580, 102 Pac. 826; *Whitehead Bros. Co. v. Dolan*, 69 Misc. 208, 126 N. Y. Supp. 414.

32. *State Road Bridge Co. v. Gage*, 143 Mich. 337, 106 N. W. 394 (four days); Code Civ. Proc. (N. Y.) §986; *Gregory v. Stout*, 6 Hill (N. Y.) 380; *Binder v. Metropolitan St. R. Co.*, 74 N. Y. Supp. 54; *Zimmer v. Matteson*, 15 N. Y. Supp. 607 (eight days).

33. Ill.—*Kelly v. Downs*, 29 Ill. 74; *Berry v. Wilkinson*, 2 Ill. 164; *Fire Assn. of Philadelphia v. Short*, 100 Ill. App. 553. Ia.—*Wright v. Stevens*, 3 G. Gr. 63. Mo.—*St. Louis, etc. R. Co. v. Holladay*, 131 Mo. 440, 33 S. W. 49; *Corpenney v. City of Sedalia*, 57 Mo. 88. Wis.—*Rines v. Boyd*, 7 Wis. 155.

34. *Berry v. Wilkinson*, 2 Ill. 164.

One day not sufficient. *Kelly v. Downs*, 29 Ill. 74; *Thomas Pressed Brick Co. v. Fowler*, 97 Ill. App. 80; *Kright v. Stevens*, 3 G. Gr. (Ia.) 63.

Two days not sufficient. *Gregory v. Stout*, 6 Hill (N. Y.) 380.

Two hours not sufficient. *St. Louis, etc. R. Co. v. Holladay*, 131 Mo. 440, 33 S. W. 49.

Application when the adverse party is present in court has been held sufficient. Ind.—*Scherer v. Ingberman*, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304. Ky. *Shepherd v. Scroggin*, 3 Dana 62. Mo. *Douglass v. White*, 134 Mo. 228, 34 S. W. 867; *Corpenney v. City of Sedalia*, 57 Mo. 88. Wis.—*Risto v. Harris*, 18

d. *Waiver of Want of Notice.*—A party waives want of notice by appearing and resisting the change on its merits.³⁵

On appeal, notice or waiver will be presumed, where the record shows that the motion was duly considered and decided.³⁶

7. *Supporting Affidavits.*—a. *The Rule.*—The application must be supported by the affidavits necessary to establish the facts upon which a change is sought.³⁷ Such affidavits must comply with statutory requirements, and with rules made by the court in conformity therewith.³⁸ Under some circumstances, no supporting affidavits are necessary.³⁹

Wis. 400; *Rines v. Boyd*, 7 Wis. 155; *Baldwin v. Marygold*, 2 Wis. 419.

Some courts hold the general rules as to notice of motions apply. *Zimmer v. Matteson*, 61 Hun 619, 15 N. Y. Supp. 607; *Willoughby v. Northeastern R. Co.*, 46 S. C. 317, 24 S. E. 308. But others consider such statutes as a general rule subject to the discretion of the court. *Corpeny v. City of Sedalia*, 57 Mo. 88, where it was said: "To hold that a party should in every case notify his adversary beforehand, of his intended application, would be equivalent to saying that when the information which would authorize a change of venue, came too late to give such notice, the party who receives it, would, without any fault on his part, be debarred from having his cause tried in a court where no preconceived bias could operate against him, and tend to his defeat."

In *Comstock v. Connine*, 152 Mich. 212, 115 N. W. 974, Cir. Ct. Rule 58 requiring ten days' notice of hearing on application to change venue was held not to apply to proceedings before a circuit court commissioner.

35. Cal.—*Wood, Curtis & Co. v. Herman M. Co.*, 139 Cal. 713, 73 Pac. 588; *Bohn v. Bohn* (Cal. App.), 116 Pac. 568. Ind.—*Scherer v. Ingerman*, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304 Wis.—*Cartright v. Town of Belmont*, 58 Wis. 370, 17 N. W. 237.

36. *Byrne v. St. Louis Pub. Schools*, 12 Mo. 402.

37. *Richardson v. Augustine*, 5 Okla. 667, 49 Pac. 930.

The adverse party should be notified of the taking of such affidavits. *Parker v. Sussex Bank*, 8 N. J. L. 160.

Affidavits which establish local prejudice in parts of the county only, are insufficient, since the prejudice must be general to warrant a change. *Car-*

penter v. Central Vt. R. Co. (Vt.), 80 Atl. 657.

38. *Rieger v. Pulaski Glove Co.*, 114 App. Div. 174, 99 N. Y. Supp. 558; *Burke v. Frenkel*, 97 App. Div. 19, 89 N. Y. Supp. 621; *Houston, etc. R. Co. v. Ryan*, 44 Tex. 426.

An affidavit which fulfils the requirements of the statute is sufficient though it does not comply with a rule of court. *Krutz v. Griffith*, 68 Ind. 444.

39. Ark.—*St. Louis, etc. R. Co. v. McNamare*, 91 Ark. 515, 122 S. W. 102; *Kirby's Dig.*, §7998. Ind.—*Joyce v. Whitney*, 57 Ind. 550. Mo.—*Barnes v. McMullins*, 78 Mo. 260; *Gale v. Michie*, 47 Mo. 326. N. Y.—*Sherman v. Gregory*, 42 How. Pr. 481, motion to change to county of defendant's residence.

Prior to the act of 1877 relating to temporary judges, "when a judge was interested in the cause, or was related to either party, or had been of counsel, it was obligatory on him upon simple motion, to send the cause elsewhere for trial without application on affidavit." *Barnes v. McMullins*, 78 Mo. 260.

In *St. Louis, etc. R. Co. v. McNamare*, *supra*, the action was not commenced in the county of the plaintiff's residence, nor in the county where the occurrence took place, nor because it was necessary in order to get service on defendant there. "Hence, upon presentation of its petition duly verified, appellant (the defendant) was entitled as a matter of right to a change of venue. . . . If the legislature had intended that the supporting affidavits should accompany the petition . . . it would have used the language 'upon presentation of his petition duly verified together with supporting affidavits.'"

Affidavits may be dispensed with

b. *Facts Should Be Stated.*—The facts should be set out in the affidavits, so that the court may judge of the propriety, or necessity of granting the change.⁴⁰ Under some statutes the affidavit must set forth the defence.⁴¹

Undue Influence.—If undue influence of the opposite party, or his attorney, is alleged, sufficient facts to establish it must be set out,⁴²

where the change is upon the ground that the judge was of counsel for one of the parties (*Joyce v. Whitney*, 57 Ind. 550), or if the judge is satisfied with proof that the convenience of witnesses and ends of justice would be promoted by the change. (*Cartright v. Town of Belmont*, 58 Wis. 370, 17 N. W. 237.

40. *U. S.*—*Lewis v. Fire Ins. Co.*, 2 Cranch C. C. 500, 15 Fed. Cas. No. 8,323. *Cal.*—*Sloan v. Smith*, 3 Cal. 410; *O'Brien v. O'Brien* (Cal. App.), 116 Pac. 692; *Ennis-Brown Co. v. Long*, 7 Cal. App. 313, 94 Pac. 250. *Ia.*—*Ferguson v. Davis County*, 51 Iowa 220, 1 N. W. 505. *Mont.*—*Kennon v. Gilmer*, 5 Mont. 257, 5 Pac. 847. *N. M.*—*Lady Franklin M. Co. v. Delaney*, 4 N. M. 39, 12 Pac. 628. *Va.*—*Boswell v. Flockheart*, 8 Leigh 364.

Conclusions.—"It was stated in Long's (the defendant's) affidavit that the written contract 'was indefinite as to the terms and the amount of consideration.' This is but the conclusion of affiant. The written memorandum should have been set forth so that the court could judge whether or not its terms were indefinite." *Ennis-Brown Co. v. Long*, 7 Cal. App. 313, 94 Pac. 250.

The statement by the defendant that he "has been and is a bona fide resident," etc., is a mere conclusion of law and of no weight in the absence of facts to sustain it. *Bernon v. Bernon* (Cal. App.), 114 Pac. 1000.

Under the South Carolina statute the affiant need not give the names and addresses of his witnesses. *McFail v. Barnwell Co.* (S. C.), 32 S. E. 417.

41. *Bowen v. Bowen*, 74 Ind. 470.

In *Hills v. LaDue*, 5 Colo. App. 248, 38 Pac. 430, the court said: "Section 29 of the Code provides that the court may, on good cause shown, change the place of trial when the convenience of witnesses and the ends of justice will be promoted by the change. There is

nothing in the affidavit from which the court could determine whether the ends of justice would be in the least promoted by the change. The facts to which the witness whose convenience it was desired to subserve would testify should have been set forth; and as no answer had been filed, and therefore no defense disclosed, the affidavit should also have stated the facts constituting the defense. Without such showing, it was impossible for the court to determine whether there was a defense, or whether, if there was, the testimony of the witness was important or material. The statement that the defendant submitted the facts to his counsel, and was advised by him that he had a good defense, amounts to nothing."

42. *Johnson v. Wakulla Co.*, 28 Fla. 720, 9 So. 690; *Greeno v. Wilson*, 27 Fla. 492, 8 So. 723.

The disagreement of the jury is not alone evidence that the plaintiff cannot have an impartial trial in the county as that is not an uncommon occurrence. *Noonan v. Luther*, 128 App. Div. 673, 112 N. Y. Supp. 898.

"The belief of a party in his inability to procure an impartial trial is insufficient, in the absence of facts and circumstances showing such belief to be well founded. *People v. Wright*, 5 How. Pr. (N. Y.) 23, 27; *People v. Sammis*, 3 Hun (N. Y.) 560. The record herein discloses no facts sufficient to invoke the exercise of any discretion on the part of the Special Term. It shows an extensive acquaintance by the defendant, and business and political prominence and activity on his part, and also professional and political prominence of his attorneys. These facts are insufficient to justify the order. *Weiant v. Rockland Lake Trap Rock Co.*, 74 App. Div. 24, 76 N. Y. Supp. 699; *Lent v. Ryder*, 47 App. Div. 415, 62 N. Y. Supp. 400." *Noonan v. Luther*, 128 App. Div. 673, 112 N. Y. Supp. 898."

the prominence of the parties, or notoriety of the case not being sufficient, unless it is shown to be prejudicial to the applicant.⁴³

Convenience of Witnesses.—The affidavits supporting an application for a change for the convenience of witnesses should give the names of the witnesses, and show that their testimony is material, and the facts to which they will testify, and that applicant's counsel has advised him that they are material to his case.⁴⁴

Prejudice or Interest of Judge.—Under some statutes, a mere statement that the applicant cannot have a fair trial, by reason of the prejudice of the judge, or of the inhabitants, is all that is required.⁴⁵

43. *Mathis v. Bank of Taylorville*, 136 Ky. 634, 124 S. W. 876; *Noonan v. Luther*, 123 App. Div. 673, 112 N. Y. Supp. 898.

44. *Hurn v. Olmstead*, 105 N. Y. Supp. 1091; *Mole v. New York, etc. R. Co.*, 102 N. Y. Supp. 308. *Contra, McFail v. Barnwell Co.*, 54 S. C. 368, 32 S. E. 417.

In *Hurn v. Olmstead*, *supra*, it was said to be a rule that the parties must disclose the grounds of their expectations as to what their witnesses will testify, so that the court can draw its own conclusion, but there are cases holding this unnecessary. *Ballston R. & S. Co. v. De Foe*, 67 App. Div. 341, 73 N. Y. Supp. 772; *Sinnit v. Cambridge Val. etc. Assn.*, 50 N. Y. Supp. 166. And in *Kalbfleisch v. Rider*, 120 App. Div. 623, 105 N. Y. Supp. 539, the failure to do so was said to be merely a factor to be considered in determining the merits of the motion.

In California a statement of the advice of counsel is held unnecessary if the substance of the testimony is given so that the court can judge of its materiality. *Pascoe v. Baker*, 158 Cal. 232, 110 Pac. 815; *Cook v. Pennington*, 61 Cal. 72.

The testimony need not be repeated in the affidavit if it appears elsewhere in the record. *Park v. Gruwell* (Cal. App.), 115 Pac. 252. And see *Grant v. Bannister*, 145 Cal. 219, 78 Pac. 653, where the court refused to reverse an order granting a change of venue for the convenience of witnesses, where the affidavits of both parties were general, saying, "if the court below had denied the motion, we would attach little importance to such affidavits, had defendants appealed. But the court granted the motion, and we cannot say that the affidavits, in connection with the

pleadings and the papers on file, were not sufficient as a basis for the order."

Form.

John Doe
ads.

Richard Roe

} Supreme Court.

County, ss: John Doe, the above-named defendant, being sworn says, that the venue in this cause is laid in the county of _____; that the declaration was served on the _____; that the cause is not at issue; (or if at issue, state the fact, and the time when issue was joined;) that deponent has fully and fairly stated the case to _____, his counsel in this cause, who resides at _____, in the county of _____, and has fully and fairly disclosed to his said counsel the facts which he expects to prove by each and every of the witnesses herein-after named; that deponent has a good and substantial defense on the merits, in this cause, as he is advised by said counsel and verily believes; that _____ and _____ of the town of _____ and _____, _____ of the town of _____, all of whom reside in said county _____, are each and every of them material witnesses for this deponent on the trial of this cause, as he is advised by said counsel and verily believes; and that, without the testimony of each and every of the said witnesses, deponent cannot safely proceed to the trial of this cause, as he is also advised by said counsel and verily believes.

Subscribed and sworn, etc.

See *Brittan v. Peabody*, 4 Hill (N. Y.) 61, 66.

45. Ill.—*McGoon v. Little*, 7 Ill. 42. Ind.—*Corey v. Silcox*, 5 Ind. 370; *Brow v. Levy*, 3 Ind. App. 464, 29 N. E. 417. Ind. Ter.—Ann. St., ch. 57, §3553, §51.

But in some jurisdictions the reasons for such belief should be set out.⁴⁶

c. *Allegations Positive and Certain.*—The statements should be made positively, and with certainty.⁴⁷ If the application is on the

MD.—*Albert v. State*, 66 Md. 325, 7 Atl. 697. **MICH.**—*Preston Nat. Bank v. Brooke*, 142 Mich. 272, 105 N. W. 757.

MO.—*Gale v. Michie*, 47 Mo. 326. **OHIO.** *Snell v. Cincinnati R. Co.*, 60 Ohio 256, 54 N. E. 270; *Barclay v. Salmon*, 17 Ohio C. C. 152. **OKLA.**—*Jones v. Balsley*, 27 Okla. 420, 111 Pac. 942.

"It is sufficient," said the court in *Barclay v. Salmon*, *supra*, "to file an affidavit setting forth the fact of such interest, bias, etc.; that is, aver such interest, bias, etc."

In *Newcomb-Buchanan Co. v. Bassett*, 14 Bush. (Ky.) 658, it is said that "the facts and circumstances leading to this belief have never been required to be stated," but Gen. St. (Ky.), ch. 28, art. 7, §1, is held to require the affiant to state facts upon which the belief is founded. *German Ins. Co. v. Landran*, 88 Ky. 433, 11 S. W. 367. And see cases, *infra*.

But if the applicant essays to state his reasons the court is at liberty to judge of their sufficiency and may deny a change if the general averment of prejudice is thus limited. *Brow v. Levy*, 3 Ind. App. 464, 29 N. E. 417.

Affidavit that affiant has good reason to believe that the judge is prejudiced, is sufficient under the Wisconsin statute. *Vogel v. City of Milwaukee*, 47 Wis. 435, 2 N. W. 543; *Seehawer v. City of Milwaukee*, 39 Wis. 409.

Averment of "fear" of prejudice is not equivalent to the "belief" required by Wis. Rev. St. §2625. *Smith v. Clarke*, 70 Wis. 137, 35 N. W. 318.

46. FLA.—*Conn v. Chadwick*, 17 Fla. 428. **IDAHO.**—*Bell v. Bell*, 18 Idaho 636, 111 Pac. 1074. **IA.**—*Garrett v. Bicklin*, 78 Iowa 115, 42 N. W. 621. (Prior to 1884 the court had no discretion in such cases, but Code §2590 establishes a different rule). **KAN.**—*Griggs v. Corson*, 71 Kan. 884, 81 Pac. 471; *McCormick Harv. Mach. Co. v. Hayes*, 7 Kan. App. 141, 53 Pac. 70. **KY.**

Powers v. Reynolds, 89 Ky. 259, 12 S. W. 298; *Vance v. Field*, 89 Ky. 178, 12 S. W. 190. **MONT.**—*Kennon v. Gilmer*, 5 Mont. 257, 5 Pac. 847. **NEV.**—*Table Mount, etc. Co. v. Waller's D. S. M. Co.*, 4 Nev. 218. **N. J.**—*Lee v. Evald*, 1 N. J. L. 283. **N. C.**—*State v. Twitty*,

9 N. C. 248. **S. C.**—*McNair v. Tucker*, 24 S. C. 105.

It must be shown against whom the judge is prejudiced. *Toledo, M. & W. R. Co. v. Eddy*, 72 Ill. 138.

But if the facts are such that a recital of them would be calculated to expose the court to scandal or contempt, a general statement is sufficient. *Hughes v. People*, 5 Colo. 436.

47. CAL.—*Hearne v. DeYoung*, 111 Cal. 373, 43 Pac. 1108; *Chase v. South Pacific C. R. Co.*, 83 Cal. 468, 23 Pac. 532; *People v. Williams*, 24 Cal. 31; *Sloan v. Smith*, 3 Cal. 410. **COLORADO.**—*DeWein v. Osborne*, 12 Colo. 407, 21 Pac. 189 (defendants failed to show that they were not residents of the county at the time the action was begun); *Denver & R. G. R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285 (if change is sought for the convenience of witnesses it should show who they are). **IA.**

Fairburn v. Goldsmith, 58 Iowa 339, 12 N. W. 273. **MINN.**—*State v. District Court*, 88 Minn. 95, 92 N. W. 518. **MONT.** *Kennon v. Gilmer*, 5 Mont. 257, 5 Pac. 847. **NEV.**—*Table Mountain G. & S. M. Co. v. Waller's Defeat Silver M. Co.*, 4 Nev. 218, a statement of belief without facts, held too loose and uncertain. **N. J.**—*Murray v. New Jersey R. & T. Co.*, 23 N. J. L. 63, mere opinion or belief of witnesses insufficient. **N. Y.**—*Bull v. Babbitt*, 1 How. Pr. 183 (change denied because affidavit did not show where the venue was laid); *Manning v. Downing*, 2 Johns. 453 (an argumentative statement held insufficient); *Franklin v. Underhill*, 2 Johns. 374 (the affiant "must swear positively"); *Wheaton v. Slosson*, 2 Johns. Cas. 111 (the affidavit must be special, not general).

In *Hearne v. De Young*, *supra*, the application of a defendant for a change to the county of his residence was held properly denied because he failed to negative the admission that the action was properly brought as to his co-defendant.

A statement in the affidavit that "the last three named above persons are not related to the parties making the motion nearer than the fourth degree," was held insufficient to show that none

ground that the venue is not properly laid, the affidavit must be sufficiently specific and certain to show that the plaintiff had no right to bring it where laid, not merely that the defendants might have been sued elsewhere.⁴⁸

d. *By Whom Made.*—The affidavit must generally be made by the moving party,⁴⁹ though affidavits of others may be admissible, or necessary, under some circumstances, to establish the facts relied upon.⁵⁰

of them were so related. *Fairburn v. Goldsmith*, *supra*.

An affidavit that defendant had been a resident of another county "for more than two months last past" does not show with sufficient certainty that she was such resident at the time of the commencement of the action, such date not appearing therein. *State v. District Court* (Minn.), 92 N. W. 518.

The statement by defendant under oath that he "lived" at a certain address is not inconsistent with his residence elsewhere. *O'Brien v. O'Brien* (Cal. App.), 116 Pac. 692.

Negations in affidavits are permissible under some circumstances. *Doll v. Stewart*, 30 Colo. 326, 70 Pac. 326 (affiants stated they had never heard of the controversy); *Carpenter v. Central Vt. R. Co.* (Vt.), 80 Atl. 657 (affiants denied knowledge of any facts which would indicate that a fair trial could not be had).

Diligence.—If the application is tardy the affidavit should show clearly when the information was acquired in order to enable the court to judge whether the applicant has used due diligence. *Jones v. American Cent. Ins. Co.*, 83 Kan. 44, 109 Pac. 1077; *St. Louis, etc. R. Co. v. Holladay*, 131 Mo. 440, 33 S. W. 49.

Where a change after a continuance is permitted only if knowledge of the facts has been acquired since that time, an affidavit which does not set forth that fact is deficient. *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa 530, 70 N. W. 769; *McCracken v. Webb*, 36 Iowa 551; *Finch v. Billings*, 22 Iowa 228; *Dean v. White*, 5 Iowa 266.

The affidavit need not show that the defendant was diligent in discovering the ground for the change, where the application is tardy. *Wilson v. Johnson*, 145 Ind. 40, 38 N. E. 38; *Ogle v. Edwards*, 133 Ind. 358, 33 N. E. 95, *overruling pro tanto*, *Ringgenberg v.*

Hartman, 102 Ind. 537, 26 N. E. 91, and *Witz v. Spencer*, 51 Ind. 253.

48. Cal.—*Hearne v. De Young*, 111 Cal. 373, 43 Pac. 1108. Colo.—*De Vein v. Osborn*, 12 Colo. 407, 21 Pac. 189. N. Y.—*Tillinghast v. King*, 6 Cow. 591.

49. Ia.—*Hedge v. Gibson*, 58 Iowa 656, 12 N. W. 713. Minn.—*Olivier v. Cunningham*, 51 Minn. 232, 53 N. W. 462 (affidavit of merits by defendant's attorney held insufficient), *citing Frankoviz v. Smith*, 35 Minn. 278, 28 N. W. 508, and *Peoples' Ice Co. v. Schlentur*, 50 Minn. 1, 32 N. W. 219. Wis.—*Western Bank v. Tallman*, 15 Wis. 92.

The affidavit may be made by one of the defendants for all. *People v. Larue*, 66 Cal. 235, 5 Pac. 157; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

It may be made by attorney of applicant in Wyoming. *Perkins v. McDowell*, 3 Wyo. 203, 19 Pac. 440.

In Indiana it must be made by the party himself only in case of prejudice. *Heshion v. Pressley*, 80 Ind. 490.

50. Ark.—*St. Louis, etc. R. Co. v. McNamare*, 91 Ark. 515, 122 S. W. 102; *Kirby's Dig. §7996* (affidavits of at least two credible persons required in support of petition). Ill.—*Hanna v. People*, 86 Ill. 243, affidavit of two disinterested persons required to authorize change for prejudice of judge. Ia.—*Deere v. Bagley*, 80 Iowa 197, 45 N. W. 557; *Fairburn v. Goldsmith*, 58 Iowa 339, 12 N. W. 273. Ky.—*Newcomb-Buchanan Co. v. Baskett*, 14 Bush 658. Ohio.—*Snell v. Cincinnati St. R. Co.*, 60 Ohio 256, 54 N. E. 270. Okla.—*Richardson v. Augustine*, 5 Okla. 667, 49 Pac. 930.

In Iowa and Texas the affidavit of three disinterested parties is also necessary. *Deere v. Bagley*, 80 Iowa 197, 45 N. W. 557; *Fairburn v. Goldsmith*, 58 Iowa 339, 12 N. W. 273; *Texas &*

If a corporation is a party, the affidavit may be made by its duly authorized officer, or agent,⁵¹ but his authority to act for it must be established.⁵²

Local Prejudice.—In determining local prejudice, the opinions of representative, unbiased persons, subject to act as jurors, are given more weight than those of interested parties.⁵³

e. *Affidavit of Merits.*—The defendant, in some states, when he asks a change on certain grounds, is required to make affidavit that he has a meritorious defense, as a condition precedent to the change.⁵⁴

P. R. Co. v. Allen, 7 Tex. Civ. App. 214, 26 S. W. 434.

If by the attorney of the party, the reason therefor should be stated. Dean v. White, 5 Iowa 266; Olivier v. Cunningham, 51 Minn. 232, 53 N. W. 462.

51. Ill.—Commercial Ins. Co. v. Mehlman, 48 Ill. 313; First Nat. Bank v. Levison, 129 Ill. App. 173. Pa. Williamsport & E. R. Co. v. Cummins, 8 Watts 450. Wis.—Wheeler & Wilson Mfg. Co. v. Lawson, 57 Wis. 400, 15 N. W. 398.

An affidavit on behalf of a corporation should be made by an officer thereof (McGovern v. Keokuk Lumb. Co., 61 Iowa 265, 16 N. W. 106; Hedge v. Gibson, 58 Iowa 656, 12 N. W. 713; Wheeler & Wilson Mfg. Co. v. Lawson, 57 Wis. 400, 15 N. W. 398), unless an employee is in a better position to be conversant with the facts (Jones v. Chicago & N. W. R. Co., 36 Iowa 63; Dean v. White, 5 Iowa 266; Texas & P. R. Co. v. Hawkins (Tex. Civ. App.), 30 S. W. 1113; Texas & P. R. Co. v. Allen, 7 Tex. Civ. App. 214, 26 S. W. 434).

In Ohio "when a corporation having more than fifty stockholders is a party in an action pending in any county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party makes affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjacent county most convenient for both parties." Snell v. Cincinnati St. R. Co., 60 Ohio St. 256, 54 N. E. 270; Rev. St. §5033.

52. A recital to that effect in the affidavit is not enough. McGovern v. Keokuk Lumb. Co., 61 Iowa 265, 16 N. W. 106.

53. State v. Rooke, 10 Idaho 388, 79 Pac. 82.

"It is usual in such cases [applications for a change of venue on the ground of local prejudice] to give the court the opinions of intelligent citizens, subject to be called as jurors, scattered throughout the county, based upon a proper statement of facts, showing that a party cannot likely have a fair trial in the judgment of such citizens." Gilbert v. Washington W. P. Co. (Wash.), 115 Pac. 924.

54. Cal.—Johnson v. Walden, 12 Pac. 257; Palmer v. Barclay, 92 Cal. 199, 28 Pac. 226; Rathget v. Tisconia, 66 Cal. 96, 4 Pac. 987; Buell v. Dodge, 63 Cal. 553; Watkins v. Degener, 63 Cal. 500; Grangers' Union v. Ashe, 12 Cal. App. 143, 106 Pac. 889. Ind.—Bowen v. Bowen, 74 Ind. 470. N. Y.—Jordan v. Garrison, 6 How. Pr. 6; Lynch v. Mosher, 4 How. Pr. 86; Hemingway v. Spaulding, 1 How. Pr. 70; Cromwell v. Van Rensselaer, 3 Cow. 346; Onondaga County Bank v. Shepherd, 19 Wend. 10; State Bank v. Gill, 23 Hun 406; White v. Hale, 40 N. Y. Supp. 945. But see Sherman v. Gregory, 42 How. Pr. 481.

Sherman v. Gregory, *supra*, holds that no affidavit of merits is required "to change the place of trial to the proper county, that is, to a county where some of the parties reside." But in California a defendant asking a change on the ground that the suit is not filed in the proper county must file an affidavit of merits. Pascoe v. Baker, 158 Cal. 232, 110 Pac. 815. And the rule is the same in Washington. State v. Superior Court, 9 Wash. 668, 38 Pac. 206.

In New York an affidavit of merits is necessary in applying for a change on the ground of the convenience of witnesses. See the New York cases cited, *supra* this note.

The affidavits should state that the affiant has fully disclosed the facts of the case to his attorney;⁵⁵ that the latter has advised him that he has a good defense thereto,⁵⁶ and that he, himself so believes.⁵⁷

B. BY COURT OF ITS OWN MOTION.—It is generally held that the court has no inherent power to change the venue of its own motion,⁵⁸ but if reason therefor arises, from causes touching the qualifications of the judge, such as his prejudice, interest in the suit, or former connection therewith, the court in some states may order a change upon mere suggestion of that fact.⁵⁹

C. BY AMENDMENT.—Change of venue is sometimes effected by an amendment of the complaint,⁶⁰ and if the right to amend is given

Lack of an affidavit of merits is not fatal where the necessary averments were contained in the moving affidavits (*Agne v. Schwab*, 127 App. Div. 67, 111 N. Y. Supp. 8), or in the verified answer (*Iron Nat. Bank v. Dodge*, 46 App. Div. 327, 61 N. Y. Supp. 680), or if the change is a matter of right (*Packard v. Hesterberg*, 48 Misc. 30, 96 N. Y. Supp. 72).

In Minnesota the defendant should present an affidavit of merits in resistance of an application by the plaintiff for a change of the place of trial on the ground of convenience of witnesses. *Olivier v. Cunningham*, 51 Minn. 232, 53 N. W. 462.

55. *Johnson v. Walden* (Cal.), 12 Pac. 257; *Lynch v. Mosher*, 4 How. Pr. (N. Y.) 86.

Averment that the defendant has fully stated "the case" is equivalent to "the facts of the case." *Rathgeb v. Tiscornia*, 66 Cal. 96, 4 Pac. 987; *Watkins v. Degener*, 63 Cal. 500; *Eddy v. Houghton*, 6 Cal. App. 85, 91 Pac. 397; but "his case" is not equivalent to "the case" (*People v. Larue*, 66 Cal. 235, 5 Pac. 157), nor "the facts," to "the facts of the case" (*Jensen v. Dorr*, 9 Cal. App. 18, 98 Pac. 45).

The fact that the attorney giving the advise is the counsel of the affiant must be stated in the affidavit. *Jensen v. Dorr*, 9 Cal. App. 18, 98 Pac. 45; *State Bank v. Gill*, 23 Hun (N. Y.) 406.

56. The affidavit must state unequivocally that the advice was given by the party's attorney. Cal.—*Grangers' Union v. Ashe*, 12 Cal. App. 143, 106 Pac. 889. N. Y.—*Swartwout v. Hoage*, 16 Johns. 3. Wash.—*State v. Superior Court*, 9 Wash. 668, 38 Pac. 206.

57. *Rowland v. Coyne*, 55 Cal. 1; *Lynch v. Mosher*, 4 How. Pr. (N. Y.) 86.

Statement that he believes the advice of his attorney, insufficient. *Lynch v. Mosher*, 4 How. Pr. (N. Y.) 86; *Brittan v. Peabody*, 4 Hill (N. Y.) 61.

58. Ia.—*Bennett v. Carey*, 57 Iowa 221, 10 N. W. 634. Mo.—*Leslie v. G. W. Chase & Son Co.*, 200 Mo. 363, 98 S. W. 523. Mont.—*State v. District Court*, 30 Mont. 188, 75 Pac. 1109. Neb.—*Lefferts v. Bell*, 57 Neb. 248, 77 N. W. 680; *Fisk v. Thorp*, 51 Neb. 1, 70 N. W. 498. N. Y.—*Phillips v. Tietjen*, 108 App. Div. 9, 95 N. Y. Supp. 469, cited and explained in *Cronin v. Manhattan Transit Co.*, 124 App. Div. 543, 108 N. Y. Supp. 963. Ohio.—*Eaton & H. R. Co. v. Varnum*, 10 Ohio St. 622. Wis.—*Mills v. National Fire Ins. Co.*, 88 Wis. 351, 60 N. W. 426.

In *Scott Hdw. Co. v. Riddle*, 84 Mo. App. 275, the power of the court to make a change in its own motion was denied because the act creating the common pleas court expressly provided that changes of venue should be to the circuit court of the county.

In Wisconsin the judge may change the place of trial without an application if he is a party, or is interested in the action, or has been of counsel. Rev. St. §2623. He has no such authority under the condition. *Mills v. National Fire Ins. Co.*, 88 Wis. 351, 60 N. W. 426.

59. Cal.—*Livermore v. Brundage*, 64 Cal. 299, 30 Pac. 848. Ill.—*Bruen v. Bruen*, 43 Ill. 408. Ind.—*Joyce v. Whitney*, 57 Ind. 550. Mo.—*Gale v. Michie*, 47 Mo. 326. Wis.—*Mills v. National Fire Ins. Co.*, 88 Wis. 351, 60 N. W. 426.

60. *Gay v. Homer*, 13 Pick. (Mass.) 535; *Conroe v. National Protection Ins.*

by the statute, as of course, the change would necessarily follow.⁶¹

D. BY CONSENT OF PARTIES.—1. In General.—A change of venue may be made in pursuance of a mutual agreement of the parties, if some statutory ground therefor exists,⁶² upon order of court, duly made and entered.⁶³

2. Demand and Consent.—A change is provided for by statute in some states, upon demand of the defendant, and consent thereto by the plaintiff,⁶⁴ and it is allowed in other states, even in the absence of

Co., 10 How. Pr. (N. Y.) 403; *Swartwout v. Payne*, 16 Johns. (N. Y.) 149; *Wolverton v. Wells*, 1 Hill (N. Y.) 374; *McCosker v. Smith*, 14 N. Y. Supp. 615.

Under earlier New York practice such amendment lay in the discretion of the court. *Pain v. Parker*, 13 Johns. (N. Y.) 329.

Change for convenience of witnesses under the present practice should be made by motion and not by amendment of the declaration. *Lindsley v. Sheldon*, 43 Misc. 116, 88 N. Y. Supp. 192.

If the original venue is proper an amendment as to parties does not necessarily confer a right to a change. *Healy v. Mathews*, 108 Minn. 125, 121 N. W. 428; *Thomas v. Ellison*, 102 Tex. 354, 116 S. W. 1141, *modifying* 110 S. W. 934.

61. *Stryker v. New York Exch. Bank*, 28 How. Pr. (N. Y.) 20; *Toll v. Cromwell*, 12 How. Pr. (N. Y.) 79.

Such amendment would operate to suspend proceedings until the removal of the cause to the proper jurisdiction. *Moulton v. Beecher*, 52 How. Pr. (N. Y.) 182.

But under New York Code Civ. Proc., §417, providing that the summons must contain "the name of the county in which the plaintiff desires trial," it is held plaintiff cannot change the place of trial by an amendment as of course. *Wadsworth v. Georger*, 18 Abb. N. C. 199.

Such amendment, however, is usually subject to the condition that the defendant's rights shall not be prejudiced thereby, and hence will not be allowed if rights acquired under previous proceedings in the case would be affected adversely. *Faherty v. Schnyler Steam, etc. Line*, 43 Hun (N. Y.) 432; *Rector v. Ridgwood Ice Co.*, 38 Hun (N. Y.) 293.

Hence a motion by defendant for a change to another county would be de-

termined just as though no such amendment had been made. *Moulton v. Beecher*, 52 How. Pr. (N. Y.) 182.

62. Ark.—*Ex parte Snow*, 28 Ark. 471. Fla.—*State v. Walker*, 6 So. 169. Ill.—*Pierson v. Finney*, 37 Ill. 29; *People v. Scates*, 4 Ill. 351. Ind.—*Garrigan v. Dickey*, 1 Ind. App. 421, 27 N. E. 713. Mo.—*Scott Hdw. Co. v. Riddle*, 84 Mo. App. 275. Wash.—*Rem. & Bal. Code*, §209; *State v. Superior Court*, 61 Wash. 681, 112 Pac. 927.

A second change was held proper upon consent of the parties in *Hourigan v. Com.*, 94 Ky. 520, 23 S. W. 355.

Parties cannot change the venue by agreement after the time for application has expired. *Ruby Canyon Gold M. Co. v. Hunter*, 60 Fed. 305.

63. *Swan v. Porter*, 96 Wis. 34, 70 N. W. 1068.

64. Ariz.—*Solomon v. Norton*, 2 Ariz. 100, 11 Pac. 108. Cal.—*Byrne v. Byrne*, 57 Cal. 348 (notice of motion for change held not equivalent to a demand); *Estrada v. Orena*, 54 Cal. 407 (Code Civ. Proc. §396). Ia.—*Carroll County v. American Emigrant Co.*, 37 Iowa 371. Nev.—*Elam v. Griffin*, 19 Nev. 442, 14 Pac. 582; *Gen. St.*, §3043. N. Y.—*Sherman v. Gregory*, 42 How. Pr. 481; *Granger v. Sheble*, 1 How. Pr. (N. S.) 130; *Philbrick v. Boyd*, 16 Abb. Pr. 393; *Marsh v. Lowry*, 26 Barb. 197; *Knight & Wall Co. v. Thomas*, 103 App. Div. 605, 92 N. Y. Supp. 997; *Virden v. Thomas*, 103 App. Div. 606, 92 N. Y. Supp. 996; *Washington v. Thomas*, 103 App. Div. 423, 92 N. Y. Supp. 994; *Kubiac v. Clement*, 35 App. Div. 186, 54 N. Y. Supp. 773; *Larkin v. Watson Wagon Co.*, 74 N. Y. Supp. 73. N. C.—*McArthur v. Griffith*, 147 N. C. 545, 61 S. E. 519 (a prayer to dismiss held not equivalent to a demand). Wis.—*Rev. St.* 1898, §2621; *Anderson v. Arpin Hdw. L. Co.*, 131 Wis. 34, 110 N. W. 788.

any express provision in their statutes authorizing the change.⁶⁵

V. RESISTANCE TO CHANGE.—A. GROUND FOR RESISTING. If the change is not mandatory upon the showing of the applicant, it may be resisted on the ground that the county where the suit was instituted is more convenient for the witnesses,⁶⁶ but not if the state of the cause is such that the court would not have before it sufficient data on which to base its judgment;⁶⁷ or because the inhabitants of the county to which it is sought to transfer the cause are prejudiced against the contestant.⁶⁸ Or the application may be resisted on its

In California.—If the judge is disqualified the parties may agree on the court to which the action shall be transferred. Code Civ. Proc. §398; *Krumdick v. Crump*, 98 Cal. 117, 32 Pac. 800.

A demand is necessary only if the change is demanded as a matter of right. *Larkin v. Watson Wagon Co.*, 74 N. Y. Supp. 73.

If the plaintiff does not acquiesce in the change a motion may then be filed. *Kubiac v. Clement*, 35 App. Div. 186, 54 N. Y. Supp. 773.

If the demand is served by mail plaintiff has double the time in which to consent. In case of refusal the defendant has ten days in which to serve notice of his motion to change. It has been held that under such circumstances the defendant has double time in which to serve his notice of motion. *Binder v. Metropolitan St. R. Co.*, 74 N. Y. Supp. 54; *Lesser v. Williams*, 5 N. Y. Supp. 97. But this rule was not followed in *State Board of Pharmacy v. Rhinehardt*, 116 App. Div. 495, 101 N. Y. Supp. 769.

A demand is held necessary before a motion can be made, in *Whitehead Bros. v. Dolan*, 69 Misc. 208, 126 N. Y. Supp. 414 (overruling the construction of Code Civ. Proc., §986, in *McConihe v. Palmer*, 27 N. Y. Supp. 832); *Phillips v. Tietjen*, 108 App. Div. 9, 95 N. Y. Supp. 469.

Byrne v. Byrne, 57 Cal. 348, held that a notice of a motion to change does not satisfy Code Civ. Proc., §396, providing for a demand in writing.

65. *Ill.*—*Pierson v. Finney*, 37 Ill. 29. *Ind.*—*Garrigan v. Dickey*, 1 Ind. App. 421, 27 N. E. 713. *Miss.*—*Choat v. Billingsly*, Walk. 420. *Nev.*—*Lyon County v. Washoe County*, 6 Nev. 241.

66. *Hall v. Central Pac. R. Co.*, 49 Cal. 454; *Hanchett v. Finch*, 47 Cal. 192; *Wong Fung Hing v. San Fran-*

cisco R. & R. C. Funds, 15 Cal. App. 537, 115 Pac. 331; *Jones v. Swank*, 54 Minn. 259, 55 N. W. 1126.

If the change is a matter of right it cannot be contested. *Cal.*—*Krumdick v. Crump*, 98 Cal. 117, 32 Pac. 800; *Rathgeb v. Tiscornia*, 66 Cal. 96, 4 Pac. 987. *N. Y.*—*Mills & Gibb v. Starlin*, 119 App. Div. 336, 104 N. Y. Supp. 230; *Sylvester v. Lewis*, 55 App. Div. 470, 67 N. Y. Supp. 176; *Griffin v. Olean Times Pub. Co.*, 126 N. Y. Supp. 1102. *S. D.*—*Ivanusch v. Great Northern R. Co.*, 128 N. W. 333.

67. *Cal.*—*McSherry v. Pennsylvania Con. Gold Min. Co.*, 97 Cal. 637, 32 Pac. 711; *Cook v. Pendergast*, 61 Cal. 72; *Wong Fung Hing v. San Francisco R. & R. Co. Funds*, 15 Cal. App. 537, 115 Pac. 331. *N. Y.*—*Hinchman v. Butler*, 7 How. Pr. 462; *Moore v. Gardner*, 5 How. Pr. 243. *Wis.*—*Van Kleck v. Hanchett*, 51 Wis. 398, 8 N. W. 236; *Bonnell v. Easterly*, 30 Wis. 549.

"If his [the defendant's] motion to change the place of trial is brought to hearing before he has answered, the plaintiff cannot by cross-motion, demand the retention of the action in the county where it is pending, on the ground of convenience, etc." *Cook v. Pendergast*, 61 Cal. 72.

In such cases the change must be made and the application for a second change then presented by the other party in the receiving court. *Pascoe v. Baker*, 158 Cal. 232, 110 Pac. 815; *Moore v. Gardner*, 5 How. Pr. (N. Y.) 243; *Mills & Gibbs v. Starlin*, 119 App. Div. 336, 104 N. Y. Supp. 230; *Sylvester v. Lewis*, 55 App. Div. 470, 67 N. Y. Supp. 176; *Griffin v. Olean Times Pub. Co.*, 126 N. Y. Supp. 1102.

68. *Tuomey v. Kingsford*, 74 N. Y. Supp. 13.

But an affidavit of the prejudice of the judge of the circuit court for the county in which the defendants resided

merits without making a counter showing on other grounds.⁶⁹

Calling in Judge.—In some states a change may be avoided by calling in, or electing another judge.⁷⁰

B. How RESISTED.—1. **Counter-Affidavits.**—The proper method of resisting an application for a change of venue, under the present practice, is by counter-affidavits.⁷¹ These should comply with the

was held not, of itself, sufficient ground for denying a motion to change the place of trial to that county, where defendant was entitled to the change. *Moe v. Moe*, 39 Wis. 308.

69. The credibility of the affiants may be attacked. *Freeman v. Ortiz* (Tex. Civ. App.), 136 S. W. 113.

Applicant charged undue influence of opposing attorneys. A change was denied on their withdrawal. *Anderson v. Leverich*, 70 Iowa 741, 30 N. W. 39.

A change will not be denied because plaintiff offers to pay expenses of defendant's witnesses on certain conditions. *Dexter v. Alfred*, 12 N. Y. Supp. 365.

70. Cal.—*Upton v. Upton*, 94 Cal. 26, 29 Pac. 411. Idaho.—*Bell v. Bell*, 18 Idaho 636, 111 Pac. 1074; *Day v. Day*, 12 Idaho 536, 86 Pac. 531. Ill.—*American Car & F. Co. v. Hill*, 226 Ill. 227, 80 N. E. 784, judgment affirmed, 128 Ill. App. 176; *Chicago & A. R. Co. v. Harrington*, 192 Ill. 9, 61 N. E. 622, affirmed, 90 Ill. App. 638. Ind.—*Burn's Code*, 1908, §422; *Scherer v. Ingberman*, 110 Ind. 423, 11 N. E. 8, 12 N. E. 304; *Hutts v. Hutts*, 51 Ind. 581. Mo.—*Little Tarkio Dr. Dist v. Richardson*, 227 Mo. 252, 126 S. W. 1021; *State v. Flournoy*, 160 Mo. 324, 60 S. W. 1098; *State v. McKee*, 150 Mo. 233, 51 S. W. 421. Mont.—*Granite Mountain M. Co. v. Dufree*, 11 Mont. 222, 27 Pac. 919. Okla.—*Horton v. Haines*, 23 Okla. 878, 102 Pac. 121. Wis.—*State v. Clementson*, 133 Wis. 458, 113 N. W. 667.

And see the title "Courts."

In *Santa Cruz Bank v. Taylor*, 125 Cal. 249, 57 Pac. 987, a change was held properly denied because the disqualified judge had been succeeded by one who was not disqualified.

In California the constitutional provision that "a judge of any superior court may hold a superior court in any county, at the request of a judge of the superior court thereof, and upon the request of the governor it shall be his duty so to do" is held to author-

ize the calling in of another judge by one who is disqualified, and that the right to have the case transferred to another county is superseded. *Upton v. Upton*, 94 Cal. 26, 29 Pac. 411. But it has been said that "the court went to the extreme verge of toleration" in this case. *Krumdick v. Crump*, 93 Cal. 117, 32 Pac. 800.

In Indiana the statute (*Burn's Code*, §427) provides for a change of judge upon agreement of the parties, or the appointment of a special judge (*Burn's Code*, §428). The latter section provides, "That in all civil actions where a change of venue is taken from this regular judge of any circuit or superior court of this state, it shall be the duty of said regular judge, within five days after such change of venue is applied for, to appoint a special judge to hear and try such action."

71. Cal.—*Schilling v. Buhne*, 139 Cal. 611, 73 Pac. 431; *Cook v. Pendergast*, 61 Cal. 72; *Mahler v. Drummer Boy G. M. Co.*, 7 Cal. App. 190, 93 Pac. 1064. Colo.—*Doll v. Stewart*, 30 Colo. 326, 70 Pac. 326. Ia.—*Croft v. Chicago, etc., R. Co.*, 134 Iowa 411, 109 N. W. 723; *Union Mill Co. v. Prenzler*, 69 N. W. 876. Mo.—*Leslie v. G. W. Chase & Son M. Co.*, 200 Mo. 363, 98 S. W. 523. N. Y.—*Rieger v. Pulaski Glove Co.*, 114 App. Div. 174, 99 N. Y. Supp. 558; *Burke v. Frenkel*, 97 App. Div. 19, 89 N. Y. Supp. 621; *Thomson v. Perkins*, 39 App. Div. 656, 57 N. Y. Supp. 810; *Sinnit v. Cambridge, etc., Stock Breeders' Assn.*, 27 Misc. 586, 58 N. Y. Supp. 238. Okla.—*Richardson v. Augustine*, 5 Okla. 667, 49 Pac. 930. S. D.—*Senn v. Connelly*, 23 S. D. 153, 120 N. W. 1097. Tex.—*Freeman v. Ortiz* (Tex. Civ. App.), 136 S. W. 113. W. Va.—*Caperton v. Bowyer*, 4 W. Va. 176, *appealed*, 14 Wall. (U. S.) 216, 20 L. ed. 882.

A contestant who presents no counter-affidavits but relies merely on objections to the sufficiency of the moving papers "concedes that the motion may be granted if the defendants have

analogous requirements as to form and substance applying to those of the applicant,⁷² and, in order to defeat the application, they must make a sufficient showing to overcome the *prima facie* case made out by the proponent.⁷³

2. Counter-Motion.—If the retention is asked on independent grounds, a counter-motion, or application, should be made.⁷⁴ But if a change is imperative under the statute, and the applicant complies therewith, counter-affidavits, or motion cannot be entertained.⁷⁵

made a case, however slight." *Hurn v. Olmstead*, 105 N. Y. Supp. 1091.

72. *Rieger v. Pulaski Glove Co.*, 114 App. Div. 174, 99 N. Y. Supp. 558; *Sinnit v. Cambridge, etc., Stock Breeder's Assn.*, 27 Misc. 586, 58 N. Y. Supp. 238, citing *Carpenter v. Continental Ins. Co.*, 31 Hun (N. Y.) 78, which discussed the requirements as to the affidavits of the applicant.

In *Rieger v. Pulaski Glove Co.*, *supra*, the court held the counter-affidavits of the plaintiffs "fatally defective," because they did not "give the names, addresses or occupations of individual witnesses, except three, but they mention 12 or more partnerships whose testimony is desired." And further: "It is not stated that the plaintiffs are advised by counsel that the testimony of such witnesses is material and necessary, nor that the individuals named will swear to any material fact. It is the rule that the absence of such a statement as to the advice of counsel constitutes a fatal defect, and cannot countervail allegations of the moving party. That was held by this court in *Fish v. Fish*, 61 App. Div. 572, 70 N. Y. Supp. 900."

The plaintiff's counter-affidavit "must state facts sufficient to show that he has resorted to such means to ascertain the defendant's residence as would be expected of a reasonable man seeking in good faith to make the discovery," to justify a venue laid under a statute permitting the plaintiff to bring the action in any county, if the residence of the defendant is unknown to him. "A mere statement that the residence of defendant is unknown to him, is not enough." *Mahler v. Drummer Boy Gold Min. Co.*, 7 Cal. App. 93, 93 Pac. 1064, citing *Thurber v. Thurber*, 113 Cal. 607, 45 Pac. 852; *Loehr v. Latham*, 15 Cal. 418.

73. *Thurber v. Thurber*, 113 Cal. 607, 45 Pac. 852; *Bachman v. Cathry*, 113 Cal. 498, 45 Pac. 814; *Loehr v. Latham*,

15 Cal. 418; *Mahler v. Drummer Boy Gold M. Co.*, 7 Cal. App. 190, 93 Pac. 1064; *Rieger v. Pulaski Glove Co.*, 114 App. Div. 174, 99 N. Y. Supp. 558; *Burke v. Frenkel*, 97 App. Div. 19, 89 N. Y. Supp. 621.

An affidavit by the plaintiff's attorney stating facts that are only hearsay will not be considered. *Bachman v. Cathry*, *supra*.

Plaintiff's affidavit, verified February 13, 1904, alleging that she "resides" in Brooklyn, was held insufficient to establish the fact that she resided there at the time of the commencement of the action, on January 20, 1904, as against the affidavit of defendant that at the time the cause of action arose she was a resident of Chicago. *Burke v. Frenkel*, 97 App. Div. 19, 89 N. Y. Supp. 621.

An averment that the expenses of certifying the necessary papers was "more than this affiant can stand," was held insufficient ground for denying the defendant's *prima facie* right to be sued in the county of his residence, where defendant stipulated to receive uncertified copies and thus obviate such expense. *Schilling v. Buhne*, 139 Cal. 611, 73 Pac. 431.

74. Cal.—*Wong Fung Hing v. San Francisco R. & R. Funds*, 115 Pac. 331; *Heald v. Hendry*, 65 Cal. 321, 4 Pac. 27; *Cook v. Pendergast*, 61 Cal. 72; *Edwards v. Southern Pac. R. Co.*, 48 Cal. 460. Minn.—*Allis v. White*, 70 Minn. 186, 72 N. W. 1070. N. Y.—*Griffin v. Olean Times Pub. Co.*, 126 N. Y. Supp. 1102.

75. Cal.—*Krumdick v. Crump*, 98 Cal. 117, 32 Pac. 800; *Cook v. Pendergast*, 61 Cal. 72. Ind.—*Route v. Ninde*, 118 Ind. 123, 20 N. E. 704; *Witter v. Taylor*, 7 Ind. 110; *Smith v. Amiss*, 30 Ind. App. 530, 66 N. E. 501. Minn.—*State v. District Court*, 77 Minn. 302, 79 N. W. 960. Mo.—*Eudaley v. Kansas City, etc. R. Co.*, 186 Mo. 399, 85 S. W. 366. N. Y.—*Mills & Gibbs v. Starin*,

VI. HEARING ON THE APPLICATION.—A. IN GENERAL.

Upon proper application a hearing is had, to determine the existence of cause for a change, and should take precedence of proceedings on the merits,⁷⁶ though, under some circumstances, the judge has no jurisdiction except to order the change.⁷⁷

B. DETERMINATION IN DISCRETION.—The determination of the facts on which the application for a change is based, lies in the sound discretion of the court,⁷⁸ and it may take any apt methods of inform-

119 App. Div. 336, 104 N. Y. Supp. 230. **Tex.**—*Salinas v. Stillman*, 25 Tex. 12.

76. *Scanlon v. Deuel* (Ind.), 94 N. E. 561; *Galey v. Mason* (Ind.), 91 N. E. 561; *Moorhouse v. King County L. & C. Co.* (Tex. Civ. App.), 139 S. W. 883; *Carpenter v. Kone*, 54 Tex. Civ. App. 264, 118 S. W. 203.

The decision on an application on the ground of local prejudice may be reserved until after the jury has been impaneled. *Richardson v. Augustine*, 5 Okla. 667, 49 Pac. 930. But it is not necessary to proceed with the trial and postpone decision until a disagreement of the jury. *Jacob v. Town of Oyster Bay*, 119 App. Div. 503, 104 N. Y. Supp. 275; N. Y. Code Civ. Proc. §987, subd. 2. Though in an early New York case it was said that "when it is found by actual experiment that a fair trial, or, as in this case, no trial can be had in the county where the venue is laid, the motion, on the ground relied on in this case (excitement) will be granted; but otherwise not." *Messenger v. Holmes*, 12 Wend. (N. Y.) 203.

After the motion is properly made it rests with the court and parties to determine when it shall be heard. *Farmers' State Alliance v. Murrell*, 119 N. C. 124, 25 S. E. 785.

The absence of one of the parties will not prevent a hearing even though he might be able, if present, to show facts which would be material. *Newport v. Bowen*, 4 Hayw. (Tenn.) 195.

77. *Graham v. People*, 111 Ill. 253; *Roberson v. Tippie*, 126 Ill. App. 579; *Barnes v. McMullins*, 78 Mo. 260; *Corpenney v. City of Sedalia*, 57 Mo. 85; *Gale v. Michie*, 47 Mo. 326 (judge interested in the action).

In Minnesota, if the venue is not laid in the proper county a demand and affidavit filed in the office of the clerk of the court operates *ipso facto* to change the venue without a hearing. Gen. Laws, 1895, ch. 28, p. 147; Rev.

Laws, 1905, §4096; *State v. District Court*, 90 Minn. 118, 100 N. W. 2; *Jones v. District Court*, 92 Minn. 205, 99 N. W. 806; *State v. District Court*, 92 Minn. 402, 95 N. W. 591; *State v. District Court*, 77 Minn. 302, 79 N. W. 960; *Flowers v. Bartlett*, 66 Minn. 213, 68 N. W. 976.

78. **Ark.**—*Louisiana & N. W. R. Co. v. Smith*, 74 Ark. 172, 85 S. W. 242. **Cal.**—*Watson v. Whitney*, 23 Cal. 375. **Colo.**—*People v. District Court*, 30 Colo. 488, 71 Pac. 388; *Doll v. Stewart*, 29 Colo. 320, 70 Pac. 326; *Colorado Fuel & Iron Co. v. Four Mile R. Co.*, 29 Colo. 90, 66 Pac. 902. **Fla.**—*Anderson v. Browards*, 45 Fla. 160, 34 So. 897.

Ill.—*Pittsburgh, etc. R. Co. v. Chicago*, 144 Ill. App. 293, *affirmed*, 242 Ill. 178, 89 N. E. 1022. **Ia.**—*Croft v. Chicago, etc. R. Co.*, 134 Iowa 411, 109 N. W. 723; *Alverson v. Anchor Mut. F. Ins. Co.*, 105 Iowa 60, 74 N. W. 746; *Union Mill Co. v. Prenzler*, 100 Iowa 540, 69 N. W. 876. **Ky.**—*Warden v. Madisonville, etc. R. Co.*, 125 Ky. 644, 101 S. W. 914; *Louisville & E. R. Co. v. Coulter's Admr.*, 119 Ky. 558, 84 S. W. 576; *Kentucky Timber & L. Co. v. Daniels*, 21 Ky. 107, 50 S. W. 1097; *Smith v. Sisters, etc. of Louisville*, 27 Ky. L. Rep. 1107, 87 S. W. 1083; *Beavers v. Bowen*, 24 Ky. L. Rep. 882, 70 S. W. 195.

Minn.—*Murray Cure Inst. Co. v. Ward*, 108 Minn. 527, 121 N. W. 878. **N. Y.**—*Tuomey v. Kingsford*, 74 N. Y. Supp. 13. **N. C.**—*Bridgers v. Ormond*, 148 N. C. 375, 62 S. E. 422. **Okla.**—Sess. Laws, 1907, 1908, art. 1, p. 592, §10, ch. 68; Rev. & Ann. St., 1903, §4256; Civ. Code Proc., §58; *State v. Brown*, 24 Okla. 433, 103 Pac. 762; *Horton v. Haines*, 23 Okla. 878, 102 Pac. 121; *Maharry v. Maharry*, 5 Okla. 371, 47 Pac. 1151; *Richardson v. Augustine*, 5 Okla. 667, 49 Pac. 930.

Pa.—*Willoughby v. Buffalo R. & P. R. Co.*, 203 Pa. 276, 52 Atl. 188; *In re Huntington County Line*, 14 Pa. Super. 571. **Tex.**—*Freeman v. Cleary* (Tex. Civ. App.), 136 S. W. 521. **Va.**—*At-*

ing itself of the necessity therefor. To this end it may examine witnesses to ascertain the facts bearing thereon,⁷⁹ or, may call bystanders,⁸⁰ or veniremen,⁸¹ or may inquire into the credibility of the affiants who have sworn to the affidavits presented.⁸² If the objection is to the judge he may base his decision on his own knowledge of his qualifications.⁸³

The affidavits alone are not conclusive,⁸⁴ except in the cases where

lanta & D. R. Co. v. Rieger, 95 Va. 918, 28 S. E. 590. *Wash.*—*Ward v. Moorey*, 1 Wash. Ter. 104.

79. *Guy v. Kansas City, F. & S. M. R. Co.*, 197 Mo. 174, 93 S. W. 940; *Eudaley v. Kansas City, etc. R. Co.*, 186 Mo. 399, 85 S. W. 366.

80. *Dillard v. State*, 58 Miss. 368; *Holcomb v. State*, 8 Lea (Tenn.) 417.

81. *Mont.*—*Territory v. Marton*, 8 Mont. 95, 19 Pac. 387. *N. Y.*—*Messenger v. Holmes*, 12 Wend. 203. *Wash.*—*Ward v. Moorey*, 1 Wash. Ter. 104.

82. *Ind. Ter.*—*Bruner v. Kansas Moline Plow Co.*, 7 Ind. Ter. 506, 104 S. W. 816. *Ia.*—*Davis v. Rivers*, 49 Iowa 435. *Kan.*—*State v. Adams*, 20 Kan. 311. *Tex.*—*Farley v. Deslonde*, 58 Tex. 588; *Winkfield v. State*, 41 Tex. 149; *Mauly v. State*, 26 Tex. App. 274, 9 S. W. 563.

In *Farley v. Deslonde*, 58 Tex. 588, it was held error to hear evidence of the witnesses and the affiants as to their means of information.

In *Bruner v. Kansas Moline Plow Co.*, *supra*, the court held that the "proof must be directed to the question of their credibility, and none other," but this was determined in that case by examining them as to their means of knowing the facts to which they had sworn.

"If an attack is made upon the character of the affiants' truth, the court must determine whether they are credible persons, and, unless found to be so, the application may be denied. But in the absence of such attack, their credibility is presumed, and testimony in their support is neither required nor admissible." *Snell v. Cincinnati R. Co.*, 80 Ohio 256, 54 N. E. 270.

But the good faith of the applicant must be determined by an inspection of the records and not by taking the testimony of other witnesses. *St. Louis & S. F. R. Co. v. Big Three M. Co.*, 139 Mo. App. 272, 123 S. W. 70.

Where the affiants could not be found, and the defendant refused to give information concerning them, the court

was justified in concluding that the affidavit was not made as it purported to be. *Davis v. Rivers*, 49 Iowa 435.

83. *Cal.*—*Krumdick v. Crump*, 98 Cal. 117, 32 Pac. 800. *Ill.*—*Shields v. People*, 132 Ill. App. 109. *Kan.*—*Jones v. American Cent. Ins. Co.*, 83 Kan. 44, 109 Pac. 1077; *Gray v. Crockett*, 35 Kan. 686, 12 Pac. 192. *Wash.*—*Gibbert v. Washington W. P. Co.*, 115 Pac. 924.

In *Jones v. American Cent. Ins. Co.*, *supra*, merely overruling an application by the defendant for a change of venue made on the ground that the judge was interested in the action was held insufficient to negative that assertion. It was then held that "if the judge relies on his own knowledge, at material variance with the evidence introduced, it devolves upon him to make his knowledge of the facts known to the public in a statement which should, if desired, be made a part of the record." The judge necessarily knew the facts, and, if the attorney was misinformed, the judge owed it to himself, and to his high office, to say so.

84. *Ark.*—*St. Louis, S. W. R. Co. v. Furlow*, 81 Ark. 496, 99 S. W. 689. *N. Y.*—*Mullin v. Curtis*, 129 N. Y. Supp. 916; *Dresser v. Mercantile Tr. Co.*, 102 N. Y. Supp. 569; *State Board of Pharmacy v. Rhinehardt*, 101 N. Y. Supp. 769. *Tex.*—*Freeman v. Ortiz* (Tex. Civ. App.), 136 S. W. 113; *Texarkana & Ft. S. R. Co. v. Shivel* (Tex. Civ. App.), 114 S. W. 196. *Vt.*—*Willard v. Norcross*, 83 Vt. 268, 75 Atl. 269.

An unsupported affidavit of prejudice is not sufficient to disqualify the judge of another division. *Leslie v. G. W. Chase & Son M. Co.*, 200 Mo. 363, 98 S. W. 523; *Guy v. Kansas City, etc. Co.*, 197 Mo. 174, 93 S. W. 940.

If the affidavits of the parties are conflicting the decision lies in the sound discretion of the trial judge. *Bernon v. Bernon* (Cal. App.), 114 Pac. 1000.

The court may, in its discretion, deny

made so by statute.⁸⁵ But if the applicant clearly establishes his ground, it is an abuse of discretion to refuse the change.⁸⁶

C. SCOPE OF HEARING.—The hearing cannot be extended to mat-

a change even in the absence of counter-affidavits. *Texarkana & Ft. S. R. Co. v. Shivel* (Tex. Civ. App.), 114 S. W. 196.

The extent of the discretion of the court depends on the wording and construction of the statutes. "May" is construed as mandatory, and as equivalent to "must" in *Kansas Gen. St.*, 1909, §5650; *Jones v. American Cent. Ins. Co.*, 83 Kan. 44, 109 Pac. 1077; *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 628.

85. *Mo.*—*Leslie v. Chase & Son M. Co.*, 200 Mo. 363, 98 S. W. 523; *State ex rel. Sprague v. Flournoy*, 160 Mo. 324, 60 S. W. 1098. *Ohio*.—*Snell v. Cincinnati St. R. Co.*, 60 Ohio St. 256, 54 N. E. 270. *Wis.*—*Hewitt v. Follett*, 51 Wis. 264, 8 N. W. 177.

Under Rev. St. (Ohio), §5033, providing that under certain circumstances "if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue," it is made the imperative duty of the court where the action is pending to change the venue accordingly upon such affidavits. *Snell v. Cincinnati St. R. Co.*, 60 Ohio St. 256, 54 N. E. 270.

In some states an affidavit of the disqualification of the judge is conclusive and the change therefore mandatory. *Cal.*—*Krumdieck v. Crump*, 98 Cal. 117, 32 Pac. 800; *Livermore v. Brundage*, 64 Cal. 299, 30 Pac. 848. *Idaho*.—*Gordon v. Conner*, 5 Idaho 673, 51 Pac. 747. *Ill.*—*Roberson v. Tippie*, 126 Ill. App. 579. *Ind.*—*Rout v. Ninde*, 118 Ind. 123, 20 N. E. 704; *Smith v. Amiss*, 30 Ind. App. 530, 66 N. E. 501. *Ia.*—*Moorman v. Moorman*, 39 Iowa 460. *Kan.*—*Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 419. *Mich.*—*In re Sanborn's Estate*, 96 Mich. 606, 56 N. W. 25; *Grostick v. Detroit, L. & N. R. Co.*, 96 Mich. 495, 56 N. W. 24. *Mo.*—*State v. Smith*, 176 Mo. 90, 75 S. W. 586; *Gale v. Michie*, 47 Mo. 326; *State v. Dabbs*, 118 Mo. App. 663, 95 S. W.

275. *Mont.*—*State v. District Court*, 33 Mont. 138, 82 Pac. 789. *Okla.*—*Rea v. State*, 3 Okla. Crim. 276, 105 Pac. 384. *Wis.*—*In re Fraser's Will*, 135 Wis. 401, 116 N. W. 3; *Fatt v. Fatt*, 78 Wis. 633, 48 N. W. 52; *Hewitt v. Follett*, 51 Wis. 264, 8 N. W. 177.

86. *Cal.*—*Park v. Gruwell*, 115 Pac. 252; *Thompson v. Brandt*, 98 Cal. 155, 32 Pac. 890; *Bohn v. Bohn* (Cal. App.), 116 Pac. 568; *Yuba Co. v. North American Cons. G. M. Co.*, 12 Cal. App. 121, 107 Pac. 139. *Colo.*—*Woods Gold M. Co. v. Boyston*, 103 Pac. 291; *Byram v. Pigott*, 38 Colo. 70, 89 Pac. 809; *Brewer v. Gordon*, 27 Colo. 111, 59 Pac. 404.

Ill.—*Michie Ptg. P. & Mfg. Co. v. Arkulas*, 131 Ill. App. 461. *Kan.*—*Jones v. American Cent. Ins. Co.*, 83 Kan. 44, 109 Pac. 1077. *Ky.*—*Middleborough W. Co. v. Neal*, 105 Ky. 586, 49 S. W. 428; *Wall v. Muster's Exrs.*, 23 Ky. L. Rep. 556, 63 S. W. 432. *Mo.*

Walker v. Ellis, 146 Mo. 327, 48 S. W. 457; *Gee v. St. Louis R. Co.*, 140 Mo. 314, 41 S. W. 796; *Dowling v. Allen*, 88 Mo. 293; *St. Louis & S. F. R. Co. v. Big Three M. Co.*, 139 Mo. App. 272, 123 S. W. 70. *Neb.*—*Gandy v. Bissell's Estate*, 81 Neb. 102, rehearing denied, 81 Neb. 117, 115 N. W. 571, 117 N. W. 349. *Nev.*—*Gamble v. First Judicial Dist. Co.*, 27 Nev. 233, 74 Pac. 530.

N. Y.—*Adams Laundry Mach. Co. v. Prunier*, 142 App. Div. 913, 126 N. Y. Supp. 867; *Wallace v. Manning*, 130 App. Div. 894, 114 N. Y. Supp. 972; *Fuchs v. Fitzer*, 125 App. Div. 917, 109 N. Y. Supp. 1024; *Neiman v. Gardner*, 129 N. Y. Supp. 913; *Newgold v. Weller Bottling Wks.*, 128 N. Y. Supp. 499. *N. C.*—*Brown v. Cogdell*, 136 N. C. 32, 48 S. E. 515. *Okla.*—*Richardson v. Augustine*, 5 Okla. 667, 49 Pac. 930.

Pa.—*Brittain v. Monroe County*, 214 Pa. 648, 63 Atl. 1076; *Little v. Wyoming Co.*, 214 Pa. 596, 63 Atl. 1039; *Wilmington v. Buffalo R. & P. R. Co.*, 203 Pa. 276, 52 Atl. 188. *S. D.*—*Ivanusch v. Great Northern R. Co.*, 128 N. W. 333. *Tex.*—*Acts 30th Leg. p. 243*, ch. 133; *Lumpkin v. Story*, 49 Tex. Civ. App. 332, 108 S. W. 485. *W. Va.*—*Ott v. McHenry*, 2 W. Va. 73. *Wis.*—*Cyra v. Stewart*, 79 Wis. 72, 48 N. W. 50.

ters not included in the affidavits,⁸⁷ nor to matter not in issue, where the change is demanded on the ground of the convenience of witnesses,⁸⁸ nor to extrinsic circumstances,⁸⁹ nor to the merits of the action.⁹⁰

D. BURDEN OF PROOF.—The burden of proof is on the moving party.⁹¹

VII. THE ORDER.—**A. GENERALLY.**—Upon granting or refusing the change, the court should make its order accordingly.⁹²

B. AUTHORITY TO MAKE.—The judge before whom the action is pending generally has authority to make the order,⁹³ unless otherwise provided by statute.⁹⁴

C. ESSENTIALS OF.—The order need not be in any particular form,⁹⁵ but it should identify the action, state the grounds upon which

87. *Dakan v. Superior Court*, 2 Cal. App. 52, 82 Pac. 1129; *Lane v. Bochlowitz*, 77 App. Div. 171, 78 N. Y. Supp. 1072.

The way in which jurisdiction of the defendant was acquired should not be considered. *Stilson v. Greeley*, 1 Mich. (N. P.) 222.

A special plea of privilege cannot be granted on grounds not therein set up. *Pearce v. Wallis, Landes & Co.* (Tex. Civ. App.), 124 S. W. 496.

88. *Miller & Lux v. Kern Co. Land Co.*, 140 Cal. 132, 73 Pac. 836; *Danzig v. Baroody*, 140 App. Div. 542, 125 N. Y. Supp. 797; *Hurley v. Roberts*, 117 App. Div. 837, 102 N. Y. Supp. 963.

89. *Maharry v. Maharry*, 5 Okla. 371, 47 Pac. 1051.

But where the same evidence had been considered in support of a similar motion by the same party in another case only a few days before, it was not error for the judge to make his decision without actually hearing it all again, where it was put in the record. *Freeman v. Ortiz* (Tex. Civ. App.), 136 S. W. 113.

90. *O'Brien v. O'Brien* (Cal. App.), 116 Pac. 692; *Colorado Fuel & Iron Co. v. Four Mile R. Co.*, 29 Colo. 90, 66 Pac. 902.

91. *Cal.*—*Quint v. Dimond*, 135 Cal. 572, 67 Pac. 1034; *Bloom v. Michigan Salmon M. Co.*, 11 Cal. App. 122, 104 Pac. 324; *Dakan v. Superior Court*, 2 Cal. App. 52, 82 Pac. 1129. *N. Y.*—*Bischoff v. Bischoff*, 88 App. Div. 126, 85 N. Y. Supp. 81; *Whitman & Barnes Mfg. Co. v. Hamilton*, 27 Misc. 198, 57 N. Y. Supp. 760. *Ohio.*—*Snell v. Cincinnati St. R. Co.*, 60 Ohio 256, 54 N. E. 270. *Pa.*—*Burns v. Pennsylvania R. Co.*, 222

Pa. 406, 71 Atl. 1054. *Tex.*—*Jones v. Wright* (Tex. Civ. App.), 92 S. W. 1010; *Galveston, etc. R. Co. v. Bernard* (Tex. Civ. App.), 57 S. W. 686; *Trimble v. Burroughs*, 41 Tex. Civ. App. 554, 95 S. W. 614.

92. *Swan v. Porter*, 96 Wis. 34, 70 N. W. 1068.

No order is necessary if the change is effected by operation of law upon the applicant taking the proper steps. *Graham v. People*, 111 Ill. 253; *Roberson v. Tippie*, 126 Ill. App. 579; *State ex rel. Monitor Drill v. District Court*, 92 Minn. 402, 100 N. W. 2; *State v. District Court*, 90 Minn. 118, 95 N. W. 591; *State v. Meeker County*, 77 Minn. 302, 79 N. W. 960; *Flowers v. Bartlett*, 66 Minn. 213, 68 N. W. 976.

93. *Cal.*—*Parrish v. Riverside Tr. Co.*, 7 Cal. App. 95, 93 Pac. 685. *Kan.*—*Isenhardt v. Hazen*, 10 Kan. App. 577, 63 Pac. 451. *Mass.*—*Hawkes v. Inhab. of Kennebeck Co.*, 7 Mass. 461. *Mo.*—*State ex rel. Cottrell v. Wofford*, 119 Mo. 403, 24 S. W. 1009. *Mont.*—*Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918. *Ore.*—*Commercial Nat. Bank v. Davidson*, 18 Ore. 57, 22 Pac. 517.

94. *Shannon v. Smith*, 31 Mich. 451; *People v. Judge of Saginaw Cir. Ct.*, 26 Mich. 342.

95. *Watts v. Stoltz*, 28 Ill. App. 541; *Seth v. Chamberlain*, 41 Md. 186.

The order may be written by the judge or made orally by him and noted in substance on the records by the clerk under the Wisconsin. Rev. St., 1898, §2625, providing that the order "shall be entered." *Allen v. Voje*, 114 Wis. 1, 89 N. W. 924. To similar effect is *Chapman v. Woods*, 6 Blackf. (Ind.) 504.

the change was granted, and the court to which the transfer is made.⁹⁶ But if these facts appear *aliunde* a failure to restate them in detail in the order is not fatal.⁹⁷

D. VALIDITY OF.—The presumption is always in favor of the validity of the order.⁹⁸

E. WAIVER OF IRREGULARITIES.—Mere irregularities in the proceedings, or order, make it voidable only,⁹⁹ and such irregularities may be waived by proceeding in conformity with the order without objection.¹ But if there is no authority for the order, it is a nullity,²

In *Shannon v. Smith*, 31 Mich. 451, it was said that an order for the transmission of papers to a register was not an order of transfer of a cause to a court, though in this case the invalidity of the order was placed on the grounds of want of power in the judge.

96. Ala.—*Ex parte Remson*, 23 Ala. 25. Fla.—*Williams v. Robles*, 22 Fla. 95; *Smith v. Gibson*, 14 Fla. 263. Kan.—*Stow v. Shay*, 54 Kan. 574, 38 Pac. 784. Tenn.—*Roller v. Roller*, 8 Baxt. 207, citing *Kaylor v. Holt* (unreported); and *Weakley v. Pearce*, 5 Heisk. 408.

A failure to designate the court to which the action was sent was held cured by the "action of the defendants in recognizing the validity of the proceedings and submitting to the jurisdiction of the second justice." *Stow v. Shay*, 54 Kan. 574, 38 Pac. 784.

97. Ark.—*Hurley v. Bevins*, 57 Ark. 547, 22 S. W. 172. Fla.—*Keen v. Brown*, 46 Fla. 487, 35 So. 401. Tex.—*Franco-Texan Land Co. v. Howe*, 3 Tex. Civ. App. 315, 22 S. W. 766.

"Before the judge of an adjoining circuit can acquire jurisdiction, the existence of one or the other of these causes (mentioned in the statute) must be judicially ascertained, and must appear in the order of transfer, or otherwise in the record." *Williams v. Robles*, 22 Fla. 95.

98. *Robbins v. Neal*, 10 Iowa 560; *McCauley v. United States*, Morr. (Iowa) 486; *Coffey v. City of Carthage*, 200 Mo. 616, 98 S. W. 562.

99. Cal.—*People v. Sexton*, 24 Cal. 78. Ind.—*Southern Ind. R. Co. v. McCarrell*, 163 Ind. 469, 71 N. E. 156. Ia.—*Joerns v. LaNicca*, 75 Iowa 705, 38 N. W. 129. Ky.—*McNew v. Martin*, 22 Ky. L. Rep. 1275, 60 S. W. 412; *Shearer v. Clay*, 1 Litt. 260. Mo.—*Coffey v. City of Carthage*, 200 Mo. 616, 98 S. W. 562; *Cunningham v. Current R. Co.* 165 Mo. 270, 65 S. W. 556; *State v. McKee*, 150 Mo. 233, 51 S. W. 421;

Stearns v. St. Louis, etc. R. Co., 94 Mo. 317, 7 S. W. 270; *Potter v. Adams*, 24 Mo. 159. N. C.—*Turner v. Douglas*, 72 N. C. 127. Wis.—*State v. Compton*, 77 Wis. 460, 46 N. W. 535.

1. Colo.—*Phoenix Indemnity Co. v. Greger*, 39 Colo. 193, 88 Pac. 1066; *Christ v. Flannagan*, 23 Colo. 140, 46 Pac. 683. Ind.—*Daniels v. Bruce*, 95 N. E. 569; *Clark v. State*, 4 Ind. 268; *Burnham v. Hatfield*, 5 Blackf. 21. Kan.—*City of Garden City v. Heller*, 61 Kan. 767, 60 Pac. 1060; *Stow v. Shay*, 54 Kan. 574, 38 Pac. 784. Minn.—*State v. District Court*, 92 Minn. 95, 92 N. W. 518. Mo.—*Little Tarkio Drainage Dist. v. Richardson*, 227 Mo. 252, 126 S. W. 1021, 139 S. W. 576; *Haxton v. Kansas City*, 190 Mo. 53, 88 S. W. 714; *State v. McKee*, 150 Mo. 233, 51 S. W. 421; *Levin v. Metropolitan St. R. Co.*, 140 Mo. 624, 41 S. W. 968; *State v. Rombauer*, 140 Mo. 121, 40 S. W. 763; *Henderson v. Henderson*, 55 Mo. 534; *Missouri State Bank v. South St. Louis Fdry.*, 145 Mo. App. 257, 129 S. W. 433; *Cook v. Penrod*, 129 Mo. App. 377, 108 S. W. 583. N. Y.—*Koerkle v. Pangborn*, 67 N. Y. Supp. 898. N. C.—*Belding v. Archer*, 131 N. C. 287, 42 S. E. 800. Ore.—*Brown v. Deschuttes Bridge Co.*, 23 Ore. 7, 35 Pac. 177. S. D.—*George v. Kotan*, 18 S. D. 437, 101 N. W. 31. Tex.—*Tammen v. Schaefer*, 45 Tex. Civ. App. 522, 101 S. W. 468. Va.—*Carnahan v. Ashworth*, 31 S. E. 65.

Objections are not waived by proceeding to trial if plaintiff saves his exceptions (*U. S.*—*Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237. Fla.—*State v. Walker*, 6 So. 169. Mo.—*Gee v. St. Louis R. Co.*, 140 Mo. 314, 41 S. W. 796), or if the lack of authority to make the order appears on the face of the record (*Leslie v. G. W. Chase & Son M. Co.*, 200 Mo. 363, 98 S. W. 523).

2. Fla.—*Johns v. Johns*, 17 Fla. 806. Mich.—*Shannon v. Smith*, 31 Mich. 451.

and in such cases the error is not waived by proceeding to trial.³

VIII. STEPS NECESSARY TO COMPLETE CHANGE.—A. IN GENERAL.—The order granting a change is of no effect unless it is perfected within the prescribed time.⁴ This is usually done by the party applying for the change,⁵ but may be done by either party.⁶ The original papers, and a transcript of the record must be sent to the receiving court by the clerk of the court ordering the change,⁷ but irregularities,

Miss.—Yalabusha County v. Carbry, 3 Smed. & M. 529. *Mo.*—Leslie v. G. W. Chase & Son M. Co., 200 Mo. 363, 98 S. W. 523; Cole v. Cole, 89 Mo. App. 228. *N. Y.*—Root v. Taylor, 18 Johns. 335; Keep v. Tyler, 4 Cow. 541. *Tex.*—Dodson v. Bunton, 81 Tex. 655, 17 S. W. 507; Houston & T. C. R. Co. v. Ryan, 44 Tex. 426.

3. *Johns v. Johns*, 17 Fla. 806; *Bennett v. Carey*, 57 Iowa 221, 10 N. W. 634; *Ferguson v. Davis County*, 51 Iowa 220, 1 N. W. 505.

4. *Ind.*—Southern Indiana R. Co. v. McCarrell, 163 Ind. 469, 71 N. E. 156; *Snyder v. Bunnell*, 64 Ind. 403; *Dooley v. Martin*, 28 Ind. 189; *Lingerman v. State*, 23 Ind. 320; *Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103. *Ia.*—Faivre v. Manderschild, 117 Iowa 724, 90 N. W. 76. *Mich.*—Palmiter v. Pere Marquette Lumb. Co., 31 Mich. 183. *Wis.*—Rev. St. §2627; *Lee v. Buckheit*, 49 Wis. 54, 4 N. W. 1077.

The making and transmission of the transcript is a ministerial act of the clerk under Code §3509, and not one of the acts necessary to "perfect" a change, hence his delay does not affect the jurisdiction of the receiving court. *Faivre v. Manderschild*, 117 Iowa 724, 90 N. W. 76.

Under the Indiana statute mere delay in transferring the papers does not affect the jurisdiction of the receiving court, but only subjects the party to payment of all costs up to the time of the failure to perfect. 2 Rev. St. 1876, p. 119. *Toledo, W. & W. R. Co. v. Wright*, 68 Ind. 586.

Payment of accrued costs cannot be made a condition precedent to a change, in the absence of statutory authority therefor, as the party is entitled to the change upon complying with the requirements of the statute. *People v. Quinn*, 12 Colo. 473; *South Pueblo, N. P. & P. Co. v. Moore*, 10 Colo. 254, 15 Pac. 333; *O'Connell v. Gavett*, 7 Colo. 40, 1 Pac. 902.

But under most statutes payment of

the costs is an essential step in perfecting a change. *Ark.*—*Duncan v. Tufts*, 52 Ark. 404, 12 S. W. 873. *Cal.*—*Estep v. Armstrong*, 69 Cal. 536, 11 Pac. 132. *Ill.*—*Little v. Allington*, 93 Ill. 253. *Ind.*—*Louisville, N. A. & C. R. Co. v. Grubb*, 88 Ind. 85; *Gower v. Howe*, 20 Ind. 396. *Ia.*—*Stryker v. Rivers*, 47 Iowa 108; *Pickett v. Hawes*, 13 Iowa 601. But see *Iowa Loan Co. v. Wilson*, 145 Iowa 381, 124 N. W. 201; *Faivre v. Manderschild*, 117 Iowa 724, 90 N. W. 76. *Wis.*—*Lee v. Buckheit*, 49 Wis. 54, 4 N. W. 1077; *Harder v. Smith*, 33 Wis. 274.

Iowa Code, §3511, providing that no change shall be held perfected until the costs are paid, applies only to changes from one district court to another, and not to a change from a superior court to a district court under Acts 28th Gen. Assembly, p. 6, ch. 10, §1; Code Supp., 1907, §261. *Iowa Loan Co. v. Wilson*, 145 Iowa 381, 124 N. W. 201.

The clerk may waive payment of his fees as a condition precedent, and the jurisdiction of the receiving court will attach upon receipt of the transcript. *Haglin v. Rogers*, 37 Ark. 491.

5. *Howard v. Barbee*, 21 Ind. 221.

6. *Brooks v. Douglass*, 32 Cal. 208. *Ind.*—*Michigan Mut. Life Ins. Co. v. Nangle*, 130 Ind. 79, 29 N. E. 393. *Ia.*—*Carroll Co. v. American Emigrant Co.*, 37 Iowa 371 (change by consent). *Wis.*—*Eldred v. Becker*, 60 Wis. 48, 18 N. W. 720.

7. *Ark.*—*Harwood v. State*, 63 Ark. 130, 37 S. W. 304; *Haglin v. Rogers*, 37 Ark. 491 (clerk may waive payment of his fees by sending the papers to the receiving court). *Ind.*—*Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886; *Cooper v. Arctic Ditchers*, 56 Ind. 233. *Ia.*—*Faivre v. Manderschild*, 117 Iowa 724, 90 N. W. 76. *Ia.*—*State v. Reid*, 115 La. 739, 39 So. 998. *Minn.*—*State v. District Court*, 79 N. W. 960. *Mo.*—*Gerhart Realty Co. v. Weiter*, 108 Mo. App. 248, 83

or delay on his part, will not invalidate the order,⁸ though it may necessitate a postponement of the trial.⁹

B. ORDER EFFECTS CHANGE.—In some jurisdictions the change is considered complete from the time the order changing the place of trial is made;¹⁰ but in others the jurisdiction of the receiving court does not attach until the record has been transferred.¹¹

IX. STATUS OF CAUSE AFTER CHANGE.—**A. POWER OF RECEIVING COURT.**—**1. Full Power.**—The jurisdiction of the receiving court is the same in all particulars as that of the original one,¹² except that it has no authority as to proceedings had before the order,¹³

S. W. 278. N. Y.—Code Civ. Proc. §988.

Mandamus will lie to compel the clerk to transfer the papers and files. *State ex rel. Minn. Thresh.-M. Co. v. District Court*, 77 Minn. 302, 79 N. W. 960.

8. Fritz Bros. v. Wells, 83 Ark. 124, 103 S. W. 168.

The presumption is in favor of the regularity of the steps in the transfer. *Harwood v. State*, 63 Ark. 130, 37 S. W. 304.

The clerk is the agent of the party under an agreement between them that the former would notify the latter when the order was made, and failure to perfect within the time allowed is not excused by the failure of the clerk to give such notification, it being no part of his official duty. *Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103.

9. Lewis v. Outten, 2 Dana (Ky.) 92.

10. Cal.—*Chase v. Superior Court*, 154 Cal. 789, 99 Pac. 355. **Ia.**—*Iowa Loan Co. v. Wilson*, 145 Iowa 381, 124 N. W. 201; *Farr v. Fuller*, 12 Iowa 83. **Mo.**—*Little Tarkio Dr. Dist. No. 1 v. Richardson*, 227 Mo. 576, 126 S. W. 1021, 139 S. W. 576; *Kansas City S. B. R. Co. v. Kansas City, etc. R. Co.*, 118 Mo. 599, 24 S. W. 478; *In re Whitson's Estate*, 89 Mo. 58, 1 S. W. 123; *Colvin v. Six*, 79 Mo. 198 (but not until the order is made). **N. Y.**—*Fisk v. Albany & S. R. Co.*, 41 How. Pr. 365. **Tex.** *Jones v. Bourbonnais*, 25 Tex. Civ. App. 94, 60 S. W. 986.

In *Fatt v. Fatt*, 78 Wis. 633, 48 N. W. 52, it is held that the court where the action was brought loses its jurisdiction upon an application alleging prejudice of the judge. *Citing Iron Co. v. Crane*, 66 Wis. 569, 20 N. W. 654;

Hewitt v. Follett, 51 Wis. 264, 8 N. W. 177; *Rines v. Boyd*, 7 Wis. 155.

11. Swepson v. Call, 13 Fla. 337; *Atlantic, etc. Coal Co. v. Maryland Coal Co.*, 64 Md. 302, 1 Atl. 878.

In Maryland it is held that the jurisdiction of the court is not ousted "until the case has been actually transmitted to the court to which it was removed." *Seth v. Chamberlaine*, 41 Md. 186.

12. Cal.—Code Civ. Proc. §399, §837; *Chase v. Superior Court*, 99 Pac. 355. **Ind.**—*Burns' Ann. St.* 1908, §424; *Town of Knox v. Golding*, 91 N. E. 857; *Niagara Oil Co. v. Jackson*, 91 N. E. 825; *Toledo, etc. R. Co. v. Wright*, 68 Ind. 586; *Foster v. Potter*, 24 Ind. 363. **Ia.**—*Laird v. Dickerson*, 40 Iowa 665. **Kan.**—*United Zinc & Chem. Co. v. Morrison*, 78 Kan. 799, 92 Pac. 1114; *Young v. McWilliams*, 75 Kan. 243, 89 Pac. 12; *Hazen v. Webb*, 65 Kan. 38, 68 Pac. 1096. **La.**—*State v. Beattie*, 38 La. Ann. 452. **Mo.**—*Blanchard v. Dorman*, 139 S. W. 395; *Ex parte Haley*, 99 Mo. 150, 12 S. W. 667; *Stearns v. St. Louis & S. F. R. Co.*, 94 Mo. 317, 7 S. W. 270, *overruling Fields v. Maloney*, 78 Mo. 172; *Whitehill v. Keen*, 79 Mo. App. 125.

"A court to which a cause is properly removed by change of venue, acquires jurisdiction of the cause, and subject-matter co-extensive with that of the court from which the venue was removed, and may inquire into anything connected with the subject-matter of the action, and render any judgment which might have been rendered by the court in which the case originated." *Hazen v. Webb*, 65 Kan. 38, 68 Pac. 1096.

13. Miller v. Shackelford, 4 Dana (Ky.) 264; *Levin v. Metropolitan St. R. Co.*, 140 Mo. 624, 41 S. W. 968; *Pot-*

nor in regard to the proceedings upon which the change was granted.¹⁴

2. To Remand.—The receiving court may remand the cause to the court from which it was sent, if the change was unauthorized,¹⁵ or if it has not been properly perfected.¹⁶ But the cause cannot be remanded upon grounds which would compel a review of the proceedings in the court granting the change,¹⁷ because the jurisdiction of the receiving court does not extend to such proceedings.¹⁸

B. APPEAL.—**1. Exceptions Must Be Saved.**—The propriety of granting or refusing a change of venue will not be considered on appeal, unless an objection thereto was made in the trial court, and exceptions saved.¹⁹

2. Grounds for Reversal.—The trial court is vested with a large discretion in deciding upon an application for a change, and its decision will not be disturbed unless it appears that its discretion has been abused,²⁰ or that the court, in granting the change has exceeded the

ter v. Adams, 24 Mo. 159; Bowring v. Wabash R. Co., 90 Mo. App. 324.

14. **N. C.**—Emery v. Hardee, 94 N. C. 787. **Tex.**—Harris v. Schuttler (Tex. Civ. App.), 24 S. W. 989. **Wis.**—Giese v. Schultz, 60 Wis. 449, 19 N. W. 447.

15. **Ind.**—Carger v. Fee, 140 Ind. 572, 39 N. E. 93; Perrill v. Nichols, 89 Ind. 444. **Ia.**—Polk Co. v. Hierb, 37 Iowa 361. **Mo.**—Penfield v. Vaughan, 169 Mo. 371, 69 S. W. 303; State v. Bacon, 18 S. W. 19. **Neb.**—Hitchcock v. McKinster, 21 Neb. 148, 31 N. W. 507. **Tex.**—Rogers v. Watrous, 8 Tex. 62. **Wis.**—State v. Circuit Court of Waukesha Co., 116 Wis. 253, 93 N. W. 16.

Under such circumstances a motion to remand is the proper procedure (State v. Circuit Court, 116 Wis. 253, 93 N. W. 16), not a motion to strike from the docket (State ex rel. Scotland County v. Bacon, 107 Mo. 627, 18 S. W. 19), nor a motion to dismiss (Hitchcock v. McKinster, 21 Neb. 148, 31 N. W. 507).

Before Trial.—The motion to remand must be made before trial in the receiving court. Allen v. Voje, 114 Wis. 1, 89 N. W. 924.

Receiving Judge Interested.—If the judge of the court to which the cause is sent is interested he should return it to the sending court to be transferred elsewhere. Swepson v. Call, 13 Fla. 337.

16. Lake Erie & W. R. Co. v. Lowder, 7 Ind. App. 537, 34 N. E. 447.

17. Huke v. St. Louis & K. R. Co., 79 Mo. App. 630; Williams v. Planters & M. Nat. Bank (Tex. Civ. App.), 44 S. W. 617.

18. See *supra*, VII, A, 1.

19. **Colo.**—Christ v. Flannagan, 23 Colo. 140, 46 Pac. 683. **Fla.**—State v. Walker, 6 So. 169. **Minn.**—State v. District Court, 92 Minn. 95, 92 N. W. 518. **Mo.**—State v. McKee, 150 Mo. 233, 51 S. W. 421; Gee v. St. Louis R. Co., 140 Mo. 314, 41 S. W. 796; Potter v. Adams, 24 Mo. 161. **N. Y.**—Koerkle v. Pangborn, 67 N. Y. Supp. 898. **Va.**—Muller v. Baly, 21 Gratt. 521.

The appeal must be duly perfected. Chase v. Superior Court, 154 Cal. 789, 99 Pac. 355. See the title "Appeals."

Otherwise if the face of the record discloses that the change was without authority. Leslie v. G. W. Chase & Son M. Co., 200 Mo. 363, 98 S. W. 523.

No appeal lies from the order itself granting or refusing a change of venue. *In re Fraser's Will* (Iowa), 116 N. W. 3; Kay v. Pruden, 101 Iowa 60, 69 N. W. 1137; Waukesha Co. Agr. Soc. v. Wisconsin Cent. R. Co., 117 Wis. 539, 94 N. W. 289; Latimer v. Central Elec. Co., 101 Wis. 310, 77 N. W. 155; Evans v. Curtiss, 98 Wis. 97, 73 N. W. 432 (a contrary rule prevailed prior to the passage of the Laws of 1895, ch. 212, on the ground that such an order involved the merits of the action). See Fatt v. Fatt, 78 Wis. 633, 48 N. W. 52; Atkinson v. Hewitt, 51 Wis. 275, 8 N. W. 211; Lynes v. Eldred, 47 Wis. 426, 2 N. W. 557.

20. **Colo.**—Doll v. Stewart, 29 Colo. 320, 70 Pac. 326; Michael v. Mills, 22 Colo. 439. **Ia.**—Union Mil. Co. v. Prenzler, 100 Iowa 540, 69 N. W. 876. **Neb.**—Smith v. Coon, 132 N. W. 535. **N. Y.**—Bushnell v. Durant, 83 Hun 32, 31 N. Y.

authority vested in it by the statute, and it appearing that the objection has not been waived.²¹

Supp. 608; *McConihe v. Palmer*, 76 Hun 116, 27 N. Y. Supp. 832; *Osborn v. Stephens*, 74 Hun 91, 26 N. Y. Supp. 160; *Tuomey v. Kingsford*, 74 N. Y. Supp. 13; *Newgold v. Weller B. Wks.*, 128 N. Y. Supp. 499. **Tex.**—*Freeman v. Cleary* (Tex. Civ. App.), 136 S. W. 521 (burden of proof is on complaining party to show abuse). **Vt.**—*Carpenter v. Central Vt. R. Co.*, 80 Atl. 657. **Wash.** *Gibbert v. Washington W. P. Co.*, 115 Pac. 924. **Wis.**—*Theresa Village Mut. Fire Ins. Co. v. Wisconsin Cent. R. Co.*, 144 Wis. 321, 128 N. W. 103.

In New York it is held that the court of appeals has no jurisdiction to review an order of the special term granting a change of venue. *Avery v. Kirk*, 175 N. Y. 465, 67 N. E. 1080.

21. **Fla.**—*Johns v. Johns*, 17 Fla. 806. **Ind.**—*Daniels v. Bruce*, 95 N. E. 569 (objection waived by going to trial). **Ia.**—*Bennett v. Carey*, 57 Iowa 221, 10 N. W. 634; *Ferguson v. Davis Co.*, 51 Iowa 220, 1 N. W. 505. **Mich.** *Shannon v. Smith*, 31 Mich. 451. **Miss.** *Baum v. Burns*, 66 Miss. 124, 5 So. 697; *Yalabusha County v. Carbry*, 3 Smed. & M. 529. **Mo.**—*Leslie v. G. W. Chase & Son M. Co.*, 200 Mo. 363, 98 S. W. 523; *Cole v. Cole*, 89 Mo. App. 228. **N. Y.**—*Santoro v. Trimble*, 63 App. Div. 413, 71 N. Y. Supp. 785. **Tex.**—*Dodson v. Bunton*, 81 Tex. 655, 17 S. W. 507; *Houston & T. C. R. Co. v. Ryan*, 44 Tex. 426.

"Jurisdiction of the subject-matter cannot be waived by failure to object, or conferred by consent or express agreement on a court that does not possess it." *Daniels v. Bruce* (Ind.), 95 N. E. 569.

CHATTEL MORTGAGES

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I. REMEDIES OF MORTGAGOR. — A. ACTION FOR POSSESSION OR VALUE — 1. **Before Default.** — Where the mortgagor has the right to possession of the mortgaged property until default or breach of condition, either under the statute or by agreement of the parties, he may bring an appropriate action for possession against any one who wrongfully deprives him thereof. Thus, he may maintain replevin against the mortgagee where the latter takes the property without his consent before default or breach,¹ or where he tenders the amount

1. **Ind.**—*Jones v. Smith*, 123 Ind. 585, 24 N. E. 368; *Niven v. Burke*, 82 Ind. 455. **Neb.**—*Brashier v. Tolleth*, 31 Neb. 622, 48 N. W. 398. **N. Y.**—*Newsam v. Finch*, 25 Barb. 175.

Where the mortgagor turns over the property in full payment of the mortgage debt, and the mortgagee refuses to surrender the mortgage, the mortgagor cannot maintain replevin for the property but should take steps to obtain the surrender of the mortgage or an entry of satisfaction. *Armstrong v. Murphy*, 2 Ind. 601.

Subsequent mortgagee may maintain the action against a third person other than first mortgagee. *Gardner v. Morrison*, 12 Ala. 547; *Koehring v. Aultman & Co.*, 7 Ind. App. 475, 34 N. E. 30.

Wrongful Taking by Assignee. Where the purchaser of a mortgagee took possession of the property before the debt was due, the mortgagor surrendering the same to a constable without process on the representations of such officer that it was his duty to take them under the mortgage, the mortgagor may maintain replevin for the chattels as such surrender was not voluntary. *Kidd v. Johnson*, 49 Mo. App. 486.

Measure of Damages.—"Where a mortgagee, without authority of law,

seizes a mortgaged chattel before breach of the condition of the mortgage, and the mortgagor brings his action to recover the possession of the chattel, it seems to us that he would be entitled to a verdict for the recovery of the possession of such chattel, and, in case possession cannot be delivered, then for the absolute value of the chattel, and not merely for the value of its use for the time intervening between the seizure and the maturity of the mortgage debt, for the simple reason that until breach of condition the mortgaged property belongs absolutely to the mortgagor, subject only to a lien for the payment of the debt." *Finley v. Cudd*, 42 S. C. 121, 20 S. E. 32, 33.

Creditors.—At common law a creditor of the mortgagor could not attach the property in which the latter had only an equity. *Tannahill v. Tuttle*, 3 Mich. 104, 61 Am. Dec. 480. *Thornhill v. Gilmer*, 4 Smed. & M. (Miss.) 153. But this is not so under modern statutes generally. **Ala.**—*Floyd v. Morrow*, 26 Ala. 353. **Ia.**—*Webster City Grocery Co. v. Losey*, 108 Iowa 687, 78 N. W. 75. **Me.**—*Perry v. Somerby*, 57 Me. 552. **Mass.**—*Codman v. Freeman*, 3 Cush. 306. **Mich.**—*Cary v. Hewitt*, 26 Mich. 228.

"The mortgagee takes his mortgage

of the debt and the mortgagor refuses to receive it.² In such case a prior demand for the property is a condition precedent to bringing the action where the mortgagee has come into possession lawfully,³ but not where possession was wrongfully obtained.⁴

But where the mortgagee takes possession in good faith under a clause in the mortgage giving him the right to do so at any time when he may deem himself insecure, the mortgagor cannot recover the property in an action at law.⁵

2. After Default.—After default and the mortgagee has taken possession, the general rule is that the mortgagor has no legal title and cannot maintain an action to recover the property from the mortgagee.⁶ This rule, however, is subject to some exceptions. Thus, where the mortgagor can show that there was a breach of warranty amounting to a failure of consideration he can recover possession.⁷ And for a stronger reason he may recover where the mortgage is

subject to this provision of the statute, and as long as this equity exists, though he may have possession of the goods, his possession is subject to this right in favor of the creditors of the mortgagor, and his possession may be temporarily interrupted for the purpose of disposing of the equity of redemption." *Hackleman v. Goodman*, 75 Ind. 202. And see *Ky.*—*Fugate v. Clarkson*, 2 B. Mon. 41, 36 Am. Dec. 589. *Mich.*—*Haynes v. Leppig*, 40 Mich. 602. *N. J.*—*Woodside v. Adams*, 40 N. J. L. 417.

The terms of the statute must be complied with. *Souza v. Lucas* (Cal. App.), 100 Pac. 115. And see *State v. Milligan*, 106 Ind. 509, 5 N. E. 871.

But it is held in some states that "after default and possession taken, the interest of the mortgagor being equitable only, the goods can not be taken and sold upon an execution against him." *Frankenthal v. Meyer*, 55 Ill. App. 405. And see *Simmons v. Jenkins*, 76 Ill. 479; *Durfee v. Grinnell*, 69 Ill. 371. *Merchants Natl. Bank v. Abernathy*, 32 Mo. App. 211. See generally the title "**Attachment**," 3 STAND. PROC. 315 *et seq.*

2. *Fuller v. Parrish*, 3 Mich. 211; *Boyd v. Beaudin*, 54 Wis. 193, 11 N. W. 521.

The lien is destroyed by a tender of the full amount due. *Flanders v. Chamberlain*, 24 Mich. 305.

Waiver of tender by refusal of the mortgagee to allow the mortgagor to redeem. *Vreeland v. Waddell*, 93 Wis. 107, 67 N. W. 51.

Assignee.—*Baxter v. Spicer*, 33 Mich. 325; *Karalis v. Agnew*, 111 Minn. 522, 127 N. W. 440.

3. *Brown v. Coon*, 59 Mich. 596, 26 N. W. 780.

See the title "**Replevin**."

4. *Jones v. Smith*, 123 Ind. 585, 24 N. E. 368.

5. *Evans v. Graham*, 50 Wis. 450, 7 N. W. 380.

6. *Ill.*—*Alexander v. Meyenberg*, 112 Ill. App. 223; *Frankenthal v. Meyer*, 55 Ill. App. 405. *Ia.*—*Scott v. Glaze*, 29 Iowa 168; *Talbot v. DeForest*, 3 G. Gr. 586. *Neb.*—*Lathrop v. Cheney*, 29 Neb. 454, 45 N. W. 617. *Wis.*—*Holzhausen v. Parkhill*, 85 Wis. 446, 55 N. W. 892, citing *Flanders v. Thomas*, 12 Wis. 410.

Failure to itemize debt as required by statute, before foreclosure, does not give the mortgagor who has surrendered the goods voluntarily, a right to replevin. *Atkinson v. Burt*, 65 Ark. 316, 53 S. W. 404.

7. *Hennessey v. Barnett*, 12 Colo. App. 254, 55 Pac. 197.

Where the mortgagee took possession on default of payment of one of the notes which the mortgage was given to secure, the mortgagor, in an action of replevin may show a breach of warranty and damages caused thereby equal to the amount of the note and consequently a failure of consideration for such note as a defense. As the mortgage is only the incident, "whatever defeats the principal should extinguish the incident." *Hutt v. Bruckman*, 55 Ill. 441.

absolutely void.⁸ As against third persons, however, he may recover possession after forfeiture where such persons have no interest in the mortgaged property.⁹ But the assignee of the mortgagee has such an interest as will defeat the action.¹⁰ Where the mortgagee takes more property than is covered by the mortgage the mortgagor may recover such property as was not included.¹¹

Whether or not the effect of a tender after default is sufficient to revest title in the mortgagor so as to support the action is not settled. At common law the tender of the mortgage debt on the law day satisfies the condition and discharges the mortgage, and it is generally held in those states in which a mortgage does not transfer the legal title that a tender at any time before foreclosure and sale has the same effect as a tender on the law day at common law, and, consequently, that the action can be maintained.¹² And in such states the general rule is that the tender need not be kept good by a payment into court.¹³ But in states where the mortgage operates

8. *McCartney v. Wilson*, 17 Kan. 294.

Illegal consideration, however, is not a basis for replevin after the forfeiture. *Dougherty v. Bonavia*, 124 Mass. 210.

9. After condition broken as between the mortgagor and any third person who has no interest in the property the mortgagor has the right of possession, and such special property in the mortgaged chattels that he may maintain such actions as may be necessary to protect his possession and his special right therein and thereto. *Wilkes v. Southern R. Co.*, 85 S. C. 346, 67 S. E. 292.

10. *Denning v. Davis*, 57 Ala. 590.

11. *Fleming v. Graham*, 34 Mo. App. 16, after required stock.

Measure of Damages.—Where the mortgagee disposes of the mortgaged property and along with it other property not included in the mortgage, the mortgagor in an action of replevin cannot recover a judgment absolutely for the value of the property improperly sold of as damages, but is entitled only to have the price or value thereof deducted from the amount of the mortgage debt. *Jones v. Annis*, 47 Kan. 478, 28 Pac. 156.

12. *Bartel v. Lope*, 6 Ore. 321; *Thomas v. Seattle Brewing Co.*, 43 Wash. 560, 94 Pac. 116; *Helphrey v. Strobach*, 13 Wash. 128, 42 Pac. 537.

The effect of a tender after default is a subject that is left in doubt in many jurisdictions as is also the question as to whether the tender must be kept good. In some states the courts

have refused to decide the question when directly presented and in others there are dicta indicating the attitude of the courts without deciding it. What the effect is can only be determined by the law of the particular state in which the question arises. See *U. S. Mitchell v. Roberts*, 17 Fed. 776. *Ala.* *Maxwell v. Moore*, 95 Ala. 166, 10 So. 444; *Frank v. Pickens*, 69 Ala. 369. *Wis.*—*Smith v. Phillipp*, 47 Wis. 202, 2 N. W. 285.

In *Massachusetts* by statute a tender of the amount of the debt at any time before foreclosure will discharge the lien and enable the mortgagor to maintain replevin although in that state a chattel mortgage operates to transfer the legal title. *Weeks v. Baker*, 152 Mass. 20, 24 N. E. 905; *Burtis v. Bradford*, 122 Mass. 129.

13. *Mass.*—*Weeks v. Baker*, 152 Mass. 20, 24 N. E. 905. *Mich.*—*Flanders v. Chamberlin*, 24 Mich. 306. *Minn.*—*Moore v. Norman*, 43 Minn. 428, 45 N. W. 857, 19 Am. St. Rep. 247, 9 L. R. A. 55. *Wash.*—*Thomas v. Seattle Brewing Co.*, 48 Wash. 560, 94 Pac. 116.

"A sufficient tender to the mortgagee after he has asserted his right to take possession of the property, and a demand and refusal to deliver possession to the mortgagor, entitles the latter to commence an action of replevin; and that, if the tender be kept good by a payment of the money into court, it operates as a discharge of the lien of the mortgage and entitles the mortgagor to a judgment for a return

to transfer the legal title the general rule is that tender after default does not revest title and right to possession in the mortgagor so as to enable him to maintain replevin for the property.¹⁴

3. Pleading.—The general rules of pleading governing actions for the possession of personal property are applicable to actions by the mortgagor for the possession of mortgaged chattels. Thus, there must be a general averment of ownership and right to possession in the mortgagor, and of unlawful detention by the mortgagee.¹⁵

A prior demand need not be alleged where the complaint avers a breach of warranty and a total failure of consideration and that the mortgagee had taken possession forcibly and against the consent of the mortgagor.¹⁶

That the tender has been kept good need not be alleged in states where tender discharges the mortgage lien absolutely and unconditionally.¹⁷

B. ACTION FOR DAMAGES.—1. Conversion.¹⁸—*a. Before Default.*—To maintain an action for conversion the mortgagor must have a general or special title to the property together with the right of possession. Where he has such title and right, either by law or by agreement of the parties he may maintain the action against the mortgagee where the latter takes possession of the property and disposes of it before default or forfeiture,¹⁹ or where the mortgagee refuses to allow him to redeem and the goods cannot be returned.²⁰

of the property or for a recovery of its value." *Gauche v. Milbrath*, 94 Wis. 674, 69 N. W. 999.

14. *Sims v. Canfield*, 2 Ala. 555; *Brown v. Lipscomb*, 9 Port. (Ala.) 472; *Scaffer v. Castle*, 6 Ind. Ter. 244, 91 S. W. 351.

15. *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142. See the titles "Complaint, Petition and Declaration;" "Replevin."

A general allegation of ownership showing a special property in one of the plaintiffs and a general property in the other is sufficient. *Watts v. Johnson*, 4 Tex. 311.

Usury need not be alleged in replevin. If the mortgage is invalid for usury, proof is sufficient. *Johnson v.*

16. *Rutier v. Plate*, 77 Iowa 17, 41 N. W. 474.

Simmons, 61 Mo. App. 395.

17. *Mitchell v. Roberts*, 17 Fed. 776; *Thomas v. The Seattle, etc. Brewing Co.*, 48 Wash. 560, 94 Pac. 116.

18. **The measure of damages** is the actual loss. *Kearney v. Clutton*, 101 Mich. 106, 59 N. W. 419.

If property is illegally sold the excess in value over the debt at the time of sale. *Ark.*—*Anderson v. Joseph*, 130 S. W. 165; *Jones v. Horn*, 51 Ark. 19, 25, 9 S. W. 309, 14 Am. St. Rep. 17.

Kan.—*Wygall v. Bigelow*, 42 Kan. 477, 22 Pac. 612, 16 Am. St. Rep. 495. *Okla.* *Harrill v. Weer*, 26 Okla. 313, 109 Pac. 539. *Tex.*—*Soell v. Hadden*, 85 Tex. 182, 19 S. W. 1087.

Value of reasonable use during time when mortgagor was deprived of possession. *Jackson v. Hall*, 84 N. C. 489.

Special damage must be specially alleged. If not, only such damages can be recovered as may naturally follow in any case of unlawful conversion. *Brink v. Freoff*, 44 Mich. 69, 6 N. W. 94.

19. *Harder v. Hosp*, 69 Wis. 288, 34 N. W. 145; *Wheeler v. Pereles*, 43 Wis. 332.

Debt Payable in Installments.—Where the mortgage debt was payable in installments and the mortgaged property consisted of several articles, and on default of the payment of one installment the mortgagor seized all the property and sold the same he was liable in conversion for property sold in excess of an amount sufficient to pay the installment then due. *Brink v. Freoff*, 44 Mich. 69, 6 N. W. 94.

20. *Mich.*—*Flanders v. Chamberlain*, 24 Mich. 305; *Fuller v. Parrish*, 3 Mich. 211. *Minn.*—*Latussek v. Da-*

b. *After Default.*—After default, however, the general rule is that a mortgagor cannot maintain an action for conversion for such action must be founded upon a legal title and right to immediate possession. A mere equitable interest where the legal title and actual possession are in another is not sufficient.²¹ There are, however, some exceptions to this general rule. Thus, where the mortgagee releases the mortgage in order to obtain other security, a subsequent seizure and sale of the property is tortious and entitles the mortgagor to recover its full value in an action of conversion.²² And where the mortgage is irregularly foreclosed or the property is disposed of in denial of the mortgagor's title or interest, or inconsistent with his rights, the action will lie.²³ Thus, the action will lie where, under a mortgage calling for a public sale with notice, the mortgagee takes possession after default and sells the property at a private sale as his own property.²⁴

So the mortgagor may maintain trover against the mortgagee who has sold the property for more than he is entitled to and retains the surplus,²⁵ and also for the value of property not included in the mortgage, which the mortgagee has disposed of.²⁶ If the whole transaction is void because of usury the action may be maintained where the mortgagee refuses to restore the property.²⁷ It is held in some jurisdictions that in case of an unlawful conversion by the mortgagee the mortgagor may maintain trover for the property without a tender of payment of the mortgage debt.²⁸ But in others a payment

vies, 79 Minn. 279, 82 N. W. 587. Wis. Gauche v. Milbrath, 94 Wis. 674, 69 N. W. 999; Vreeland v. Waddell, 93 Wis. 107, 67 N. W. 51.

Where the mortgagee took possession under an insecurity clause without having reasonable grounds to deem himself insecure, the mortgagor may maintain trover. Roy v. Goings, 96 Ill. 361, 36 Am. Dec. 151.

21. Ill.—Banker v. Miller, 153 Ill. App. 115; Alexander v. Meyenberg, 112 Ill. App. 223. Mass.—Holmes v. Bell, 3 Cush. 322. N. Y.—Cody v. First Nat. Bank, 63 App. Div. 199, 71 N. Y. Supp. 277; Brown v. Bement, 8 John. 96.

22. Zelenka v. Port Huron, etc. Co., 144 Iowa 592, 123 N. W. 332.

23. Burton v. Randall, 4 Kan. App. 593, 46 Pac. 326; Swank v. Elwert, 55 Ore. 487, 105 Pac. 901.

Contra.—Stoddard v. Denison, 2 Sweetney (N. Y.) 54, holding that on a bill to redeem a court of equity has power to grant all adequate relief.

24. Anderson v. Joseph (Ark.), 130 S. W. 165.

25. Anderson v. Joseph (Ark.), 130

S. W. 165; Bearss v. Preston, 66 Mich. 11, 32 N. W. 912.

Where under a power contained in the mortgage the mortgagee, after default, sold part of the property for sufficient to pay the debt and expense, the lien was extinguished, and a sale of the balance of the property thereafter was a conversion. Charter v. Stevens, 3 Denio (N. Y.) 33, 45 Am. Dec. 444n.

Action by Subsequent Mortgagee. Clendenen v. Hawk, 8 N. D. 419, 79 N. W. 878; Swank v. Elwert, 55 Ore. 487, 105 Pac. 901.

Assignee of Mortgagor.—Mowry v. First Nat. Bank, 54 Wis. 58, 11 N. W. 247.

26. Blain v. Foster, 33 Ill. App. 297.

27. Ackley v. Finch, 7 Cow. (N. Y.) 290.

For contrary rule see Burns v. Campbell, 71 Ala. 271, the debt being merely voidable to the extent of the interest.

28. Watts v. Johnson, 4 Tex. 311; Payne v. Lindsley (Tex. Civ. App.), 126 S. W. 329.

"It was useless and unnecessary to

or tender of payment is a condition precedent to any right of action by the mortgagor for the recovery of the possession of the mortgaged property or for the recovery of damages for the conversion thereof.²⁹

2. Trespass.—As in trover the right to possession is essential to enable the mortgagor to maintain trespass.³⁰ After condition broken, the mortgage containing no clause entitling the mortgagor to retain possession, he has neither property nor right of possession, and cannot maintain trespass, where the mortgagee has taken the property without a breach of the peace.³¹

tender any payment of the mortgage debt, if the plaintiff has unlawfully, fraudulently, and unfairly converted to his own use the personal property of the defendants of a much greater value than the debt, and, subsequently to such conversion, has disposed of large portions of the property, so as to be disabled from returning the same, or allowing any redemption thereof." *Wygall v. Bigelow*, 42 Kan. 477, 22 Pac. 612, 16 Am. St. Rep. 495.

29. *Marsden v. Walsh*, 24 R. I. 91, 52 Atl. 684; *Rice v. Kahn*, 70 Wis. 323, 35 N. W. 465.

In states where the mortgagee has a legal title and right to possession, the mortgagee being not *prima facie* entitled to the possession of the property "as against the mortgagor, he latter cannot, without proof of payment or extinguishment of the mortgage maintain an action of tort in the nature of trover for a conversion of the property. This is on the theory that such mortgage vests the legal title and right to possession of the property in the mortgagee, leaving the mortgagor with a mere equitable title; that is to say, the mere right in equity to redeem from the mortgage." *Hill v. Merriman*, 72 Wis. 483, 40 N. W. 399.

"The rule in equity governing such cases in this state is, that when the tender is made after default in payment it must be kept good in order to discharge the mortgage. *Crain v. McGoon*, 86 Ill. 431. At law the rule seems to be more favorable to appellants, but if we apply the equitable rule as above announced, it is a complete defense for appellants so far as mortgaged goods are concerned. If the tender was not effectual to release and discharge the mortgage it is obvious that the right of the mortgagees to the goods was not divested. If the

mortgagees were entitled to possession, the mortgagor could have had no right of possession and so could not maintain trover for the goods mortgaged." *Blain v. Foster*, 33 Ill. App. 297.

30. Ala.—*Street v. Sinclair*, 71 Ala. 110. Ky.—*Brown v. Phillips*, 3 Bush. 656. N. Y.—*Ford v. Ransom*, 39 How. Pr. 429, 8 Abb. Pr. (N. S.) 416.

A husband cannot recover in trespass for a wrongful seizure by the mortgagee of the separate property of his wife. *Burns v. Campbell*, 71 Ala. 271.

May sue officer who seizes and sells after debt paid. *Black v. Howell*, 56 Iowa 630, 10 N. W. 216.

One who takes by force or threats is liable. *Thorton v. Cochran*, 51 Ala. 415; *Nichols v. Knutson*, 62 Minn. 237, 64 N. W. 391.

31. Ala.—*Burns v. Campbell*, *supra*. Ill.—*Frankenthal v. Meyer*, 55 Ill. App. 405. N. H.—*Leach v. Kimball*, 34 N. H. 568. Wis.—*Nichols v. Webster*, 1 Chand. 234.

After foreclosure the mortgagee having an absolute title may peaceably enter the mortgagor's house and remove the property without becoming liable for trespass. *McNeal v. Emerson*, 15 Gray (Mass.) 384.

"As between the mortgagor and any other person, who has no interest in the property, the mortgagor has the right of possession, and such special property in the mortgaged chattels that he may maintain such actions as may be necessary to protect his possession and his special right therein and thereto. It would, indeed, be an anomaly to hold that, after condition broken, mortgaged chattels might be taken from the possession of the mortgagor, or injured or destroyed by any trespasser, and the mortgagor could have no redress, except through the mortgagee.

C. REDEMPTION.—At the common law the title of the chattel mortgagee became absolute on breach of condition. The mortgagor had no further rights or interest in the property and there was no redemption.³² Following the rule in the case of mortgages of real property, it is the universal rule that the mortgagor of chattels may redeem after breach of condition, either at law under the statutes or in equity under the general equity powers of courts,³³ if he brings

. . . After condition broken, the mortgagee may either bring the action himself, or the mortgagor may bring it by the consent, express or implied, of the mortgagee, or against his consent, after demand and his refusal to bring it. In either event, he would be estopped by the judgment." Wilkes v. Southern R. Co., 85 S. C. 346, 67 S. E. 292, 137 Am. St. Rep. 890.

32. Ill.—Frankenthal v. Meyer, 55 Ill. App. 405. Mass.—Weeks v. Baker, 152 Mass. 20, 24 N. E. 905; Burtis v. Bradford, 122 Mass. 129; Taber v. Hamlin, 97 Mass. 489, 93 Am. Dec. 113. N. H.—Wendell v. New Hampshire Nat'l Bank, 9 N. H. 404. N. Y.—Ackley v. Finch, 7 Cow. 290; Brown v. Bement, 8 John. 96. Eng.—Jones v. Smith, 2 Ves. Jr. 372, 378.

33. 2 Story Eq. Jur. 1031, and the following cases: Ala.—Davis v. Hubbard, 38 Ala. 185. Colo.—Leopold v. McCartney, 14 Colo. App. 442, 60 Pac. 640. Ill.—Alexander v. Meyenberg, 112 Ill. App. 223; Frankenthal v. Meyer, 55 Ill. App. 405. Ind.—Lee v. Fox, 113 Ind. 98, 14 N. E. 889. Ind. Ter. Schaffer v. Castle, 6 Ind. Ter. 244, 21 S. W. 35. Mass.—Weeks v. Baker, 152 Mass. 20, 24 N. E. 905. Mich.—Flanders v. Chamberlain, 24 Mich. 305; Tannahill v. Tuttle, 3 Mich. 104, 61 Am. Dec. 480. N. Y.—Hughes v. Harlam, 166 N. Y. 427, 60 N. E. 22; Casserly v. Witherbee, 119 N. Y. 522, 23 N. E. 1000; Hinman v. Judson, 13 Barb. 629; Cody v. First Nat. Bank, 63 App. Div. 199, 71 N. Y. Supp. 277. Wis. Rice v. Kahn, 70 Wis. 323, 35 N. W. 465; Boyd v. Beaudin, 54 Wis. 193, 11 N. W. 521; Smith v. Phillip, 47 Wis. 202, 2 N. W. 285.

After forfeiture title absolute in mortgagee. Ala.—Boswell v. Carslile, 70 Ala. 244. Ellington v. Charleston, 51 Ala. 166. Fla.—McGriff v. Porter, 5 Fla. 373. Ill.—Whittimore v. Fisher, 132 Ill. 243, 24 N. E. 636; Simmons v. Jenkins, 76 Ill. 479. Ia.—Evans v. St. Paul, etc., Works, 63 Iowa 204, 18 N. W. 881. Me.—Stewart v. Hanson,

35 Me. 506. N. H.—Provenchee v. Piper, 68 N. H. 31, 36 Atl. 552; Leach v. Kimball, 34 N. H. 568. S. C.—Levi v. Legg, 23 S. C. 282. Wis. Cline v. Libby, 46 Wis. 123.

"The execution of the mortgage transferred to the defendant a defeasible title to the property mortgaged, but which became absolute at law by the failure to pay at the stipulated time. The plaintiff, however, was not thereby divested of all interest in the property, for he still had an equity of redemption which the court of chancery would protect and enforce. On the other hand, the mortgagee might go into chancery to compel a speedy redemption, or to foreclose that right, and the same object might be attained by a fair public sale of the property, on due notice to the mortgagor." Charter v. Stevens, 3 Denio (N. Y.) 33, 45 Am. Dec. 444n.

Mortgagee Has Lien Only.—Cal.—Mathew v. Mathew, 138 Cal. 334, 71 Pac. 344. By statute, Sims Civ. Code, §2927. Idaho.—First Nat. Bank v. Steers, 9 Idaho 519, 75 Pac. 225. Ga. Code St., 1910, §3256. Mich.—Wine- man v. Electrical Mfg. Co., 118 Mich. 636, 77 N. W. 245; Woods v. Gaar Scott & Co., 93 Mich. 143, 53 N. W. 14. Neb.—Meeker v. Walfron, 62 Neb. 689, 87 N. W. 539; Drummond Carriage Co. v. Mills, 54 Neb. 417, 74 N. W. 966, 40 L. R. A. 761, 69 Am. St. Rep. 719. N. J. Finkel v. Lepkin, 62 N. J. L. 580, 41 Atl. 718. Okla.—Edmisson v. Drumm, Flato, etc., Co., 13 Okla. 440, 73 Pac. 958; Payne v. McCormick, etc., Co., 11 Okla. 318, 66 Pac. 287. N. D.—Sanford v. Duluth, etc., Co., 2 N. D. 6, 48 N. W. 434, by statute. Ore.—Knowles v. Herbert, 11 Ore. 240, 4 Pac. 126. S. D.—Jencks v. Murphy, 15 S. D. 425, 89 N. W. 1121. Utah. Blyth & Fargo Co. v. Houtz, 24 Utah 62, 66 Pac. 611. Wash.—Sayward v. Nunan, 6 Wash. 87, 32 Pac. 1022; Silsby v. Aldridge, 1 Wash. 117, 23 Pac. 836.

"The law courts following the rule

his bill within a reasonable time,³⁴ or before the right is foreclosed by a sale of the property or by judicial decree.³⁵

first set up in equity have come to recognize mortgages of all kinds to be exactly what they are—mere securities. The title may be differently regarded and treated in different forums, but the actual fact, that until foreclosure has in some way been had, the mortgagor has an interest in the property, is recognized in law as well as in equity. While courts have and do frequently speak of the title of the mortgagee being, after forfeiture, that is after default, absolute, they do not mean that the ownership of the mortgagee is absolute. No where is it now held, that upon forfeiture, the mortgagee may sell the property, give it away or destroy it, without reference to or consideration for any right or interest of the mortgagor." *Frankenthal v. Meyer*, 55 Ill. App. 405.

Title must be in mortgagor when suit is commenced. *Sims v. Canfield*, 2 Ala. 555.

Burden of proof under a bill to redeem mortgaged stock and for an accounting, is upon the mortgagee to show the amount of dividends and disbursements. *Collins v. Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012.

See *ENCYCLOPEDIA OF EVIDENCE*, title "Mortgages."

Right to redeem cannot be renounced in the mortgage. *Cal.*—*Bradbury v. Davenport*, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 92. *N. Y.*—*Hughes v. Harlam*, 166 N. Y. 427, 60 N. E. 22, where a stipulation that the right would be lost by death of mortgagor was held to defeat redemption by his personal representative. *Wash.*—*Collins v. Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012.

It may be released, however, by a subsequent agreement made for valuable consideration. *Russell v. Southard*, 12 How. (U. S.) 139, 13 L. ed. 927; *Hackleman v. Goodman*, 75 Ind. 202. "While a mortgagor may release his equity of redemption to the mortgagee by a subsequent agreement, yet the courts view such agreements with distrust and disfavor, and if it appears that the mortgagee has taken advantage of the necessities of the mortgagor, or that the consideration is grossly inadequate, the release will be

disregarded and the original relation held to continue." *Collins v. The Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012.

34. *Cal.*—*Wilson v. Brennan*, 27 Cal. 258. *Mich.*—*Flanders v. Chamberlain*, 24 Mich. 305. *Va.*—*Blodgett v. Blodgett*, 48 Vt. 32.

"For a reasonable time after a breach of condition of the mortgage, and whilst the property remains within the possession of the mortgagee, the courts of equity have uniformly, upon a proper application, allowed a redemption by the mortgagor." *Bryant v. Carson River, etc., Co.*, 3 Nev. 313, 93 Am. Dec. 403.

Statute of Limitations.—Possession for a period analogous to that fixed by the statute of limitations bars a bill to redeem. *Sims v. Canfield*, 2 Ala. 555.

A condition precedent is payment on tender of the amount due and lawful charges for care and foreclosure expenses. *Hall v. Ditson*, 5 Abb. N. C. (N. Y.) 198; *Halstead v. Swartz*, 46 How. Pr. (N. Y.) 289; *Stoddard v. Denison*, 2 Sweeney (N. Y.) 54; *Marsden v. Walsh*, 24 R. I. 91, 52 Atl. 684. And a tender must be kept good by deposit. *Brown v. Smith*, 13 N. D. 580, 102 N. W. 171.

35. *Cal.*—*Wilson v. Brannan*, 27 Cal. 258. *Ind.*—*Heimberger v. Boyd*, 18 Ind. 420. *Mich.*—*Van Brunt v. Wakelee*, 11 Mich. 177. *N. Y.*—*Hinsman v. Judson*, 13 Barb. 629.

"A mortgage is not actually foreclosed until the right of redemption is lost, and that can only be when there has been a sale of the property so that some one sets up a title no longer conditional." *Haynes v. Leppig*, 40 Mich. 602.

Until foreclosure the mortgagor may redeem and recover the property, or if it has been converted the mortgagee may be compelled to account for its value less the amount of the debt and interest. *Hunter v. Cronkhite*, 9 Ind. App. 470, 36 N. E. 924, citing *Lee v. Fox*, 113 Ind. 98, 14 N. E. 889; *Hackleman v. Goodman*, 75 Ind. 202.

"Unless the right to redeem has been waived, the mortgagor may assert his right at any time after forfeiture, and before the mortgage has

If a statutory method of redemption is provided,³⁶ the requirements of the statute must be complied with, but that interpretation will be adopted which will best attain the object of the law and promote justice.³⁷ But where, owing to the nature of the property or the peculiar circumstances of the case, it appears that no adequate remedy can be obtained under the statute providing for redemption, the courts under their general equity powers will provide an adequate remedy.³⁸

Pleading.—A bill to redeem must show the date fixed for payment of the debt.³⁹ And it must allege tender by the mortgagor of the amount due. It need not offer in express words what may be found due, but it must in substance do so.⁴⁰

been foreclosed, by paying or tendering the debt and interest, and redeeming the title." *Lee v. Fox*, 113 Ind. 98, 14 N. E. 889.

Right extinguished by valid sale.
Mass.—*Burtis v. Bradford*, 122 Mass. 129. **Nev.**—*Bryant v. Carson River Lumb. Co.*, 3 Nev. 313, 93 Am. Dec. 403. **N. Y.**—*Ballou v. Cunningham*, 60 Barb. 425; *Chamberlain v. Martin*, 43 Barb. 607; *Hall v. Ditson*, 5 Abb. N. C. 198, 211.

Not if Foreclosure Invalid.—*Harrill v. Weer*, 26 Okla. 313, 109 Pac. 313; *Vreeland v. Waddell*, 93 Wis. 107, 67 N. W. 51.

Where there is want of good faith on the part of the mortgagee in making the sale, though it be a public sale, if he becomes the purchaser such sale will be held void at the option of the mortgagor and he maintain an equitable action to redeem notwithstanding the same. *Boyd v. Beaudin*, 54 Wis. 193.

Mortgagor waives defects by consenting to sale joining in the purchase. *Hutchins, etc., Co. v. Walnut, etc., Co.*, 141 Mo. App. 251, 124 S. W. 1098.

No Power of Sale.—*Kirkbride v. Bartz*, 82 Conn. 615, 74 Atl. 388.

Redemption By Subsequent Mortgage.—*Me.*—*Treat v. Gilmore*, 49 Me. 34. **N. D.**—*Brown v. Smith & Co.*, 13 N. D. 580, 102 N. W. 171. **Wis.**—*Smith v. Coolbaugh*, 21 Wis. 427.

36. It is exclusive. *Blanchard v. Kenton*, 4 Bibb. (Ky.) 451.

In Alabama it is held that as the redemption of mortgaged chattels originally belonged to the jurisdiction of the chancery court it is not divested of its jurisdiction even though it may now be exercised by courts of law. *Davis v. Hubbard*, 38 Ala. 185.

While in Massachusetts a mortgage of personalty "passes the general property to the mortgagee, the statute has created a right of redemption in the mortgagor, after condition broken, which continues under foreclosure by sale or by notice given and recorded in the mode prescribed. This is a right of property in the mortgagor, which limits the right and title of the mortgagee. It is not an equitable right in the sense that the interposition of a court of equity is required to enforce it; but it is a legal right, growing out of the statute under which the parties make their contract." *Weeks v. Baker*, 152 Mass. 20, 24 N. E. 905.

37. *Brown v. Smith*, 13 N. D. 580, 102 N. W. 171.

38. *Mayhew v. Martha's Vineyard Natl. Bank*, 203 Mass. 511, 89 N. E. 919; *Boston, etc., Iron Works v. Montague*, 108 Mass. 248.

"The jurisdiction of this court as a court of equity is limited by statute to those cases where there is not a plain, adequate and complete remedy at law. Bills to redeem mortgages of personal property, when objection to the jurisdiction is taken by demurrer, will not be entertained, therefore, unless a case is disclosed in the allegations, where, from the nature of the property mortgaged, the peculiar relation of the parties, or the difficulty in ascertaining the amount to be paid or tendered, it is apparent that the mode specifically provided by statute for the redemption of such mortgages, will not fully protect the mortgagor's rights." *Gordon v. Clapp*, 111 Mass. 22.

39. *Sims v. Canfield*, 2 Ala. 555.

40. A bill praying for an injunction and that the mortgage lien be decreed to be satisfied and for other further re-

D. INJUNCTION.—If the mortgage stipulates that the mortgagor may retain possession until a certain time, he may enjoin the mortgagee from taking possession until such time has expired.⁴¹ And where the mortgagee refuses to accept payment as a satisfaction of the debt, and to release the title, an injunction will lie to prevent him from maintaining an action at law for the property.⁴² But an injunction will not be granted to prevent the mortgagee from taking possession under an insecurity clause in the mortgage,⁴³ nor to prevent sale of the property on execution under a general judgment rendered on the note.⁴⁴

II. REMEDIES OF MORTGAGEE.—**A. BEFORE DEFAULT.**—**1. Action for Possession.**—The right to possession of the mortgaged property before default is usually fixed by the terms of the mortgage. When by the terms of the mortgage the mortgagor is entitled to retain the possession and use until the maturity of the debt, the mortgagee cannot maintain replevin before condition broken.⁴⁵

lief as the mortgagor may be equitably entitled, and which alleges an offer to pay the debt is a sufficient bill to redeem. *Flanders v. Chamberlain*, 24 Mich. 305.

A complaint that the mortgagee had become wrongfully possessed of the mortgaged chattels and that he claimed them as his own; that his claim was based on a mortgage of said goods to him to secure the payment of the debt; that the mortgagor was ready and willing and had duly tendered the sum due said mortgagee and praying for possession and for an accounting to determine the amount due, states facts sufficient to entitle the mortgagor to redeem. *Hughes v. Harlam*, 37 App. Div. 528, 55 N. Y. Supp. 1106, *affirmed*, 168 N. Y. 427, 60 N. E. 22.

A petition alleging that property worth \$60,000 was sold by the mortgagees on foreclosure sale for \$1,000 and was bid in by the mortgagees themselves; that the property was sold in bulk when it could have been more advantageously sold in parcels; that bidders at sale were not permitted to see the property; that the mortgagor was not represented by any one at such sale; that since the sale the mortgagees had obtained \$10,000 or \$15,000 for part of the property, and praying for an application of said money to the debt and for an accounting for the balance, is sufficient to show a right to redeem. *Casserly v. Witherbee*, 119 N. Y. 522, 23 N. E. 1000.

41. *Ford v. Ransom*, 8 Abb. Pr. N. S. (N. Y.) 416.

Where the mortgage was given to secure the purchase money of the property mortgaged and a part of such price was for the good-will of the business and the contract of sale provided for liquidated damages in case the mortgagee set up in the same business in the county and that such damages could be set off against the notes in case of breach of such part of the contract, the mortgagor may enjoin an execution under an action or replevin for the mortgaged property. *Spicer v. Hoop*, 51 Ind. 365.

42. *Davis v. Hubbard*, 38 Ala. 185.

43. *Cline v. Libby*, 46 Wis. 123, 32 Am. Rep. 700.

44. *Wildin v. Duckworth*, 83 Kan. 698, 112 Pac. 606.

45. *Ingraham v. Martin*, 15 Me. 373; *Curd v. Wunder*, 5 Ohio St. 92. See also *Hickman v. Dill*, 32 Mo. App. 509.

Where a mortgage, given to secure two notes payable at different times, provided that upon default in payment of "said two notes" the mortgagee might take possession it was held that an action of replevin would not lie until after maturity of the last note. *McGuire v. Benoit*, 33 Md. 181.

"The mortgage is not the cause of action, but is merely the evidence of appellants' title. It may confer the right to possession, but the unlawful detention is the ground of the action. Unless the detention was unlawful, there was no cause of action, and the detention could not be unlawful unless the appellants were entitled to the possession. If both facts existed the

If the time for which the mortgage is to run is indefinite, he may at any time demand possession of the property, and upon non-compliance with his demand bring replevin.⁴⁶ So, if the mortgage contains a clause giving the mortgagee the right to take possession at any time when he deems himself insecure, he may demand the property at any time, and, on refusal of the mortgagor to deliver the same, may bring replevin.⁴⁷

Wherever a mortgage of chattels transfers the legal title to the mortgagee, if the mortgage is silent as to possession, the mortgagee is entitled to possession immediately upon the execution of the mortgage, and, therefore, may maintain replevin.⁴⁸ In states holding that

action may be maintained." *Johnson v. Simpson*, 77 Ind. 412.

In *Camp v. Pollock*, 45 Neb. 771, 64 N. W. 231, the court, citing *Levi v. Legg*, 23 S. C. 282, and *McLeod v. Bernhold*, 32 Ark. 671, said that these cases "hold that where a mortgage contains a stipulation that the mortgagor shall retain possession until condition broken, the mortgagor may, notwithstanding, maintain replevin against a third person who has taken the goods from the mortgagor; but both these cases are based upon the ground that title passed to the mortgagee, and that the stipulation for possession was personal to the mortgagor, and did not operate in favor of a stranger to the mortgage. In this state, as we have seen, the legal title does not pass. The right of possession, before condition broken at least, is presumably in the mortgagor, and it follows that under such circumstances the mortgagee cannot maintain an action even against a stranger."

So upon removal of the property from the premises contrary to a provision of the mortgage. *Marshall Springs Co. v. Smith*, 85 S. C. 196, 67 S. E. 129.

46. *Whittemore v. Fisher*, 132 Ill. 243, 24 N. E. 636; *McGraw v. Bishop*, 85 Mich. 72, 48 N. W. 167.

47. Ill.—*Durfee v. Grinnell*, 69 Ill. 371; *Fox v. Kitton*, 19 Ill. 519. Ia.—*Bank of Carroll v. Taylor*, 67 Iowa 572, 25 N. W. 810. Mich.—*McGraw v. Bishop*, 85 Mich. 72, 48 N. W. 167. Wis.—*Gage v. Wayland*, 67 Wis. 566, 31 N. W. 108; *Welch v. Sackett*, 13 Wis. 243; *Frisbee v. Langworthy*, 12 Wis. 375.

Where the insecurity clause is held equivalent to a consent that the mortgagee take possession on demand, he need not show reasonable ground. *Wer-*

ner v. Bergman, 28 Kan. 60, 42 Am. Rep. 152; *Hill v. Merriman*, 72 Wis. 483, 40 N. W. 399; *Cline v. Libby*, 46 Wis. 123, 32 Am. Rep. 700, 49 N. W. 832; *Huebner v. Koebke*, 42 Wis. 319. Elsewhere he must have a good reason. Colo.—*Sills v. Hawes*, 14 Colo. App. 157, 59 Pac. 422. Minn.—*Nash v. Larson*, 80 Minn. 458, 83 N. W. 451, 81 Am. St. Rep. 272; *Deal v. Osborne*, 42 Minn. 102, 43 N. W. 835. Neb—*Meyer v. Michaels*, 69 Neb. 138, 95 N. W. 63, 97 N. W. 817; *Allen v. Cerny*, 68 Neb. 211, 94 N. W. 151; *J. I. Case Plow Works v. Marr*, 33 Neb. 215, 49 N. W. 1119. N. Y.—*Hyer v. Sutton*, 59 Hun 40, 35 N. Y. St. 174, 12 N. Y. Supp. 378. S. D.—*Humpfner v. Osborne*, 2 S. D. 310, 50 N. W. 88. "The discretion given to the mortgagee is not an arbitrary one, but he must exercise his judgment in good faith, and must have such grounds for feeling himself insecure as amount to probable cause." *Hogan v. Akin*, 181 Ill. 448, 55 N. E. 137.

48. Ind.—*Johnson v. Simpson*, 77 Ind. 412; *Broadhead v. McKay*, 46 Ind. 595; *Whitehead v. Coyle*, 1 Ind. App. 450, 27 N. E. 716. Me.—*Ferguson v. Thomas*, 26 Me. 499; *Pickard v. Low*, 15 Me. 48. Mich.—*Tannahill v. Tuttle*, 3 Mich. 104, 61 Am. Dec. 480. Minn.—*Karalis v. Agnew*, 111 Minn. 522, 127 N. W. 440. Mo.—*Mertens v. Kielman*, 79 Mo. 412. Wis.—*Frisbee v. Langworthy*, 11 Wis. 375.

Parol evidence is not admissible to prove an agreement that the mortgagor was to retain possession. *Case v. Winship*, 4 Blackf. (Ind.) 425, 30 Am. Dec. 664.

Mortgage not recorded void as to creditors and mortgagee though he had possession before forfeiture to protect his security, he could not maintain re-

the mortgagee is not entitled to possession until default made or condition broken, he cannot maintain an action for the property until such default or breach.⁴⁹

2. Action for Damages.—Where the mortgagee has a special property in the mortgaged chattels and the right to possession before default, he may maintain trover against any one converting the same or trespass for any injury thereto.⁵⁰

3. Injunction.—Where the mortgagee has no right to possession before default, injunction is the proper remedy to prevent the mortgagor from disposing of or destroying the property or in any way depreciating the mortgagee's security.⁵¹ It is also the proper remedy where the mortgagor has possession during the pendency of foreclosure proceedings and is about to dispose of the property.⁵² But a court of equity will not, on complaint by the mortgagee, enjoin a judgment creditor of the mortgagee from selling the property on execution when the levy is made after the mortgagee has taken possession.⁵³ Neither will it interfere to prevent a temporary removal of the property out of the state by the mortgagor, where there is no intention to injure or dispose of the mortgagee's security,⁵⁴ nor

replevin against a sheriff who had seized for a judgment creditor. *Sidener v. Bible*, 43 Ind. 230.

The title of a prior mortgagee of chattels is, in law as well as in equity superior to that of a bailiff seizing them under a distress warrant, or an officer levying under execution against the mortgagor. *Woodside v. Adams*, 40 N. J. L. 417.

49. *Barnett v. Timberlake*, 57 Mo. 499; *Boeger v. Langenberg*, 42 Mo. App. 7; *Hickman v. Dill*, 32 Mo. App. 509; *Buck v. Payne*, 52 Miss. 271.

A mortgagee may maintain replevin for property taken from the mortgagor by an officer on execution where such officer did not comply with the statute as to payment of the amount of the mortgagee's lien or depositing the money in court before taking the property. *Berson v. Nunan*, 63 Cal. 550.

50. *Ark.*—*Ghio v. Byrne*, 59 Ark. 280, 27 S. W. 243. *Mich.*—*Tannahill v. Tuttle*, 3 Mich. 104, 61 Am. Dec. 480. *N. Y.*—*Hinman v. Judson*, 13 Barb. 629.

Case by Mortgagee.—"Where the mortgagor remains in possession before default, under a clause in the mortgage enabling him to do so, the appropriate action against an officer actually converting the chattels under a sale by virtue of an execution against the mortgagor, is an action on the case

for injury to his reversionary estate." *Woodside v. Adams*, 40 N. J. L. 417; See also *Manning v. Monaghan*, 28 N. Y. 585; *Goulet v. Asseler*, 22 N. Y. 225.

51. *Fla.*—*Logan v. Slade*, 28 Fla. 699, 10 So. 25. *Ind.*—*McCormick v. Hartley*, 107 Ind. 248, 6 N. E. 357. *Mo.*—*Barnett v. Timberlake*, 57 Mo. 499; *Hickman v. Dill*, 32 Mo. App. 509. *Ohio.*—*Curd v. Wunder*, 5 Ohio St. 92.

See the title "Injunctions."

Bill for Injunction.—A bill containing the allegation that the mortgagee "has reason to believe and therefore charges, that the defendants contemplate and design to sell and dispose of part or the whole of said property, with a view of defeating your orator's lien and that he is apprehensive the defendants will sell, dispose of, conceal or remove the whole, or a part of the personal property before the same can be made responsible to him for the satisfaction of his claim," is sufficient to entitle the mortgagee to an injunction. *Clagett v. Salmon*, 5 Gill. & J. (Md.) 314.

52. *Bennett v. Reef*, 16 Colo. 431, 27 Pac. 252; *Hall v. Bellows*, 11 N. J. Eq. 333; *Chapman v. Hunt*, 13 N. J. Eq. 370.

53. *Adams v. Nebraska Nat. Bank*, 4 Neb. 370.

54. *Walker v. Radford*, 67 Ala. 446.

to prevent an officer from levying upon and selling the property where the mortgagee has an adequate remedy at law.⁵⁵

4. Receiver.—Where the mortgagee, before he has a right to possession, has reasonable grounds to believe that the property will be removed, destroyed, or disposed of so that it cannot be applied in satisfaction of his debt, he may have a receiver appointed to take charge of the property to protect his interests.⁵⁶ And if an injunction has been granted and it proves inadequate to preserve the property to the mortgagee, he will be entitled to the additional remedy of a receiver.⁵⁷ A receiver may also be appointed at the discretion of the court pending foreclosure proceedings where it appears that such action is necessary to protect all parties interested and to promote justice.⁵⁸ But the appointment will not be made on the bare allegation that the mortgagee deemed himself insecure. He must set forth facts that will show the court that he has reasonable grounds to believe that his security is endangered.⁵⁹

B. AFTER DEFAULT.—1. General Statement.—On default in payment of the mortgage debt the mortgagee has three remedies. He may bring an action at law to recover the debt, an action to recover the property, and an action to foreclose the mortgage. He may pursue these remedies separately or he may bring them all concurrently.⁶⁰ A personal judgment for the debt does not bar the mort-

55. *La Mothe v. Fink*, 8 Biss. 493, 14 Fed. Cas. No. 8,032.

56. *Clagett v. Salmon*, 5 Gill & J. (Md.) 314; *Rose v. Bevan*, 10 Md. 466, 69 Am. Dec. 170.

See the title "Receivers."

57. *Logan v. Slade*, 28 Fla. 699, 10 So. 25.

Sufficiency of Petition.—A petition 'showing the insolvency of the mortgagor; that the property is not sufficient to secure the debt; and that there is danger of its removal beyond the jurisdiction of the court is sufficient to entitle the mortgagee to the appointment of a receiver. *Reynolds v. Quick*, 128 Ind. 316, 27 N. E. 621.

58. *Warren v. Pitts*, 114 Ala. 65, 21 So. 494; *Maish v. Bird*, 59 Iowa 307, 13 N. W. 298.

"The right of complainant as mortgagee to the appointment of a receiver pending a suit for foreclosure, rests upon the general principal, that the appointment is necessary for the preservation of the property and its appropriation to pay the mortgage debt. But the appointment should be exercised in view of all the circumstances of the particular case for the purpose of promoting the ends of justice, and of protecting the rights of all the parties

interested in the controversy and the subject-matter, and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.'" *Meyer v. Thomas*, 131 Ala. 111, 30 So. 89.

59. *Watson v. Gudney*, 144 Ill. App. 624.

60. Ala.—*Tyson v. Weber*, 81 Ala. 470, 2 So. 901. Ill.—*Barchard v. Kohn*, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803.

Ind.—*Lorch v. Aultman*, 75 Ind. 162.

Mass.—*Burtis v. Bradford*, 122

Mass. 129. Mich.—*Thurber v. Jewett*,

3 Mich. 295. N. Y.—*Fidelity & Loan*

Assn. v. Connolly, 95 N. Y. Supp. 576.

An attachment is not inconsistent

with foreclosure. *Stein v. McAuley*,

147 Iowa 630, 125 N. W. 336, 140 Am.

St. Rep. 336, 27 L. R. A. (N. S.) 692.

Where a mortgagee obtained a general judgment on the notes secured by the mortgage and also an order that the mortgage be foreclosed and the property sold, he may proceed either under the general judgment and have satisfaction under an execution and sale of the debtor's property in the first instance or he may proceed to sell the same and satisfy his claim. And the mortgagor is not entitled to

gagee's right to proceed under the mortgage,⁶¹ nor in some jurisdictions does he waive his rights thereunder by an attachment proceeding against the mortgage property.⁶² However, a different rule prevails in some states, and it is held that the liens under the mortgage and attachment are so different and inconsistent that they cannot co-exist at the same time and that the levying of the attachment is a waiver of the mortgage lien.⁶³ But under a statute providing that there shall be but one action for the recovery of a debt or the enforcement of any right secured by a mortgage the mortgagee may bring an action for possession pending the foreclosure of the mortgage.⁶⁴

2. Action for Possession or Value.—a. *Right of Action.*—On breach of the conditions of the mortgage, the mortgagee is entitled to take possession of the property,⁶⁵ and may recover the same, or any

an injunction restraining the sale of the property or an execution under the general judgment. *Wildin v. Duckworth*, 83 Kan. 698, 112 Pac. 606.

In an action by a mortgagee to have a sale of the mortgaged property, he is not entitled to the additional remedy of claim and delivery where the jury finds that the mortgage has been released before the sale. *Penny v. Ludwick*, 152 N. C. 375, 67 S. E. 919.

61. *Burton v. Tannehill*, 6 Blackf. (Ind.) 470; *Green v. Bass*, 83 Ohio St. 378, 94 N. E. 742.

"A personal judgment on the note secured by the mortgage is no bar to a subsequent suit to foreclose the mortgage, and the mortgagee does not lose his right to the mortgaged property if he seizes it on execution under the judgment." *Barchard v. Kohn*, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803.

62. *Ind.*—*Byram v. Stout*, 127 Ind. 195, 26 N. E. 687. *Kan.*—*Kansas City & Co. v. Bank*, 79 Kan. 761, 101 Pac. 617, 17 Am. & Eng. Ann. Cas. 956; *State Bank v. Mottin*, 47 Kan. 455, 28 Pac. 200. *Neb.*—*First Nat. Bank v. Johnson*, 68 Neb. 641, 94 N. W. 837. *N. D.*—*Madson v. Rutten*, 16 N. D. 281, 113 N. W. 872, 13 L. R. A. (N. S.) 554.

The fact that a mortgagee unsuccessfully prosecuted an attachment proceeding against the mortgaged property and caused the mortgagor to go to the expense of defending the same will not estop him from foreclosing the mortgage. *Stein v. McAuley*, 147 Iowa 630, 125 N. W. 336, 140 Am. St. Rep. 336, 27 L. R. A. (N. S.) 692.

63. *Me.*—*Whitney v. Farrar*, 51 Me. 418; *Libby v. Cushman*, 29 Me. 429. *Mass.*—*Evans v. Warren*, 122 Mass. 303; *Buck v. Ingersoll*, 11 Mete. 226. *Minn.*—*Dyckman v. Sevaton*, 39 Minn. 132, 39 N. W. 73. *Mo.*—*Ottumwa Natl. Bank v. Totten*, 94 Mo. App. 596, 68 S. W. 386. *Okla.*—*Dix v. Smith*, 9 Okla. 124, 60 Pac. 303, 50 L. R. A. 714 and note.

"A mortgagee of personal property, who attaches the mortgaged property, pursues his attachment to judgment and execution, and satisfies his judgment out of the property attached, has waived his right to insist upon the mortgage against subsequent attaching creditors, who have recovered judgment and seasonably placed their executions in the hands of the officer, to be levied on the property attached." *Haynes v. Sanborn*, 45 N. H. 429.

Under the Idaho code where the mortgagee brings foreclosure proceedings he cannot afterwards maintain an action of claim and delivery for possession for the same property. Where he chooses foreclosure to enforce his rights the action becomes exclusive. *Cederholm v. Loofborrow*, 2 Idaho 191, 9 Pac. 641.

64. *Harper v. Gordon*, 128 Cal. 489, 61 Pac. 84; *Ely v. Williams*, 6 Cal. App. 455, 92 Pac. 393.

65. He is entitled to possession only. *Hughes v. Smith* (Tex. Civ. App.), 129 S. W. 1142.

He is entitled to possession only for the purpose of foreclosing the mortgage. *Shaffstall v. Downey*, 87 Ark. 5, 112 S. W. 176.

Under a statute requiring the mort-

part of it,⁶⁶ from the mortgagee or other person in possession thereof, by an action of detinue,⁶⁷ or replevin.⁶⁸ There is a conflict of authority as to whether such an action may be maintained after the commencement of foreclosure proceedings.⁶⁹ Assignment of the mortgage as col-

gagee to sell the property within twenty days after seizure it was held that he did not lose his lien by failure to sell within the time prescribed but could maintain claim and delivery thereafter if the mortgagor took the property from him. *Pitts Agricultural Wks. v. Baker*, 11 S. D. 342, 77 N. W. 583.

On default in the payment of installments the mortgagee may ordinarily recover possession at once (Ill.—*Barbour v. White*, 37 Ill. 164. Ind.—*Burton v. Tannehill*, 6 Blackf. 470. Wis.—*Aultman Co. v. McDonough*, 110 Wis. 263, 85 N. W. 980), or may wait until the last payment is due, as he elects. *Barbour v. White*, 37 Ill. 164.

Indemnifying Mortgage.—A surety who has taken an indemnifying mortgage from the debtor may recover the property on failure of the mortgagor to pay the debt. *Spaulding v. Scandland*, 4 B. Mon. (Ky.) 365. Payment of the debt by the mortgagee is not a condition precedent to his right to sue in such case where the mortgage gives him a right to possession on default. *Mattingly v. Paul*, 88 Ind. 95; *McFadden v. Hopkins*, 81 Ind. 459; *Sink v. Loflin*, 76 Mo. App. 463.

Part payment is no defense. *Hudson v. Snipes*, 40 Ark. 75. See also *Burns v. Campbell*, 71 Ala. 271.

66. Where the mortgage covers several articles, the mortgagee may sue in claim and delivery for a part of them only, so as to bring the action within the jurisdiction of a justice of the peace. *Kiser v. Blanton*, 123 N. C. 400, 31 S. E. 878.

67. *Mervine v. White*, 50 Ala. 388. After expiration of the time for redemption. *Hopkins v. Thompson*, 2 Port. (Ala.) 433. See also the title "Detinue."

68. Ark.—*Hudson v. Snipes*, 40 Ark. 75; *Gilchrist v. Patterson*, 18 Ark. 575. Cal.—*Flinn v. Ferry*, 127 Cal. 652, 60 Pac. 434; *Wright v. Ross*, 36 Cal. 414, 429. Ill.—*Barchard v. Kohn*, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803. Mass.—*Tuesley v. Robinson*, 103 Mass. 558, 4 Am. Rep. 575. Neb.—*Lathrop v. Cheney*, 29 Neb. 454, 45 N. W. 617.

N. Y.—*Fidelity Loan Assn. v. Connolly*, 92 N. Y. Supp. 252. N. O. *Kiser v. Blanton*, 123 N. C. 400, 31 S. E. 878. S. O.—*Wilkes v. Southern R. Co.*, 85 S. C. 346, 67 S. E. 292, 137 Am. St. Rep. 890. Wyo.—*Boswell v. First Nat. Bank*, 16 Wyo. 161, 92 Pac. 624; *Schlessinger v. Cook*, 9 Wyo. 256, 62 Pac. 152. See also the title "Replevin."

A mortgagee who has loaned money to a corporation and taken a chattel mortgage may recover the property in an action of replevin and conduct the business and use the corporation franchises to secure repayment of his loan. *Reed v. Bradley*, 17 Ill. 321.

Where the mortgage gives the mortgagee the right to possession on default, he may maintain replevin notwithstanding the statutory provision permitting but one action for the recovery of any debt or the enforcement of any right secured by mortgage. *Harper v. Gordon*, 128 Cal. 489, 61 Pac. 84.

In Michigan execution may be levied upon the interest of the mortgagor until actual foreclosure, even though the mortgage is due and unpaid, and hence the mortgagee cannot maintain replevin against the levying officer under such circumstances. *Macomber v. Saxton*, 28 Mich. 516; *Cary v. Hewitt*, 26 Mich. 228.

Assignee.—Ark.—*Gilchrist v. Patterson*, 18 Ark. 575. Cal.—*Flinn v. Ferry*, 127 Cal. 648, 60 Pac. 434. Ill.—*Barbour v. White*, 37 Ill. 164; *Christoffel v. Lee*, 153 Ill. App. 395.

Assignment of the debt not sufficient where the legal title vests in the mortgagee. To support replevin the assignee must have the legal title. *Perry County Bank v. Rankin*, 73 Ark. 583, 84 S. W. 725.

69. In California it is held that the pendency of an action to foreclose does not bar claim and delivery, where the mortgage gives the mortgagee the right of possession on default, notwithstanding the statutory provision that there can be but one action for the recovery of any debt or the enforcement of any right secured by mort-

lateral does not deprive the mortgagee of the right to sue where it has been re-transferred to him before suit.⁷⁰ A second mortgagee, whose mortgage is executed after breach of condition of the first mortgage, cannot maintain claim and delivery against a subsequent purchaser from the first mortgagee.⁷¹

Divestiture of the mortgagee's title by operation of law or its own limitations pending suit precludes recovery,⁷² but the contrary is true of a voluntary sale of the property,⁷³ or assignment of the mortgage⁷⁴ after the property has come into his possession by virtue of such suit.

Only the identical goods covered by the mortgage at the time of its execution can be recovered.⁷⁵

b. *Demand.*—As a general rule a demand for the property is necessary before the mortgagee can maintain an action therefor against the mortgagor,⁷⁶ or other person rightfully in possession,⁷⁷ though the contrary is true in some states where the mortgage authorizes the mortgagee to take possession on default.⁷⁸ No demand is necessary, however, where the defendant is resisting the action under a claim of title and right to possession,⁷⁹ nor as against one who is a mere

gage, the action of claim and delivery being deemed merely ancillary and auxiliary to the foreclosure. *Ely v. Williams*, 6 Cal. App. 455.

In *Idaho* it is held that it cannot, in view of the statute providing that there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage. *Cederholm v. Loofborrow*, 2 Idaho 191, 9 Pac. 641.

In *Indiana* the pendency of foreclosure proceedings is no bar to an action to recover possession. *Lorch v. Aultman & Co.*, 75 Ind. 162.

70. *Rotten v. Collier & Co.*, 105 Ala. 581, 16 So. 921. See also *Eddy v. McCall*, 77 Mich. 242, 43 N. W. 911.

71. *Martin v. Jenkins*, 51 S. C. 42, 27 S. E. 947.

72. *Rotten v. Collier & Co.*, 105 Ala. 581, 16 So. 921; *Cole v. Conolly*, 16 Ala. 271.

73. *Ala.*—*Rotten v. Collier & Co.*, 105 Ala. 581, 16 So. 921. *Mo.*—*Pace v. Pierce*, 49 Mo. 393; *Lacey v. Giboney*, 36 Mo. 320. *Wyo.*—*Schlessinger v. Cook*, 9 Wyo. 256, 62 Pac. 152.

74. *Rotten v. Collier & Co.*, 105 Ala. 581, 16 So. 921.

75. Where the mortgage covers a stock of goods and contemplates that the stock will be sold and replaced by other goods from time to time, if other goods are substituted for the mortgaged property, the mortgagee can

only enforce a lien in equity. *Denier v. Bonewur*, 134 App. Div. 577, 119 N. Y. Supp. 313.

76. *Ind.*—*Roberts v. Norris*, 67 Ind. 386. *Me.*—*Newman v. Jenne*, 47 Me. 520. *Mich.*—*McGregor v. Cole*, 100 Mich. 262, 58 N. W. 1008. *N. J.*—*Black v. Pidgeon*, 70 N. J. L. 802, 58 Atl. 372; *Woodside v. Adams*, 40 N. J. L. 417. *N. C.*—*Smith v. French*, 141 N. C. 1, 53 S. E. 435. *Wyo.*—*Boswell v. First Nat. Bank*, 16 Wyo. 161, 92 Pac. 624.

77. It is a necessary prerequisite to the recovery of the property from the wife of the mortgagor, where it is in use on her farm which they both occupy, though she claims to own said property. *Campbell v. Quackenbush*, 33 Mich. 287.

78. *Morris v. Rucks*, 62 Miss. 76.

A demand is essential, however, where the instrument provides for a surrender on demand. *Bowman v. Roberts*, 58 Miss. 126.

79. *Conn.*—*Pease v. Odenkirchen*, 42 Conn. 415. *Ia.*—*Smith v. McLean*, 24 Iowa 322. *Kan.*—*Bartlett v. Ridgeway Nat. Bank*, 70 Kan. 126, 78 Pac. 414; *Schmidt v. Bender*, 39 Kan. 437, 18 Pac. 491; *Raper v. Harrison*, 37 Kan. 243, 15 Pac. 219. *N. C.*—*Moore v. Hurtt*, 124 N. C. 27, 32 S. E. 317; *Heath v. Morgan*, 117 N. C. 504, 23 S. E. 489. *N. D.*—*Thompson v. Thompson*, 11 N. D. 208, 91 N. W. 44. *Wyo.*

custodian of the property for the mortgagor,⁸⁰ or one in joint possession of the property who is not made a party to the suit.⁸¹

Payment of the indebtedness need not be demanded.⁸²

Sufficiency of Demand.—The demand need not be made in any particular form, any words which, fairly understood, would convey notice that a delivery was required, being sufficient.⁸³

c. Pleading.⁸⁴—The complaint must allege all facts essential to the plaintiff's cause of action,⁸⁵ including facts showing his special ownership of the property under the mortgage,⁸⁶ and his right to the immediate possession thereof,⁸⁷ and a demand and refusal in cases where a demand is an essential prerequisite to suit.⁸⁸ The property

Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 624.

Demand, however, "is not required 'where the defendant has committed acts inconsistent with the title and right of possession in the mortgagee and has conducted himself in such a way as to show that a demand would be wholly unavailing.'" *Smith v. French*, 141 N. C. 1, 53 S. E. 435.

Not where possession has been delivered to a grantee of the mortgagor. *Morris v. Rucks*, 62 Miss. 76.

80. *Lemaster v. Fisher*, 82 Kan. 280, 108 Pac. 93.

81. Mortgagee's wife, who also signed the mortgage. *McGregor v. Cole*, 100 Mich. 262, 58 N. W. 1008.

82. *Acme Harvester Co. v. Butterfield*, 12 S. D. 91, 80 N. W. 170.

83. *Smith v. French*, 141 N. C. 1, 53 S. E. 435.

84. See also the titles "*Detinue*;" "*Replevin*."

85. A petition alleging that the plaintiff was the special owner of the property under a mortgage, a copy of which was attached, and that the defendants without the knowledge of the plaintiff removed the property from the place designated in the mortgage where it was to be kept and that he was wrongfully and unjustly detaining it and had so detained it for thirty days prior to the commencement of the action, states a good cause of action. *Lemaster v. Fisher*, 82 Kan. 280, 108 Pac. 93.

86. *Swope v. Johnson*, 6 Okla. 736, 52 Pac. 942.

Since a mortgage is merely the evidence of the mortgagee's title, it is not sufficient to aver merely that the plaintiffs are the owners of a chattel mortgage on the property, but the title itself must be averred by direct and

traversable allegations. *Johnson v. Simpson*, 77 Ind. 412.

In states where the legal title remains in the mortgagor until foreclosure, a general allegation of ownership in plaintiff in an action against a third person will not be supported by proof of a chattel mortgage, but the special claim must be pleaded. *Norcross v. Baldwin*, 50 Neb. 885, 70 N. W. 511; *Camp v. Pollock*, 45 Neb. 771, 64 N. W. 231.

Complaint held to be sufficient as against a general demurrer. *Hoy v. Leonard*, 13 Colo. App. 449, 59 Pac. 229.

Amendment.—It is not error for the court to permit the mortgagee to amend a petition where it alleges an absolute ownership to an allegation of special ownership by virtue of a chattel mortgage. *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924.

87. *Ind.*—*Johnson v. Simpson*, 77 Ind. 412. **N. D.**—*Thompson v. Thompson*, 11 N. D. 208, 91 N. W. 44. **Okla.** *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924.

Complaint held to be sufficient as against a general demurrer. *Hoy v. Leonard*, 13 Colo. App. 449, 59 Pac. 229.

Petition held not to be demurrable as showing that plaintiff was not entitled to possession. *Payne v. McCormick & Co.*, 11 Okla. 318, 66 Pac. 287.

In states where the right to possession remains in the mortgagor until foreclosure, in replevin by the mortgagee against a third person to recover the mortgaged property he must specially plead the facts entitling him to possession. *Norcross v. Baldwin*, 50 Neb. 885, 70 N. W. 511; *Camp v. Pollock*, 45 Neb. 771, 64 N. W. 231.

88. *Thompson v. Thompson*, 11 N. D.

should be described with sufficient accuracy to enable it to be identified as that covered by the mortgage.⁸⁹ While it is the better practice to set out the exact amount due, it is not absolutely necessary.⁹⁰

As a rule the mortgage is not deemed the cause of action so as to require the original or a copy thereof to be filed with the complaint.⁹¹

Answer. — A general denial or plea of the general issue puts in issue all of plaintiff's allegations which it is necessary for him to prove in order to maintain his action,⁹² and under it defendant may show any fact which goes to disprove such allegations.⁹³ A defense that there is no debt should be specially pleaded.⁹⁴

By statute in some states defendant may avail himself of any defense which would be available against an action on the mortgage debt.⁹⁵

Whether or not the defendant may interpose a set-off or counterclaim for sums due him from plaintiff in order to reduce or extinguish the mortgage debt depends on the statutes of the various states.⁹⁶

208, 91 N. W. 44. *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924.

89. So that, taken with the evidence thereunder, it can be identified. *Perry Live Stock Co. v. Barto*, 3 Neb. (Unof.) 654, 92 N. W. 762.

A slight variance is not fatal where it can be shown by parol evidence that the property is in fact the same. *Boyle v. Miller*, 93 Ill. App. 627.

90. *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924.

91. *Smith v. McLean*, 24 Iowa 322.

92. It puts in issue the plaintiff's allegation of a demand, and unless the general denial is modified by subsequent allegations, proof of demand must be made. *Bartlett v. Ridgeway Nat. Bank*, 70 Kan. 126, 78 Pac. 414.

93. Payment in detinue. *Pinckard v. Bramlett*, 165 Ala. 327, 51 So. 557.

Alteration of the mortgage, and that it was given to secure a single note admitted to have been paid. *Carlisle v. People's Bank*, 122 Ala. 446, 26 So. 115.

Fraud. *Payne v. McCormick & Co.*, 11 Okla. 318, 66 Pac. 287. *Plano Mfg. Co. v. Person*, 12 S. D. 448, 81 N. W. 897.

In *Nebraska* under a general denial in replevin defendant may prove any special matter which amounts to a defense to plaintiff's cause of action, such as usury, or that plaintiff is indebted to him for more than the amount of the mortgage note. *Davis v. Culver*, 58 Neb. 265, 78 N. W. 504.

Blue Valley Bank v. Bane, 20 Neb. 294, 30 N. W. 64.

94. *Hooper v. Birchfield*, 115 Ala. 226, 22 So. 68.

95. Ala. Code, 1896, §1478. In detinue. *Hooper v. Birchfield*, 115 Ala. 226, 22 So. 68; *Powell v. Crawford*, 110 Ala. 294, 18 So. 302; *Lewis v. Simon*, 101 Ala. 546, 14 So. 331.

Breach of warranty of goods sold, for the purchase price of which the mortgage was given. *McDaniel v. Sullivan & Bramlett*, 144 Ala. 583, 39 So. 355.

96. In *Alabama* set-off or recoupment in part is permissible under the statute authorizing any matter of defense which would be available under the mortgage debt. *Hooper v. Birchfield*, 115 Ala. 226, 22 So. 68. See also *Powell v. Crawford*, 110 Ala. 294, 18 So. 302.

In *Arkansas* set-off is not permitted. *Hudson v. Snipes*, 40 Ark. 75.

In *Michigan* set-off is not permitted in replevin. *Pinch v. Willard*, 108 Mich. 204, 66 N. W. 42.

In *Nebraska* under the general denial the mortgagor may show as set-off that the mortgagee is indebted to him for labor for more than the amount of the note. *Davis v. Culver*, 58 Neb. 265, 78 N. W. 504. But see *Blue Valley Bank v. Bane*, 20 Neb. 294, 30 N. W. 64.

In *North Carolina* where the mortgagor admitted the mortgagee's right of possession, but alleged that there has been turned over to him under pro-

3. Action for Damages. — a. *Conversion.*⁹⁷ — After default, a mortgagee who is entitled to the possession of the mortgaged property⁹⁸ may maintain an action for damages against any person unlawfully converting the property to his own use.⁹⁹ Thus, he may bring such an action against an officer who illegally levies an attachment against the property,¹ or against an execution creditor and officer who seize and sell the property under an execution against the mortgagor,² or against a vendee of the mortgagor,³ or a second mortgagee.⁴

Parties. — Senior and junior mortgagees must sue separately for injuries to their separate interests and cannot join as plaintiffs in a single action.⁵

cess in the cause, other property which had been converted and wasted by the mortgagee "And tendered an issue as to the value of the property seized to the end that defendant might have payment for any excess over and above the plaintiff's debt," it was held to be error for the court to decline to submit the issue. *Smith v. French*, 141 N. C. 1, 53 S. E. 435.

In Wisconsin, an action of replevin by a non-resident mortgagee, the mortgagor may counter-claim damages under sec. 2658, *Wisc. Stat.* 1898, for breach of warranty in property sold and for loss of time while attempting to use such property, on account of its defects. *Aultman Co. v. McDonough*, 110 Wis. 263, 85 N. W. 980.

In Wyoming off-set or counter-claim is not permissible. *Schlessinger v. Cook*, 9 Wyo. 256, 62 Pac. 152. See also the title "**Set-off and Counter-claim.**"

⁹⁷. See also the title "**Trover and Conversion.**"

⁹⁸. To maintain trover he must have a right to possession at the time when the goods are converted. *Hunter v. Cronkhite*, 9 Ind. App. 470, 36 N. E. 924; *Burton v. Tannerhill*, 6 Blackf. (Ind.) 470.

Waiver. — By consenting to a sale of the property by the mortgagor, the mortgagee waives his right to sue the purchaser for conversion. *Rusk County Lumb. Co. v. Meyer* (Tex. Civ. App.), 126 S. W. 317.

⁹⁹. *Ark.* — *Ghio v. Byrne*, 59 Ark. 280, 27 S. W. 243. *Ga.* — *Ellison & Chew v. Wilson*, 7 Ga. App. 214, 66 S. E. 631. *Ind.* — *Hunter v. Cronkhite*, 9 Ind. App. 470, 36 N. E. 924. *Wis.* — *Low v. Wing*, 56 Wis. 31, 13 N. W. 892; *Smith v. Konst*, 50 Wis. 360, 7 N. W. 293.

A surety holding an indemnifying

mortgage, and who has paid the mortgagor's debt, though before it was due. *Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545.

Under a mortgage covering cotton grown in a certain county, the mortgagee, in order to maintain conversion must show that the cotton alleged to have been converted was grown in said county. Otherwise he has no property either general or special in such cotton. *Gray v. D. P. Haynes & Bro.*, 164 Ala. 294, 51 So. 416.

1. In such case he is not obliged to sue for conversion, but may foreclose his mortgage instead. *Souza v. Lucas* (Cal. App.), 100 Pac. 115.

2. Where it is in the mortgagor's possession. *Williams v. Dobson*, 26 S. C. 110, 1 S. E. 421.

3. *McFadden v. Hopkins*, 81 Ind. 459; *Simonson v. Aney* (S. D.), 128 N. W. 319.

A foreclosure does not effect the mortgagor's vendee where the latter was not made a party and, the mortgagee may bring conversion against such vendee as if there had been no foreclosure, and the respective rights are to be determined by the mortgage alone. *Fletcher v. Neudeck*, 30 Minn. 125, 13 N. W. 513.

As against persons claiming under the mortgagor or his assignees, his right to damages is limited to the amount due on his mortgage. *Klinkert v. Fulton & Co.*, 113 Wis. 493, 83 N. W. 507.

4. *McFadden v. Hopkins*, 81 Ind. 459; *Burton v. Tannerhill*, 6 Blackf. (Ind.) 470.

5. Their interests are entirely distinct and separate, and they are neither joint tenants nor tenants in common of the property. *Newman v. Tymeson*, 13 Wis. 172, 80 Am. Dec. 735.

Pleading.—The complaint should state facts sufficient to show the plaintiff's special ownership of the property under the mortgage and his right to the immediate possession thereof.⁶ The mortgage is not the basis of the action and cannot be made a part of the complaint by filing a copy therewith.⁷ When an actual conversion is alleged it is not necessary to allege a demand before suit is brought.⁸ Nor is it necessary to allege that defendant did wrongfully receive and wrongfully retain the property in such case.⁹

b. *Trespass.*—After default the mortgagee may maintain an action against third persons for injury to the mortgaged property or the invasion of his lawful possession,¹⁰ even though he is not in possession,¹¹ and has not foreclosed the mortgage.¹²

Parties.—Mortgagees who are tenants in common of the mortgaged property must join in a single action.¹³

4. **Foreclosure.**—a. *The Right and It's Accrual.*—The right to foreclose accrues to the mortgagee immediately on default.¹⁴

b. *Methods of Foreclosure in General.*—A chattel mortgage may generally be foreclosed by action, or by sale by the mortgagee without judicial sanction.¹⁵

c. *Foreclosure by Suit or Action.*—(I) **General Principles.**—A chattel mortgage may be foreclosed by a suit in equity or an equitable action under the code,¹⁶ or, as is provided in some states, by a statutory

6. *Hunter v. Cronkhite*, 9 Ind. App. 470, 36 N. E. 924.

7. *Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545; *Hunter v. Cronkhite*, 9 Ind. App. 470, 36 N. E. 924.

8. *Koehring v. Aultman*, 7 Ind. App. 475, 34 N. E. 30.

9. *Proctor v. Cole*, 66 Ind. 576. Not that he unlawfully obtained possession. *Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545.

10. *Wilkes v. Southern R. Co.*, 85 S. C. 346, 67 S. E. 292, 137 Am. St. Rep. 890.

In such an action he may recover for any injury to the rights of the mortgagor as well as his own damages. *Frankenthal v. Meyer*, 55 Ill. App. 405. See also the title "*Trespass*."

11. Though it is in possession of the mortgagee. *Wylie v. Ohio R. & C. R. Co.*, 48 S. C. 405, 26 S. E. 676.

12. *Muskin v. Lazarovitch*, 106 Me. 353, 76 Atl. 702, 138 Am. St. Rep. 340.

13. The concurrent execution and delivery of two chattel mortgages to two mortgagees made such mortgagees tenants in common. *Welch v. Sackett*, 12 Wis. 243.

14. *Burtis v. Bradford*, 122 Mass. 129; *Lyon v. Ballentine*, 65 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284; *Leland v. Colver*, 34 Mich. 418; *Tannahill v. Tuttle*, 3 Mich. 104, 61 Am. Dec. 480.

Where no time of payment is specified the mortgage may be foreclosed immediately after delivery. *McGraw v. Bishop*, 85 Mich. 72, 48 N. W. 167; *Lyon v. Ballentine*, 65 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284; *Stearns v. Oberle*, 47 Misc. 349, 94 N. Y. Supp. 37.

A mortgage given to secure a debt past due and specifying no time of payment may be foreclosed at once. *Johnston v. Robuck*, 104 Iowa 523, 73 N. W. 1062; *Bearss v. Preston*, 66 Mich. 11, 32 N. W. 912.

15. *Cal.*—*Wilson v. Brannan*, 27 Cal. 258. *Ind.*—*Lee v. Fox*, 113 Ind. 98, 14 N. E. 889. *N. J.*—*Long Dock Co. v. Mallery*, 12 N. J. Eq. 93. *N. Y.* *Rich v. Milk*, 20 Barb. 616.

16. *Ind.*—*Lee v. Fox*, 113 Ind. 98, 14 N. E. 889; *Blakemore v. Taber*, 22 Ind. 466. *Ia.*—*Packard v. Kingman*, 11 Iowa 219. *Neb.*—*Lexington Bank v. Wirges*, 52 Neb. 649, 72 N. W. 1049.

proceeding to foreclose which is held to be an action at law,¹⁷ notwithstanding the right of the mortgagee to sell after default,¹⁸ and even though the mortgage contains an express power of sale,¹⁹ or a provision for foreclosure and sale by advertisement.²⁰ In most jurisdictions statutory remedies for foreclosure without suit are no bar to such a suit or action.²¹

(II.) *Parties.*—Ordinarily all persons secured by the mortgage must join in a single suit to foreclose,²² though in some states, where the mortgage covers separate liabilities to each of several persons any one of the mortgagees may enforce his claim by a separate action,²³ or may join in the foreclosure with the other mortgagees.²⁴

Where the mortgage runs to a trustee, a sole beneficiary²⁵ may sue in

N. J.—*Freeman v. Freeman*, 17 N. J. Eq. 44. *N. Y.*—*Blake v. Corbett*, 120 N. Y. 327, 24 N. E. 477.

Foreclosure in equity is on the ground, "that the property may be sold under the direction of the court—that if it falls short of satisfying the debt, the mortgagee may have a decree for the residue, or, if there should be a surplus, that it may be awarded the mortgagor and so put an end to litigation." *Bryan v. Robert*, 1 Strobb. Eq. (S. C.) 334.

17. A statutory proceeding to foreclose under Rev. St. 1899, §4342, is an action at law rather than a suit in equity. *Brown v. Koffler*, 133 Mo. App. 494, 113 S. W. 711.

18. *Lee v. Fox*, 113 Ind. 98, 14 N. E. 889; *Long Dock Co. v. Mallory*, 12 N. J. Eq. 93.

Though he has absolute title to the goods at law after forfeiture and may sell them, or maintain an action at law against a wrongdoer for their conversion. *Freeman v. Freeman*, 17 N. J. Eq. 44.

Though he may recover possession thereof at law. *Forepaugh v. Pryor*, 30 Minn. 35, 14 N. W. 61; *Marx v. Davis*, 56 Miss. 745.

The remedy by suit is safer and more adequate than that of actual seizure and sale of the property or than the action of replevin, detinue, or trover. *Broom v. Armstrong*, 137 U. S. 266, 11 Sup. Ct. 73, 34 L. ed. 648.

19.—*U. S.*—*H. B. Clafin Co. v. Furtick*, 119 Fed. 429. *Colo.*—*Bennett v. Reef*, 16 Colo. 431, 27 Pac. 252. *Ind.*—*Lee v. Fox*, 113 Ind. 98, 14 N. E. 889. *Minn.*—*Forepaugh v. Pryor*, 30 Minn. 35, 14 N. W. 61. *Miss.*—*Green v. Gaston*, 56 Miss. 748; *McDonald v. Vinson*, 56 Miss. 497. *N. Y.*—*Briggs v. Oliver*, 68 N. Y. 336.

But see *Gilbert v. Block*, 51 Ill. App. 516.

20. *Meeker v. Waldron*, 62 Neb. 689, 87 N. W. 539; *Monnich v. Schwartz*, 4 Neb. (Unof.) 811, 96 N. W. 636.

21. *Packard v. Kingman*, 11 Iowa 219; *Meeker v. Waldron*, 62 Neb. 689, 87 N. W. 539; *Lexington Bank v. Wirges*, 52 Neb. 649, 72 N. W. 1049; *Monnich v. Schwartz*, 4 Neb. (Unof.) 811, 96 N. W. 636.

Federal Courts.—A statutory remedy in the state courts is no bar to a bill to foreclose in a federal court of equity. *H. B. Clafin v. Furtick*, 119 Fed. 429.

22. Where a mortgage was given to complainant to secure the payment of any money due him, and also any money due a third person, the latter was held to be a necessary party. *Chapman v. Hunt*, 14 N. J. Eq. 149.

In *Avery v. Popper* (Tex.), 48 S. W. 572, it was held that while two persons secured by a mortgage should have brought a single suit to foreclose, the proceedings in separate suits brought by them were not for that reason void, and where the mortgagors did not object, a third person claiming the property could not do so further than to insist that he should not be charged with the costs of two suits instead of one.

23. *Lyon v. Ballentine*, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284; *Walker v. White*, 60 Mich. 427, 27 N. W. 554; *Adams v. Niemann*, 46 Mich. 135, 8 N. W. 719; *Sloan v. Thomas*, Mfg. Co., 58 Neb. 713, 79 N. W. 728.

24. *Howard v. Chase*, 104 Mass. 249; *Lyon v. Ballentine*, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284.

25. *H. B. Clafin Co. v. Furtick*, 119 Fed. 429; *Peoples v. Harlow, Beine & Co.*, 89 Ark. 252, 116 S. W. 197.

his own name, though the trustee should be made a party plaintiff.²⁶

All persons claiming an interest in the mortgaged property may properly be joined as defendants,²⁷ but persons whose rights will not be affected need not be joined.²⁸

The mortgagor is a necessary party,²⁹ unless he has disposed of all his interest in the mortgaged property and no personal judgment is sought against him,³⁰ and even then he is a proper one.³¹ He is a necessary party to a suit by an equitable assignee, where he retains the legal title.³²

Vendees of the mortgagor are proper,³³ and necessary parties.³⁴

Subsequent mortgagees are proper but not necessary parties.³⁵ But they will be made parties on their own application.³⁶

A guarantor whose liability is conditioned upon the exhausting of the security is not a proper party defendant.³⁷

26. *Peoples v. Hayley, Beine & Co.*, 69 Ark. 252, 116 S. W. 197.

He is a proper party. *H. B. Claffin Co. v. Furtick*, 119 Fed. 429.

27. Any person may be joined as a defendant to answer as to his interest, but it must appear that the person so joined at least claimed to have some interest in the property in controversy. *Huff v. Clark*, 33 Ind. App. 606, 71 N. E. 910.

28. Mortgagor of a second mortgage is not a necessary party. *Gregory v. Cable*, 26 N. J. Eq. 178.

The corporation and other stockholders were held not to be necessary parties to a suit to foreclose a mortgage on corporate stock. *Thompson v. Grace*, 91 Ark. 52, 120 S. W. 397.

In *South Dakota v. North Carolina*, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. ed. 448, it was held that under a statute providing for the issuance of state bonds, each bond issued was secured by a separate mortgage of ten shares of stock, so that other bondholders were not necessary parties to a suit by one bondholder to foreclose.

29. *South Dakota v. North Carolina*, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. ed. 448; *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233, 10 Sup. Ct. 260, 33 L. ed. 589.

In an action against a storage company with whom the goods have been stored without the consent of the mortgagee. *Bauman v. Kuhn*, 103 N. Y. Supp. 773; *Fishel v. Hamilton Storage Warehouse Co.*, 86 N. Y. Supp. 196.

30. *Farnsley v. Anderson Foundry & Mach. Wks.*, 90 Ind. 120; *Weir v. Bathbun*, 12 Wash. 84, 40 Pac. 625.

31. *Farnsley v. Anderson Foundry & Mach. Wks.*, 90 Ind. 120.

32. Where foreclosure is sought in a court of equity by the equitable assignee of the mortgagee, the latter is a necessary party as he holds the legal title, and a decree of the court would not bind the legal title unless the owner was in court. *Fulgham v. Morris*, 75 Ala. 245; *Prout v. Hoge*, 57 Ala. 28.

33. Bill is not multifarious because it joins the mortgagor's vendees as defendants. *Greither v. Alexander*, 15 Iowa 470.

In Arizona a grantee who has assumed the payment of the mortgage debt may be joined, and a personal judgment may be recovered against him. *Kastner v. Fashion Livery Co.*, 10 Ariz. 23, 85 Pac. 120.

34. *Trittip v. Edwards*, 35 Ind. 467.

"In the case of personal estate, in order to consummate a sale, the possession would necessarily be changed, and this makes it necessary, where a third person is in possession, under a claim of right, that his title should be passed upon before the sale takes place." *Branch Bank of Mobile v. Taylor*, 10 Ala. 67.

35. *Rowan v. Mercer*, 10 Humph. (Tenn.) 359.

A second mortgagee was held not to be a necessary party where he acknowledged that plaintiff's lien was superior. *Thompson v. Grace*, 91 Ark. 52, 120 S. W. 397.

36. *Parrott v. Hughes*, 10 Iowa 459.

37. One who sells and transfers notes together with the mortgage securing them, with a conditional in-

The nonjoinder of necessary parties does not oust the court of jurisdiction, but the only effect is that the judgment is not binding against them.³⁸

(III.) *Pleading.* — The bill or complaint should contain a clear and exact statement of all material facts necessary to the plaintiff's cause of action.³⁹ It should show of what the mortgaged property consists,⁴⁰ the mortgagor's title or claim of title to it,⁴¹ and that it is within the jurisdiction of the court,⁴² and that there has been a breach of the conditions of the mortgage.⁴³

d. *By Sale Without Judicial Sanction.* (I) *Right To Sell.* — Chattel mortgages generally provide that, in case of default in payment of the mortgage debt or other breach of condition, the mortgagee may take possession of the property and sell the same to satisfy his claim,⁴⁴

dorsement obligating him to pay any balance that may remain due after the security has been exhausted cannot be joined as a defendant. *Smith v. Bradley* (N. D.), 112 N. W. 1062.

38. *Bauman v. Kuhn*, 108 N. Y. Supp. 773.

39. *Leader Pub. Co. v. Grant Trust & Sav. Co.* (Ind.), 91 N. E. 498; *Chapman v. Hunt*, 14 N. J. Eq. 149.

Complaint held sufficient as against a general demurrer. *Johnson v. Hibbard*, 27 Utah 342, 75 Pac. 737.

40. *Chapman v. Hunt*, 14 N. J. Eq. 149.

The description should correspond with that contained in the mortgage, but a slight variance will not render the complaint bad. *Scaling v. First Nat. Bank*, 39 Tex. Civ. App. 154, 87 S. W. 715.

Where a complaint describes the property in the same terms that were used in the mortgage the mortgagor cannot object to the sufficiency thereof where he himself wrote the description in the mortgage. *Boob v. Hall*, 107 Cal. 160, 40 Pac. 117.

A complaint to foreclose a mortgage given to secure certain bonds to be issued in the future must aver that such bonds were issued as provided for in the mortgage. *Leader Pub. Co. v. Grant Trust & Sav. Co.* (Ind.), 91 N. E. 498.

41. *Chapman v. Hunt*, 14 N. J. Eq. 149.

While the mortgagor's interest must be shown, it is not necessary to allege that he was the owner of the property at the time of the execution of the mortgage. *Edwards v. Trittip*, 62 Ind. 121.

42. *Chapman v. Hunt*, 14 N. J. Eq. 149.

Where there is an allegation that the note and mortgage were executed and mortgage recorded in the county which the suit was brought, it will be inferred that the property was in the county and consequently within the jurisdiction of the court at the commencement of the suit. *Tyler v. Toph*, 51 Fla. 597, 40 So. 624.

43. Failure of the complaint to allege that the debt is due is cured by filing a copy of the mortgage as an exhibit which shows that fact. *Baldwin v. Boyce*, 152 Ind. 46, 51 N. E. 334.

In a suit to foreclose a mortgage given to secure bonds the complaint was held to sufficiently show an election to mature the debt in advance of the time fixed for payment for default in the payment of interest. *Leader Pub. Co. v. Grant Trust & Sav. Co.* (Ind.), 91 N. E. 498.

Where based on an insecurity clause, the bill must allege facts to show that the security was imperiled, a mere allegation by way of conclusion that the mortgagee took possession because he felt unsafe and insecure being insufficient. *Watson v. Cudney*, 144 Ill. App. 624.

44. *Flanders v. Chamberlain*, 24 Mich. 305; *Briggs v. Oliver*, 68 N. Y. 336.

Neither the mortgagor nor the equitable owner that he represents can do anything to defeat the right of the mortgagee to foreclose by sale under a power contained in the mortgage. *Harvey v. Smith*, 179 Mass. 592, 61 N. E. 217.

and in some,⁴⁵ though not all,⁴⁶ of the states he is held to have this right even though the mortgage does not so provide. He may ordinarily proceed under a power of sale though the statute provides for a foreclosure by action.⁴⁷

Where a single mortgage runs to several mortgagees and is given to secure separate debts, one of them may foreclose separately under a power of sale,⁴⁸ but where the mortgage debt is not divisible all must join in a single proceeding.⁴⁹

In many states a sale without judicial sanction is provided for by statute,⁵⁰ and when such is the case the method therein provided may be resorted to though the mortgage contains a power of sale.⁵¹

(II.) **General Rules of Procedure.**—Statutory provisions as to the method of foreclosure must be substantially complied with, unless waived by the mortgagor.⁵²

In Georgia the mortgagee, on filing with the clerk of the superior court, or in some cases with a justice of the peace, the mortgage, or a sworn copy thereof, and an affidavit of the amount due thereon, is entitled to an execution directing the sale of the mortgaged property to satisfy the mortgage debt.⁵³

45. *Lee v. Fox*, 113 Ind. 98, 14 N. E. 889.

May sell it on due notice at public sale. *Wilson v. Brannon*, 27 Cal. 258.

46. The power of sale must be specifically given. *Kirkbride v. Bartz*, 82 Conn. 615, 74 Atl. 888.

47. *Dowie v. Christen*, 115 Iowa 364, 88 N. W. 830; *Geiser Mfg. Co. v. Krogman*, 111 Iowa 503, 82 N. W. 938.

A statute which provides that there shall be but one action for the enforcement of a right secured by a mortgage which shall be for the enforcement of the lien or mortgage, does not deprive the mortgagee of his right to sell without action. *Wilson v. Brannon*, 27 Cal. 258; *Bryant v. Carson-River L. Co.*, 3 Nev. 313, 93 Am. Dec. 403.

48. *Hutchins Hanks Coal Co. v. Walnut Land & Coal Co.*, 141 Mo. App. 251.

49. *Hutchins Hanks Coal Co. v. Walnut Land & Coal Co.*, 141 Mo. App. 251.

The objection is waived where the mortgagor consents to the purchase of the property by the single mortgagee instituting the proceedings and joins with him in the purchase. *Hutchins Hanks Coal Co. v. Walnut Land & Coal Co.*, 141 Mo. App. 251.

50. *Ariz.*—Civ. Code, 1901, §3292. *Cal.*—Sims Civ. Code, 1906, §2967. *Ia.*

McClains, Ann. Codes, 1888, §4543. *Idaho.*—Code, 1908, §§3413-3415. *Kan.* *Dasslers Gen. St.* 1909, §523. *Mass.* *Rev. L.* 1902, ch. 198, §5-7. *Minn.*—*Rev. L.* 1905, §3468. *Mont.*—Code, 1895, §3821. *Neb.*—*Cobbeys*, Ann. St. 1903, §§3901-6. *N. H.*—*Pub. St.* 1901, ch. 140, §20. *N. M.*—*Comp. L.* 1897, §2367. *Okla.*—*Comp. L.* 1909, §4416. *Ore.* *Bell. & C. Ann. Codes & St.* 1902, §5637. *B. I.*—*Gen. Laws* 1909, p. 901, §16. *S. D.*—*Rev. Code*, 1903, §2074, Civ. Code. *Utah.*—*Comp. Law* 1907, §160. *Vt.*—*Pub. St.*, 1906, §2636. *Wash.* *Rem. & Bell. Ann. Codes & St.* 1910, §1104. *Wis.*—*St.* 1898, §2316 (a). *Wyo.* *Comp. St.* 1910, §3735.

51. *Willis v. Jefferson*, 75 Ga. 743; *Pettee v. John Deere Plow Co.*, 11 Okla. 467, 68 Pac. 735.

52. *Geiser Mfg. Co. v. Krogman*, 111 Iowa 503, 82 N. W. 938; *Callen v. Rose*, 47 Neb. 638, 66 N. W. 639; *Loeb v. Milner*, 21 Neb. 392, 32 N. W. 205.

53. Code 1895, §§2753-2769. For construction of this statute see the following cases: *Waters v. Hughes*, 131 Ga. 725, 63 S. E. 214; *Arnold v. Carter*, 125 Ga. 319, 54 S. E. 177; *Ford v. Fargason*, 120 Ga. 606, 48 S. E. 180; *Green v. Rhodes*, 8 Ga. App. 301, 68 S. E. 1090. *Bainbridge Stock Co. v. Krause, McFarlin & Co.*, 8 Ga. App. 220, 68 S. E. 1013; *Ragan v. Coley & Bros.*, 4 Ga. App. 421, 61 S. E. 862;

(III.) *Notice.* — It is the general rule that the mortgagor is entitled to notice before sale of the mortgaged property to satisfy the debt. It is usual to provide for notice in the mortgage, and where such provision is made it must be strictly followed.⁵⁴ Unless waived by the mortgagor or changed by the terms of the mortgage, statutory provisions as to notice,⁵⁵ including those as to its form and contents,⁵⁶ and the manner of serving the same,⁵⁷ must be substantially complied with. But where the mortgage dispenses with notice, none need be given,⁵⁸ even though the statute provides for one.⁵⁹ The mortgagor may also waive notice by an agreement made after the execution of the mortgage.⁶⁰ In some states it is held that the purchaser will take a good title although notice is not given in accordance with the terms of the mortgage, and that the only remedy of the mortgagor in such case is by an action at law for damages.⁶¹ But in other jurisdictions the rule seems to be that unless the requirements as to notice are strictly complied with the sale will be invalid.⁶²

(IV.) *Conduct of Sale.* — Unless waived by the mortgagor, statutory provisions as to the method of foreclosure must be substantially complied with,⁶³ and a failure in this regard will render the mortgagee liable to account for the full value of the property coming into his

Meadows v. Alexander, 1 Ga. App. 40, 57 S. E. 901.

54. *Ala.*—*Speakman v. Vest*, 166 Ala. 235, 51 So. 980. *Ind.*—*Whitehead v. Coyle*, 1 Ind. App. 450, 27 N. E. 716. *Mich.*—*Kelsey v. Ming*, 118 Mich. 438, 76 N. W. 981; *Flanders v. Chamberlain*, 24 Mich. 305. *Mo.*—*Tobener v. Hassinbusch*, 56 Mo. App. 591.

55. *Kelsey v. Ming*, 118 Mich. 438, 76 N. W. 981; *Pickle v. Smally*, 21 Wash. 473, 58 Pac. 581.

Failure to give notice to the party in possession as required by statute renders the sale invalid. *Rawson v. Ellsworth*, 13 Wash. 667, 43 Pac. 934.

56. A notice given in the early part of the month stating that the sale would take place on the 25th of the same month was sufficient although it omitted to state the year. *Waite v. Denison*, 51 Ill. 319.

See the statutes of the various states.

57. A statute providing that the "notice shall be placed in the hands of the sheriff or other proper officer," will not empower a constable to serve the same. *Jacobson v. Aberdeen Pack Co.*, 26 Wash. 175, 66 Pac. 419.

Where the return showed substituted service on defendant's father, but did not show that defendant could not be found or that the attempted service was made at defendant's dwelling house, it was held that there was no

foreclosure. *Mitchell, Lewis & Staver Co. v. O'Neil*, 16 Wash. 108, 47 Pac. 235.

See the statutes of the various states.

58. *Ballou v. Cunningham*, 60 Barb. (N. Y.) 425; *Chamberlain v. Martin*, 43 Barb. (N. Y.) 607.

Where the mortgage provided for a private sale and made no provision for notice, a private sale without notice was held valid. *Rose v. Page*, 82 Mich. 105, 46 N. W. 227.

A sale without notice was held valid in view of a provision authorizing the mortgagee to take possession and sell at public sale without any liability for damages. *Geiser Mfg. Co. v. Krogman*, 111 Iowa 503, 82 N. W. 938.

59. *Harris v. Lynn*, 25 Kan. 281, 37 Am. Rep. 253.

60. *Reynolds v. Thomas*, 28 Kan. 810.

61. *Hungate v. Reynolds*, 72 Ill. 425, 37 Am. Rep. 168; *Campbell v. Wheeler*, 69 Iowa 588, 29 N. W. 613.

62. *Speakman v. Vest*, 166 Ala. 235, 51 So. 980; *Whitehead v. Coyle*, 1 Ind. App. 450, 27 N. E. 716.

63. *Callen v. Rose*, 47 Neb. 638, 66 N. W. 639; *Loeb v. Miliner*, 21 Neb. 392, 32 N. W. 205.

Such provisions are mandatory. *Coad v. Home Cattle Co.*, 32 Neb. 761, 49 N. W. 757, 29 Am. St. Rep. 465.

hands.⁶⁴ Such statutes are, however, designed for the protection of the mortgagor, and he may waive compliance therewith, either by a stipulation in the mortgage,⁶⁵ or by subsequent agreement.⁶⁶ Thus he may waive the statutory requirements as to advertisement,⁶⁷ and as to the time⁶⁸ and manner of conducting the sale.⁶⁹ The sale must be made in strict accord with the terms of the mortgage,⁷⁰ unless its provisions waived or changed by subsequent agreement.⁷¹ It must be fair and open in all respects,⁷² and the mortgagee must exercise good faith and proper care and diligence to avoid any unnecessary sacrifice of the mortgagor's rights.⁷³

The property may be sold at private sale where the mortgage so provides,⁷⁴ even though the statute provides for a public one.⁷⁵ In some states it is held that a mortgagee in possession may lawfully sell at private sale, notwithstanding the mortgage requires a public one,⁷⁶ but that if he does so he will be liable to the mortgagor for any resulting injury.⁷⁷ In many jurisdictions, however, a private sale under

64. *Callen v. Rose*, 47 Neb. 638, 66 N. W. 639; *Coad v. Home Cattle Co.*, 32 Neb. 761, 49 N. W. 757, 29 Am. St. Rep. 465.

65. *Geiser Mfg. Co. v. Krogman*, 111 Iowa 503, 82 N. W. 938; *Lexington Bank v. Wirges*, 52 Neb. 649, 72 N. W. 1049.

66. *Reynolds v. Thomas*, 28 Kan. 810; *Welcome v. Mitchell*, 81 Wis. 566, 51 N. W. 1080, 29 Am. St. Rep. 913; *Stevens v. Breen*, 75 Wis. 595, 44 N. W. 645.

67. *Darnell v. Darlington*, 28 S. C. 255, 5 S. E. 620.

68. A sale before the time fixed by statute is valid where the mortgagor consents thereto. *Patrick & Co. v. Deschamp*, 145 Wis. 224, 129 N. W. 1096; *Stevens v. Breen*, 75 Wis. 595, 44 N. W. 645.

69. That the property must be in actual view at the time of the sale. *Lexington Bank v. Wirges*, 52 Neb. 649, 72 N. W. 1049.

70. U. S.—*Kohn v. Dravis*, 94 Fed. 288, 36 C. C. A. 253. Mich.—*Flanders v. Chamberlain*, 24 Mich. 305. Mo.—*Tobener v. Hassinbusch*, 56 Mo. App. 591, 596.

Otherwise the mortgagee will be deemed guilty of conversion. *Jones v. Horn*, 51 Ark. 19, 9 S. W. 309, 14 Am. St. Rep. 17.

71. The place of sale as fixed by the mortgage may be changed by subsequent agreement. *Tootle v. Taylor*, 64 Iowa 629, 21 N. W. 115.

72. An agreement between the mortgagee and the purchaser for the

purpose of suppressing the bidding and depressing the price renders the sale void. *Henderson-Snyder Co. v. Polk*, 149 N. C. 104, 62 S. E. 904.

73. Ia.—*Johnston & Son v. Robuck*, 104 Iowa 523, 73 N. W. 1062. Mich.—*Croze v. St. Mary's Canal M. Land Co.*, 153 Mich. 363, 117 N. W. 81. Minn.—*Stromberg v. Lindberg*, 25 Minn. 513.

Inadequacy of price is not ground for setting aside the sale in the absence of fraud or bad faith or want of diligence. *Tootle v. Taylor*, 64 Iowa 629, 21 N. W. 115; *Gear v. Schrei*, 57 Iowa 666, 11 N. W. 625.

74. *Johnston & Son v. Robuck*, 104 Iowa 523, 73 N. W. 1062.

75. Kan.—*Reynolds v. Thomas*, 28 Kan. 810; *Harris v. Lynn*, 25 Kan. 281, 37 Am. Rep. 253. Neb.—*Lexington Bank v. Wirges*, 52 Neb. 649, 72 N. W. 1049. Wash.—*Sheehan v. Levy*, 1 Wash. 149, 23 Pac. 802. Wis.—*Welcome v. Mitchell*, 81 Wis. 566, 51 N. W. 1080, 29 Am. St. Rep. 913.

76. *McConnell v. People*, 84 Ill. 583; *Seaton v. Ruff*, 29 Ill. App. 235.

77. *McConnell v. People*, 84 Ill. 583; *Seaton v. Ruff*, 29 Ill. App. 235.

The mortgagor may acquiesce in the sale and may recover in an action at law the difference between the market value of the property and the amount of the mortgage debt. *Tobener v. Hassinbusch*, 56 Mo. App. 591.

In such case the mortgagee is chargeable with the full value of the property, irrespective of the amount actually received at the sale. Md.—*Booth v. Baltimore Steam Packet Co.*, 63 Md.

such circumstances is regarded as a conversion.⁷⁸

Ordinarily only so-much of the property should be sold as is necessary to satisfy the mortgage debt,⁷⁹ especially where the mortgage so provides.⁸⁰

Where the matter is not controlled by the statute or the terms of the mortgage, whether the mortgaged articles should be sold separately, in lots, or in bulk depends largely on their character and the circumstances of each case.⁸¹

A valid mortgage is not extinguished by an irregular sale, but the purchaser succeeds to the rights of the mortgagee.⁸² If the sale is made in good faith, a mere irregularity will not subject the purchaser or mortgagee to an action of tort in which the whole value of the property may be recovered, leaving the mortgage debt unpaid.⁸³

(V.) **Purchase by Mortgagee.** — The right of the mortgagee to become

39. *Mich.*—*Botsford v. Murphy*, 47 *Mich.* 537, 11 N. W. 375. N. J.—*Bird v. Davis*, 14 N. J. Eq. 467.

See also *Warwick v. Hutchinson*, 45 N. J. L. 61.

78. *Colby v. Kimball & Co.*, 99 *Iowa* 321, 68 N. W. 786; *Howery v. Hoover*, 97 *Iowa* 581, 66 N. W. 772.

A mortgagee was held not to be liable for conversion for selling at private sale after the property had been turned over to her by the mortgagor that she might satisfy her claim out of it. *W. A. Jordan Co. v. Sperry Bros.*, 141 *Iowa* 225, 119 N. W. 692.

Measure of Damage.—Is liable for the value of the property, less the amount of the mortgage debt. *Anderson v. Joseph* (Ark.), 130 S. W. 165.

79. If the mortgagee unnecessarily sells the whole, he is liable to the mortgagor for his resulting damages, especially where he acts in bad faith. *Stromberg v. Lindberg*, 25 *Minn.* 513.

In *Croze v. St. Mary's Canal M. Land Co.*, 153 *Mich.* 363, 117 N. W. 81, it was held that the mortgagee was not required to sell the mortgaged logs one by one until it had realized enough to satisfy the mortgage, but that it might sell them in quantities, and so long as it acted reasonably was liable only for the surplus left in its hands.

80. In such case the mortgagee is liable for the market value of any goods sold in excess of that amount. *Kohn v. Dravis*, 94 *Fed.* 288, 291, 36 C. C. A. 253.

81. *Johnston & Son v. Robuck*, 104 *Iowa* 523, 73 N. W. 1062.

Mortgaged logs need not be sold one by one until enough is realized to satisfy the mortgage, but may be sold in

quantities. *Croze v. St. Mary's Canal M. Land Co.*, 153 *Mich.* 363, 117 N. W. 81.

A sale will not be set aside because the property was sold in lots, where there is no showing that it was improper to so sell it or that a better price could have otherwise been obtained. *Tootle v. Taylor*, 64 *Iowa* 629, 21 N. W. 115.

May be sold in bulk by agreement. *Gear v. Schrei*, 57 *Iowa* 666, 11 N. W. 625.

82. *Kelsey v. Ming*, 118 *Mich.* 438, 76 N. W. 981.

83. *Rose v. Page*, 82 *Mich.* 105, 46 N. W. 227.

The court distinguished *Culbertson v. Young*, 50 *Mich.* 190, 15 N. W. 77, saying: "That was a bill to redeem; and the facts were that the assignee of a chattel mortgage to secure a number of notes transferred some, with the power of sale, but retained a junior interest in the mortgage much larger than that which he transferred. The transferee foreclosed without notice to the holder of the junior interest, and with no other notice to the public than by posting notices the night before the sale, and tearing them down immediately afterwards. The question of notice, under the circumstances of this case, was not involved in that one. That the defendant acted in good faith is settled by the verdict of the jury. Under such circumstances the proper remedy for the plaintiff was by a bill to redeem, in which proceedings the rights of all parties could be protected, or, if she chose, to ratify the sale, and bring an action of *assumpsit* to recover the surplus."

the purchaser of the mortgaged property at his own foreclosure sale differs in the different states. In some states the right is given by statute, provided the sale is fairly and openly made.⁸⁴ Where the statute is silent on the subject, some courts hold that such a purchase by the mortgagee does not render the sale void, provided he acts fairly, and in good faith,⁸⁵ but at most casts the burden on the mortgagee to show that the sale was fairly and openly made, in strict compliance with the power and that the price paid was not so clearly and grossly disproportioned to the value of the property as to raise presumption of fraud or bad faith,⁸⁶ or renders the sale voidable at the election of the mortgagor.⁸⁷ In some jurisdictions, however, it is held that the mortgagee cannot become the purchaser even though the price paid be the fair value of the property.⁸⁸ In any event such a sale is valid where the mortgage expressly authorizes the mortgagee to purchase,⁸⁹ or where the mortgagor consents to his doing so,⁹⁰ or subsequently ratifies a sale to him.⁹¹

e. *Disposition of Proceeds.*—*Surplus.*—After the mortgagee has satisfied his claim from the proceeds derived from the sale of the mortgaged property he is a trustee as to any surplus remaining and must account for the same to the mortgagor or to any other person who has acquired the rights of the latter in the property.⁹² And in case he

84. Mich.—How. Com. St. 1897, §9530; *Castner v. Darby*, 123 Mich. 241, 87 N. W. 199; *Manwaring v. Jenison*, 61 Mich. 117, 142, 27 N. W. 899. Minn.—Rev. L. 1905, §3473. Neb.—Cobbeys Ann. St., 1903, §3906. Okla. Com. L. 1909, §4419. R. I.—Gen. L. 1909, p. 901, §16. S. D.—Civ. Code, 1903, §2083. Utah.—Com. L. 1907, §162. Wyo.—Com. St. 1910, §3742.

85. Ind.—Syfers v. Bradley, 115 Ind. 345, 16 N. E. 805, 17 N. E. 619; *Emons v. Hawn*, 75 Ind. 356. Ia.—*Richardson v. Coffman*, 87 Iowa 121, 54 N. W. 356. Kan.—*Wygall v. Bigelow*, 42 Kan. 477, 22 Pac. 612. Mo.—*Parker v. Roberts*, 116 Mo. 657, 22 S. W. 914; *Moore v. Ryan*, 31 Mo. App. 474. *Contra*, *Byrne v. Carson*, 70 Mo. App. 126; *Moore v. Thompson*, 40 Mo. App. 195. N. Y.—*French v. Powes*, 120 N. Y. 128, 24 N. E. 296; *Casserly v. Witherbee*, 119 N. Y. 522, 23 N. E. 1000; *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 87 Am. Dec. 298. S. C.—*Black v. Hair*, 2 Hill Eq. 622. Tex.—*Goodgame v. Rushing*, 35 Tex. 723.

In *Boyd v. Baudin*, 54 Wis. 193, 11 N. W. 521, a sale to the mortgagee at an inadequate price was set aside.

86. Ind.—*Lee v. Fox*, 113 Ind. 98, 14 N. E. 889. Kan.—*Wygall v. Bigelow*, 42 Kan. 477, 22 Pac. 612, 16 Am. St. Rep. 495. Mo.—*Parker v. Roberts*, 116 Mo. 657, 22 S. W. 914.

87. *Moore v. Ryan*, 31 Mo. App. 474. Such a sale is voidable in equity for fraud or bad faith. *Parker v. Roberts*, 116 Mo. 657, 22 S. W. 914; *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 298.

88. Ark.—*Imboden v. Hunter*, 23 Ark. 622, 74 Am. Dec. 116. Ill.—*Waite v. Dennison*, 51 Ill. 319. Md.—*Korns v. Shaffer*, 27 Md. 83.

If he does so, he is liable to the mortgagor for the actual value of the property. *Lynch v. Naylor*, 63 Ill. App. 107. *Smith v. French*, 152 N. C. 754, 67 S. E. 249.

A mortgagee who purchases at his own sale is liable to holders of other notes secured by the mortgage. *Beard v. Westerman*, 32 Ohio St. 29.

89. *Clarkson v. Mullin*, 62 Mo. App. 622.

In such case he may purchase indirectly through another. *Jewell Pure Water Co. v. Kansas City Towel & L. Co.*, 74 Mo. App. 150.

90. *Goodell v. Dewey*, 100 Ill. 308.

91. If he acquiesces in it with knowledge of the facts, it will not be set aside in equity. *Moore v. Ryan*, 31 Mo. App. 474.

92. Colo.—*First Nat. Bank of Colo. Springs v. Wilbur*, 16 Colo. 316, 26 Pac. 777. Ia.—*Hoffman v. Wetherell*, 42 Iowa 89. Kan.—*Wygall v. Bigelow*, 42 Kan. 477, 22 Pac. 612, 16 Am. St.

fails to turn over such surplus an action will lie by any one entitled thereto for the same either at law,⁹³ or in equity.⁹⁴ Where the foreclosure is effected by a suit in equity, any surplus may be awarded to the mortgagor by the decree.⁹⁵ A second mortgagee may recover a surplus accruing on a foreclosure under the first mortgage,⁹⁶ and may elect whether he will pursue the property by foreclosure or bring suit for conversion.⁹⁷

Deficiency. — Ordinarily where a sale under a power does not produce a sum sufficient to pay the mortgage debt, the mortgagee may maintain an action for the balance.⁹⁸ Where the mortgagee sells the property without foreclosure, however, he is not entitled to recover for a deficiency.⁹⁹

In some states a deficiency judgment may be rendered in a suit in equity to foreclosure.¹

III. CRIMINAL ACTIONS. — An indictment for selling or disposing of mortgaged property must set forth all the elements necessary to constitute the offense.² Thus it must set forth facts to show the

Rep. 495; *Cooper v. First Nat. Bank*, 40 Kan. 5, 18 Pac. 937; *Denny v. Faulkner*, 22 Kan. 89. **Ky.**—*Hawkins Furniture Co. v. Morris*, 143 Ky. 738, 137 S. W. 527. **Mo.**—*White v. Quinlan*, 30 Mo. App. 54. **N. C.**—*Penny v. Ludwick*, 152 N. C. 375, 67 S. E. 913; *Wick v. Smith*, 83 N. C. 80. **Ohio.** *Root v. Davis*, 51 Ohio St. 29, 36 N. E. 669, 23 L. R. A. 445. **S. C.**—*Reese v. Lyon*, 20 S. C. 17. **Wis.**—*Flanders v. Thomas*, 12 Wis. 410.

The debt, interest and any expenses must be paid before anyone is entitled to any surplus. *Howard v. Gemming*, 10 Wash. 1, 38 Pac. 478.

The necessary and proper costs of foreclosure must be allowed to the mortgagee. *Keairnes v. Durst*, 110 Iowa 114, 81 N. W. 238.

93. He may maintain assumpsit therefor. *Flanders v. Chamberlain*, 24 Mich. 305; *White v. Quinlan*, 30 Mo. App. 54.

94. He is entitled to an accounting in equity. *Martin v. Jenkins*, 51 S. C. 42, 27 S. E. 947.

Where the mortgage provides that the mortgagee may take possession on default and sell the property and provides further that he shall pay the surplus to the mortgagor, he becomes a trustee for the mortgagor as to such surplus and in case he refuses to return the same a court of equity will compel him to render an accounting. *Korns v. Shaffer*, 27 Md. 83.

95. *Lee v. Fox*, 113 Ind. 98, 14 N. E. 889.

96. *White v. Quinlan*, 30 Mo. App. 54.

97. *Stewart v. Long*, 16 Ind. App. 164, 44 N. E. 63.

98. *Lee v. Fox*, 113 Ind. 98, 14 N. E. 889.

99. Where an attempted foreclosure under the statute is void. *Mitchell & Co. v. O'Neil*, 16 Wash. 108, 47 Pac. 235.

As to necessity of foreclosure by suit see *Landon v. White*, 101 Ind. 249.

1. *Hartman v. Pistorius*, 248 Ill. 568, 94 N. E. 131.

Such a judgment may be recovered against a grantee of the mortgagor who has assumed the payment of the mortgage debt. *Kastner v. Fashion Livery Co.*, 10 Ariz. 23, 85 Pac. 120.

2. *State v. Gustafson*, 50 Iowa 194; *State v. Hughes*, 38 Neb. 366, 56 N. W. 982.

An indictment that the defendant "did remove, conceal, or sell a horse, the personal property of A. H., for the purpose of hindering, delaying, or defrauding the said A. H., who had a claim to said horse under a written instrument, to wit: a mortgage; he, the said defendant then and there having knowledge of the existence of said written instrument or mortgage," contains a statement of all the facts necessary to constitute the offense. *Glenn v. State*, 60 Ala. 104.

An indictment charging in a single count that the defendant removed and concealed, and that he aided and abetted in removing and selling the

execution and delivery of a valid mortgage,³ and that it was still valid, subsisting and unpaid when the alleged offense was committed.⁴ It should describe the property so that it can be identified as that covered by the mortgage,⁵ and allege its value at the time of the sale.⁶ Intent to defraud need not be alleged, unless an essential element of the offense.⁷ The manner of disposal should be set out,⁸ and that it

mortgaged property is not bad as either of these allegations is sufficient with the other allegations of the indictment to constitute the offense charged. *Com. v. Wallace*, 108 Mass. 12.

Venue.—By statute in Arkansas where the venue is not laid in the indictment the offense will be considered as having been alleged to have been committed within the jurisdiction of the court in which the indictment is found. *Hampton v. State*, 67 Ark. 266, 54 S. W. 746.

Ownership.—An indictment is not defective because it alleges that the administrators of the mortgagees are the holders of the mortgage upon the property, which is charged to have been disposed of. *State v. Maxey*, 41 Tex. 524.

3. An allegation that the mortgagor executed and delivered to the mortgagees a valid mortgage in writing specifying the date and naming the parties is sufficient. *Haile v. State (Tex.)*, 43 S. W. 999.

It must be alleged that the mortgage was in writing and that the injured party was the holder of the lien. *Moye v. State*, 9 Tex. App. 88.

An averment that the mortgage was valid is only a legal conclusion. *Keyes v. People*, 100 Ill. App. 163.

Conditional Mortgage.—An indictment charging the defendant with selling property conditionally mortgaged and which fails to allege that the mortgage had become absolute is bad. *State v. Devereux*, 41 Tex. 383.

An indictment for the disposal of a crop which was mortgaged before being planted should allege, "that the accused executed a mortgage upon a crop to be planted—that the same was afterwards planted by him, that when the same was planted and was growing or grown the said mortgage attached to and became a lien upon the same; and that the accused fraudulently disposed of the same, etc." *Mooney v. State*, 25 Tex. App. 31, 7 S. W. 587.

Ownership by defendant need not be alleged. *State v. Williams*, 32 Minn. 537, 21 N. W. 746.

Exhibits.—Attaching a copy of the mortgage to the indictment as an exhibit instead of incorporating it into the body of the same is objectionable practice but upon demurrer the exhibit will be deemed a part of the indictment. *State v. Williams*, 32 Minn. 537, 21 N. W. 746.

4. *Satchell v. State*, 1 Tex. App. 438.

It is necessary to allege the existence of the debt which the mortgage was given to secure at the time the offense was committed. *McCaskill v. State*, 68 Ark. 490, 60 S. W. 234.

That the debt was unpaid and the lien in force at the time of the sale. *State v. Burns*, 80 N. C. 376.

5. *Hampton v. State*, 124 Ga. 3, 52 S. E. 19.

It is not necessary to use the exact words of the mortgage. *Com. v. Strangford*, 112 Mass. 289.

Where the indictment described the mortgage as executed and delivered to M. Cartwright, and in the mortgage the word "Trustee" followed the name Cartwright, the difference was held not to be a variance. *Sweat v. State (Tex. Crim.)*, 59 S. W. 265.

6. *State v. Ladd*, 32 N. H. 110.

Where value is material in determining the grade of the offense and the extent of the punishment. *State v. Perry*, 87 S. C. 735, 70 S. E. 304.

7. *State v. Hurds*, 19 Neb. 316, 27 N. W. 139.

8. *State v. Burns*, 80 N. C. 376; *State v. Pickens*, 79 N. C. 652.

A count charging that the defendant, did "sell, barter, or otherwise dispose of," the property is bad for uncertainty. *Cooper v. State*, 37 Ark. 412.

It is not necessary to set out the manner of the disposal in alleging the intent, where it is alleged in the stating part immediately preceding that the defendant sold the property. *State*

was made without the consent of the holder of the mortgage.⁹ In some jurisdictions it is not necessary to state the name of the person to whom the property was sold,¹⁰ but a contrary rule prevails in others.¹¹ It is not necessary to aver that the mortgage was recorded,¹² unless a recorded lien is essential to the commission of the offense.¹³ An indictment substantially following the language of the statute is sufficient.¹⁴

v. Crawford, 64 Ark. 194, 41 S. W. 425.

9. *State v. Hughes*, 38 Neb. 36, 56 N. W. 982.

It need not be alleged that the disposal was without written consent. *State v. Pepin*, 22 Ind. App. 373, 53 N. E. 842; *State v. Munsen*, 72 Mo. App. 543. *Contra*, *State v. Hughes*, 38 Neb. 366, 56 N. W. 982.

10. **Ark.**—*State v. Crawford*, 64 Ark. 194, 41 S. W. 425. **Neb.**—*State v. Hughes*, 38 Neb. 366, 56 N. W. 982. **S. C.**—*State v. Perry*, 87 S. C. 735, 70 S. E. 304.

11. *State v. Burns*, 80 N. C. 376; *State v. Pickens*, 79 N. C. 652; *Armstrong v. State*, 27 Tex. App. 462, 11 S. W. 462.

The indictment must allege his name, or if his name be unknown it must state such fact. *Alexandria v. State*, 27 Tex. App. 94, 10 S. W. 764.

12. *State v. Barnett*, 65 Ark. 80, 44 S. W. 1037.

13. *State v. Harbetson*, 43 Ark. 378.

14. *State v. Hurds*, 19 Neb. 316, 27 N. W. 139; *State v. Perry*, 87 S. C. 735, 70 S. E. 304.

CHOICE AND ELECTION OF REMEDIES

By WALTER CLARK,
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I. DEFINITION.—Election of remedies has been defined as the choice between two or more co-existing and inconsistent remedies, in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both.¹

1. 2 Story's Eq. Jur. §1075. See also Cyclopedic Law Dict., p. 311; Bouv. Law. Dict., p. 646, and the following cases: Idaho.—Elliott v. Collins, 6 Idaho 266, 55 Pac. 301. Neb.—Turner v. Grimes, 75 Neb. 412, 106 N. W. 465; Pekin Plow Co. v. Wilson, 66 Neb. 115, 92 N. W. 176; State v. Bank of Commerce, 61 Neb. 22, 84 N. W. 406. N. C.—Sigmon v. Hawn, 87 N. C. 450. Wis.—Rowell v. Smith, 123 Wis. 510, 102 N. W. 1. Eng.—Ker v. Wauchope, 1 Bligh 1, 4 Eng. Reprint 1, 3 Eng. Rul. Cas. 310.

General Rule.—The general rule as to the election of remedies is that, where a party has a right to choose one of two or more appropriate, but inconsistent, remedies, and with full knowledge of all the facts of the case, and of his rights, makes deliberate choice of one, then he is bound by his election, and is estopped from again electing or resorting to the other remedy,² although the judgment obtained in the

See generally "Introduction," Vol. I; and articles dealing with specific actions throughout this work.

"Election is simply what its name imports; a choice shown by an overt act between two inconsistent rights, either of which may be asserted at the will of the chooser alone." *Wm. W. Bierce v. Hutchins*, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. ed. 828, reversing 16 Hawaii 717.

Every case of election "presupposes a plurality of gifts or rights, with an intention express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefits of both." 2 Story's Eq. Jur. §1075. See also note (5) to *Dillon v. Parker*, 1 Swanst. 359, 394, 36 Eng. Reprint 422, 433, 436; *Thellusson v. Woodford*, 13 Ves. 209, 220, 33 Eng. Reprint 273, 277.

Election goes not to the form, but to the essence of the remedy. *Ullrich v. Bigger*, 81 Kan. 756, 106 Pac. 1073; *Sweet v. Montpelier Sav. Bank & Trust Co.*, 69 Kan. 641, 77 Pac. 538.

Foundation of Rule.—"The foundation of the rule is that no one can be permitted to accept and reject the same instrument; and in every case therefore, coming before the courts in which such alternative rights are presented, there is but one thing left to be done, and that is to ascertain the intention of the party from whom the last right emanates, and to know whether that intention would be frustrated by permitting both rights to be enjoyed by the same person." *Sigmon v. Hawn*, 87 N. C. 450.

"The doctrine of election of remedies is conceived to be founded in the very just idea that a party ought not to be needlessly harassed with litigation." *O'Meara v. McDermott* (Mont.), 115 Pac. 912.

When Applicable.—"The doctrine of election of remedies applies to cases where there is by law or by contract

a choice between two remedies which proceed on opposite and irreconcilable claims of right." *In re Garver*, 176 N. Y. 386, 68 N. E. 667.

The doctrine of election of remedies is usually predicated upon inconsistent remedial rights. III.—*Stier v. Harms*, 154 Ill. 476, 40 N. E. 296. Mass.—*Snow v. Alley*, 156 Mass. 193, 30 N. E. 691, citing *Metcalf v. Williams*, 11 N. E. 700. Mich.—*Thompson v. Howard*, 31 Mich. 309. Minn.—*Dyckman v. Sevaton*, 39 Minn. 132, 39 N. W. 73. Mo. *Hill v. Coombs*, 92 Mo. App. 242. Neb. *State v. Bank of Commerce*, 61 Neb. 22, 84 N. W. 406. N. Y.—*Mills v. Parkhurst*, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472; *Bowen v. Mandeville*, 95 N. Y. 237. Pa.—*Patterson v. Swan*, 9 Serg. & R. 16. See *infra*, II, B.

2. *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958. See also U. S.—*United States v. Yuen Pak Sune*, 183 Fed. 260, 266. Ala.—*Calhoun County v. Art Metal Const. Co.*, 152 Ala. 607, 44 So. 876. Minn.—*Aho v. Republic Iron & Steel Co.*, 104 Minn. 322, 116 N. W. 590. Miss.—*Watson v. Perkins*, 88 Miss. 64, 76, 40 So. 643.

No Election When Remedies Concurrent.—"An election exists only where two or more inconsistent remedies are open to a party, and he is at liberty to pursue any one of them. It cannot exist between consistent concurrent remedies, or between a rightful remedy and one which the party may mistakenly suppose to be applicable." *Redhead Bros. v. Wyoming Cattle Co.*, 126 Iowa 410, 102 N. W. 144. All the Iowa cases are in strict harmony with this rule and it is also the general rule in other jurisdictions. *Zimmerman v. Robinson*, 128 Iowa 72, 102 N. W. 814.

Election Not Conclusive.—An action brought against one standing in a parental relation to an infant for the negligence of the infant, which action was dismissed, does not preclude the

first action fails to afford relief to the party making the election.³

Election and Mistake Distinguished. — Election is to be distinguished from mistake as to remedy. The pursuit of a remedy which one supposes he possesses, but which in fact has no existence, is not an election between remedies, but a mistake as to the available remedy, and will not prevent a subsequent recourse to whatever remedial right was originally available.⁴ This rule applies whether the mistake be of

bringing of an action against the infant upon his becoming of age when the question of negligence and infancy were not reached nor disposed of in the former case. *Chaddock v. Tabor*, 115 Mich. 27, 72 N. W. 1093.

3. *First Nat. Bank v. Wallis*, 34 Hun 376, 32 N. Y. Supp. 382, 65 N. Y. St. 588.

Difference Between Election and Estoppel. — "The doctrine of election of remedies differs from that of estoppel in its broadest sense in that the party invoking it need not show that he will suffer some material disadvantage unless his adversary be required to abide by his election." *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958, citing *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1; *Spurr v. Home Ins. Co.*, 40 Minn. 424, 42 N. W. 206; *Dyckman v. Sevaton*, 39 Minn. 132, 39 N. W. 73; *Thomas v. Joslin*, 36 Minn. 1, 29 N. W. 344, 1 Am. St. Rep. 624. To same effect, *Aho v. Republic Iron & Steel Co.*, 104 Minn. 322, 116 N. W. 590. See, however, *Trimble v. Wollman*, 71 Mo. App. 467, holding that in Missouri "election is in the nature of an estoppel and unless it is shown by the record of a final judgment, or contains the elements of an estoppel *in pais* owing to intervening rights, it will not conclude the party against whom it is invoked." See also *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 142 U. S. 396, 415, 12 Sup. Ct. 188, 35 L. ed. 1055; *Bolton M. Co. v. Stokes*, 82 Md. 50, 33 Atl. 491.

Necessity of Making Proper Choice. "The necessity of making a proper choice as the preliminary step arises from the consideration that after a party has once chosen to proceed by one of two inconsistent remedies, he is held to have elected and is thereafter barred from pursuing a remedy based on a right inconsistent with that set up by the remedy chosen, and growing out of the same subject of controversy." *Will's Gould Pl.*, 59.

4. **U. S.** — *Wm. W. Bierce v. Hutchins*, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. ed. 828, reversing 16 Hawaii 717; *Northern Assur. Co. v. Grand View Bldg. Assn.*, 203 U. S. 106, 27 Sup. Ct. 27, 51 L. ed. 109; *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 2 L. R. A. (N. S.) 1153; *Standard Oil Co. v. Hawkins*, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739; *Brown v. Fletcher*, 182 Fed. 963, 971, 105 C. C. A. 425; *Greenhall v. Carnegie Trust Co.*, 180 Fed. 812, 821; *Elgin Nat. Watch Co. v. Meyer*, 29 Fed. 225. **Cal.** *Agar v. Winslow*, 123 Cal. 587, 56 Pac. 422, 69 Am. St. Rep. 84. **Fla.** — *Hays v. Weeks*, 57 Fla. 73, 48 So. 997; *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 123, 47 So. 942. **Ind.** — *Bunch v. Grave*, 111 Ind. 351, 12 N. E. 514. **Ia.** — *Asher v. Pegg*, 146 Iowa 541, 123 N. W. 739; *Moon v. Hartsuck*, 137 Iowa 236, 114 N. W. 1043; *Zimmerman v. Robinson*, 128 Iowa 72, 102 N. W. 814, 5 A. & E. Ann. Cas. 960; *Redhead Bros. v. Wyoming Cattle Co.*, 126 Iowa 410, 102 N. W. 144. **Kan.** — *McKim v. Carre*, 72 Kan. 461, 83 Pac. 1105, proceeding under an unconstitutional statute. **Me.** *Marsh Bros. & Co. v. Bellefeur*, 81 Atl. 79; *Clark v. Heath*, 101 Me. 530, 64 Atl. 913, 8 L. R. A. (N. S.) 144. **Mass.** — *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760, 42 Am. St. Rep. 424, 25 L. R. A. 42; *Snow v. Alley*, 156 Mass. 193, 30 N. E. 691; *Metcalf v. Williams*, 144 Mass. 452, 11 N. E. 700; *Peters v. Ballistier*, 3 Pick. 495, 505. **Mich.** — *First Nat. Bank v. Sweet*, 136 Mich. 615, 99 N. W. 861; *Shanahan v. Coburn*, 128 Mich. 692, 87 N. W. 1038; *Glover v. Radford*, 120 Mich. 542, 79 N. W. 803; *Sullivan v. Ross' Estate*, 113 Mich. 311, 76 N. W. 309, 71 N. W. 634; *McLaughlin v. Austin*, 104 Mich. 489, 62 N. W. 719. **Miss.** *Tucker v. Wilson*, 68 Miss. 693, 9 So. 898; *Conn v. Bernheimer*, 67 Miss. 498, 7 So. 345. **Mo.** — *Johnson-Brinkman Com. Co. v. Missouri Pac. R. Co.*,

126 Mo. 344, 28 S. W. 870. **Mont.** Kaufman v. Cooper, 39 Mont. 146, 101 Pac. 969. **Neb.**—Moas v. Marks, 70 Neb. 701, 97 N. W. 1031; State v. Bank of Commerce, 61 Neb. 22, 84 N. W. 406; Chicago, B. & Q. R. Co. v. Bigley, 1 Neb. (Unof.) 225, 95 N. W. 344. **N. H.**—Gould v. Blodgett, 61 N. H. 115; Kittredge v. Holt, 58 N. H. 191. **N. J.** Dunham v. Ewen, 15 Atl. 245; Macknet v. Macknet, 29 N. J. Eq. 54. **N. Y.** Henry v. Herrington, 193 N. Y. 218, 86 N. E. 29; Morris v. Rexford, 18 N. Y. 552; White v. Whiting, 8 Daly 23; Baird v. Erie R. Co., 129 N. Y. Supp. 329, 346. **N. D.**—McFadden v. Thorpe Elev. Co., 18 N. D. 93, 118 N. W. 242. **Ohio.**—Becker v. Walworth, 45 Ohio St. 169, 12 N. E. 1. **Ore.**—Powell v. Dayton, S. & G. R. Co., 16 Ore. 33, 16 Pac. 863, 8 Am. St. Rep. 251. **Pa.** In re Woodburn's Estate, 138 Pa. 606, 21 Atl. 16. **R. I.**—Whipple v. Stephens, 25 R. I. 563, 57 Atl. 375. **Tex.**—Wilson v. Carroll (Tex. Civ. App.), 50 S. W. 222; Bandy v. Cates, 44 Tex. Civ. App. 38, 97 S. W. 710. **Vt.**—Holbrook v. J. J. Quinlan & Co., 80 Atl. 339; Priest v. Foster, 69 Vt. 417, 38 Atl. 78. **Wis.**—Astin v. Chicago, St. P. & M. R. Co., 143 Wis. 477, 128 N. W. 265; Powell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 Am. & Eng. Ann. Cas. 773. **Eng.**—Spread v. Morgan, 11 H. L. Cas. 588, 615, 11 Eng. Reprint 1461. And see **Ill.**—Fisher v. Brown, 111 Ill. App. 486, 492. **Ia.**—Wells v. Western Union Tel. Co., 144 Iowa 605, 123 N. W. 371. See also Dooley v. Crabtree, 134 Iowa 465, 109 N. W. 889. **Mass.**—Morris v. Robinson, 3 Barn. & C. 196, 107 Eng. Reprint 706; Nightingal v. Devisme, 5 Burr. 2589, 98 Eng. Reprint 361.

Listing of certain land by a widow, as part of her husband's estate of which she asks a share, does not prevent her from setting up title to the property which she subsequently learns she is entitled to, especially where the heirs have not been led by her act to incur any expense or been placed in a more unfavorable position than they occupied at the outset. Matheson v. Matheson, 139 Iowa 511, 117 N. W. 755, 18 L. R. A. (N. S.) 1167.

Mistake of Remedies Differs From an Election Between Inconsistent Remedies.—The rule that "the definite adoption of one of two or more in-

consistent remedies by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy," does not apply if, in reality, he had only one remedy. Clark v. Heath, 101 Me. 530, 64 Atl. 913.

Misconception of Remedies.—"A party who imagines he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one." Bunch v. Grave, 111 Ind. 351, 357, 12 N. E. 514. **Mich.**—McLaughlin v. Austin, 104 Mich. 489, 62 N. W. 719. **Pa.**—Kelsey v. Murphy, 26 Pa. 78, 83. **Wis.**—Fuller, Warren Co. v. Harter, 110 Wis. 80, 85, 85 N. W. 698.

Effect of Mistake on Inconsistent Demands.—"There is a rule of law well established which is that, if a person prosecute an action based upon a remedial right which he erroneously supposed he had, but which in fact he did not have, and he is defeated because of his error, he will not be held to have made an election of remedies, and will not be precluded from asserting one which he has, even though it be inconsistent with that which he supposed he had but did not have." Kaufman v. Cooper, 38 Mont. 6, 98 Pac. 504, 1135, followed in O'Meara v. McDermott (Mont.), 115 Pac. 912.

Erroneous Choice.—By proving a claim in bankruptcy where one erroneously supposed he had a claim against the bankrupt estate, does not estop such person from claiming the entire fund, on the ground that he is the proper owner of the fund and that the trustee in bankruptcy has no claim thereto. Doucette v. Baldwin, 194 Mass. 131, 80 N. E. 444.

One is not precluded from resorting to a remedy which the law gives him, because he has attempted to avail himself of one to which he was not entitled. Stone v. Snell, 86 Neb. 581, 125 N. W. 1108. *Compare*, however, Robb v. Voss, 22 Ohio L. J. 338, holding that a party cannot be permitted to abandon one remedy and adopt another merely on the ground that he had misapprehended his rights.

Counterclaim.—Interposing a counterclaim which is dismissed by reason of its being premature, is a mistake of remedies and not an election. Suss-

law or of fact;⁵ but if a party persists in his erroneous course after the disclosure of his true remedy, he may be held bound thereby.⁶

II. RULES GOVERNING. — A. WHEN REMEDIES CONSISTENT.

Actions though not identical may still be consistent,⁷ and a party may

wein v. Pennsylvania Steel Co., 184 Fed. 102, *affirmed*, 186 Fed. 1023.

Illustration of Principle.—In proceedings to assess damages for a taking of property by a city under the right of eminent domain, it was held there was no taking such as would permit plaintiff to have damages assessed in that way, and the proceedings were dismissed. An action was thereupon begun by the plaintiff against the city for trespass, upon which the defense was made that plaintiff had elected another remedy which was inconsistent with this form of action and was therefore barred. The court held that if any one was bound it was the city, and that it having been held in the first case that plaintiff had mistaken his remedy, he could properly maintain his second action. *Reap v. Scranton*, 7 Pa. Super. 32.

A broker in Boston was employed by a customer to buy on margin certain stock which was only dealt in on the stock exchange in that city. The broker not being a member of the exchange employed another broker who was a member to make the purchase. The last named broker makes the purchase and carries it with money supplied by the other broker, who obtained the money from his customer, although mingling it with his own. The first broker did not disclose his agency. He was subsequently adjudicated a bankrupt. It was held that though the customer had proved his claim against the estate, he was not estopped from proceeding to recover the property in the hands of the broker holding it. *Doucette v. Baldwin*, 194 Mass. 131, 80 N. E. 444.

Bona Fides of Claim.—It is not material, in determining whether or not there is an election, where a mistaken remedy is resorted to, that it should be found the claim first asserted was in good faith. *Asher v. Pegg*, 146 Iowa 541, 123 N. W. 739.

5. *Standard Oil Co. v. Hawkins*, 74 Fed. 395, 399, 20 C. C. A. 468, 33 L. R. A. 739; *Ex parte Simmonds*, L. R.

16 Q. B. Div. 308, *approving Ex parte James*, L. R. 9 Ch. App. 609; *Dixon v. Brown*, L. R. 32 Ch. Div. 597.

6. *People ex rel. Warschauer v. Dalton*, 29 Misc. 154, 60 N. Y. Supp. 376, *affirmed*, 52 App. Div. 371, 65 N. Y. Supp. 342.

7. U. S.—*Crockett v. Miller*, 112 Fed. 729, 50 C. C. A. 447. Ark.—*Craig v. Merriweather*, 84 Ark. 298, 105 S. W. 585. Ga.—*Bacon v. Moody*, 117 Ga. 207, 43 S. E. 482. N. Y.—*Bowen v. Mandeville*, 95 N. Y. 237. Wis.—*Carpenier v. Meachem*, 111 Wis. 60, 86 N. W. 552.

“It is the inconsistency of the demands which makes the election of one right of action and estoppel against the subsequent assertion of the other and not the fact that the forms of action are different.” *Mintz v. Jacob*, 163 Mich. 280, 128 N. W. 211.

Deceit and Rescission.—An action against an agent of the vendor to recover damages for his deceit in effecting the sale is not necessarily inconsistent with a subsequent action to rescind the sale, and its disaffirmance against the vendor himself. Furthermore the vendee may keep the property and bring his suit for damages against the guilty agent, and there is no principle of law requiring a court to hold that the retention of the property as against the vendor discharges or waives the claim for damages against the agent; nor is the vendee's action for deceit inconsistent with his disaffirmance of the sale. *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 7 Fed. 401, *citing* *Hubbell v. Meigs*, 50 N. Y. 480; *Whitney v. Allaire*, 1 N. Y. 305; *Hersey v. Benedict*, 15 Hun (N. Y.) 282; *Henderson v. Lacon*, L. R. 5 Eq. 249. Compare *Kimball v. Cunningham*, 4 Mass. 505, which case is discussed and distinguished in *Emma Silver Min. Co. v. Emma Silver Min. Co.*, *supra*.

Action for Delivery of Property.—An action to recover from A. damages for failure to deliver to plaintiff certain notes which had been improperly de-

prosecute as many remedies as he legally has, provided they are consistent and concurrent;⁸ but this rule does not permit a party to receive more than one satisfaction, which regardless of the source ends his cause of action.⁹

Test of Consistency.—“It will be found, upon close examination,

livered to a third person, no fraud having been alleged or proved, does not prevent an action against such third person for the delivery of the notes. *Gillett v. Landis*, 7 Rob. (La.) 332.

8. Ark.—*Bell v. Old*, 88 Ark. 99, 113 S. W. 1023. Fla.—*McKinnon v. Johnson*, 59 Fla. 332, 52 So. 288. Ga.—*Bacon v. Moody*, 117 Ga. 207, 43 S. E. 482; *Kennedy v. Manry*, 6 Ga. App. 816, 66 S. E. 29; *Consignee's Favorite Box Co. v. Meers*, 5 Ga. App. 155, 62 S. E. 1000. Ill.—*Bradner, Smith & Co. v. Williams*, 178 Ill. 420, 53 N. E. 358. Ia.—*Orke v. McManus*, 149 Iowa 685, 129 N. W. 68; *Redhead Bros. v. Wyoming Cattle Invest. Co.*, 126 Iowa 410, 102 N. W. 144. Kan.—*Kansas City Live Stock Com. Co. v. Bank of Hamlin*, 79 Kan. 761, 101 Pac. 617, 24 L. R. A. (N. S.) 490. Ky.—*Eastern Ky. Tel. & Tel. Co. v. Hardwick*, 142 Ky. 229, 134 S. W. 140. Mich.—*Stringer v. Gamble*, 155 Mich. 295, 118 N. W. 979. Neb.—*Clark v. Hall*, 54 Neb. 479, 74 N. W. 856. N. M.—*In re Dye's Estate*, 113 Pac. 839. N. Y.—*Bowen v. Mandeville*, 95 N. Y. 237; *Whitney v. Allaire*, 1 N. Y. 312, 1 Hill 484, 4 Denio 554; *Morgan v. Skidmore*, 3 Abb. N. C. 92, *affirming* 55 Barb. 263; *Corn Exchange Ins. Co. v. Babcock*, 8 Abb. Pr. (N. S.) 257; *Wanzer v. DeBaun*, 1 E. D. Smith 261. Vt.—*Town of Pawlet v. Kelley*, 69 Vt. 398, 38 Atl. 92. Eng.—*Scarf v. Jardine*, L. R. 7 App. Cas. 345. And see *Roberts v. Moss*, 127 Ky. 657, 106 S. W. 297; *Harrison v. Manson*, 95 Va. 593, 29 S. E. 420.

Concurrent Remedies.—By beginning an action to foreclose a mortgage and for a personal judgment on the notes against a grantee of the property mortgaged, there is no such election as would prevent an action against a former grantee who also assumed the mortgage. *Bossingham v. Syck*, 118 Iowa 192, 91 N. W. 1047. See also *Silvey v. Axley*, 118 N. C. 959, 23 S. E. 933.

“If more than one remedy exists, but they are not inconsistent, only a

full satisfaction of the right asserted will estop the plaintiff from pursuing other consistent remedies. All consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to the other remedies.” *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 123, 47 S. E. 942.

An action against an assignee, on which a judgment was recovered against the “goods and estate” in the hands of an assignee, does not prevent an action against such assignee for an accounting and the recovery of a certain sum of money in the hands of the assignee alleged to belong to plaintiff. *Mayberry v. Sprague*, 207 Mass. 508, 93 N. E. 925.

Procuring a judgment on a supersedeas bond, will not preclude an application to the trial court for distribution of a fund in the hands of the court, although there can be but one satisfaction of the debt. *Sturdivant v. Reese*, 86 Ark. 452, 111 S. W. 261.

Consistent Actions.—“The doctrine of election of remedies and the pursuit of one remedy which will exclude the pursuit of another, applies only to those cases in which the party has two remedies which are inconsistent with each other, and has no application to a state of facts where the party may have the right to bring more than one suit.” In this case it was held that an action for an accounting did not prevent a subsequent action for accrued profits. *Steinbach v. Murphy*, 143 Mo. App. 537, 128 S. W. 207. See also *Beller v. Murphy*, 139 Mo. App. 663, 123 S. W. 1029.

9. *McLendon v. Finch*, 2 Ga. App. 421, 58 S. E. 690.

Satisfaction of the claim operates as a bar where the remedies are consistent. *Ullrich v. Bigger*, 81 Kan. 756, 106 Pac. 1073; *Sweet v. Montpelier Sav. Bank & Trust Co.*, 69 Kan. 641, 77 Pac. 538.

that in no case can remedies be regarded as consistent unless predicated upon consistent allegations or grounds of recovery."¹⁰

10. *Crook v. First Nat. Bank*, 83 Wis. 31, 52 N. W. 1131.

Condemnation Proceedings.—Resorting to proceedings to defeat condemnation proceedings, would not thereafter prevent the same party from litigating the amount of his damages. *Beckman v. Lincoln & N. W. R. R. Co.*, 85 Neb. 228, 122 N. W. 994.

When Action on Contract and For Rescission Not Inconsistent.—Where, under a contract for the delivery of lumber two carloads had been delivered, an action on the contract for the purchase price is not inconsistent with the right to bring a subsequent action for a rescission of the contract; there being a right to recover for the lumber already delivered whether the contract was subsequently rescinded or not. *Kilgore Lumb. Co. v. Thomas & Hammonds* (Ark.), 135 S. W. 858.

Action on Contract and Reformation. A second mortgagee is not estopped from bringing an action to reform a policy of fire insurance so as to set forth the true contract, by reason of his having brought a previous action to recover for a loss thereunder, where there was a mutual mistake. *Kelsey v. Agricultural Ins. Co.* (N. J.), 79 Atl. 539.

Remedy In Rem and In Personam. "A creditor whose debt is secured by way of mortgage or trust, has two remedies, one *in personam* for his debt, the other *in rem*, to subject the mortgaged property to its payment; and a resort to one is no waiver of the other." *Silvey v. Axley*, 118 N. C. 959, 23 S. E. 933. See also, *Herr v. Sullivan*, 25 Colo. 190, 54 Pac. 637; *Pyle v. Crebs*, 112 Ill. App. 480 (as to necessity for election between principal obligation and collateral security); *Libby v. Cushman*, 29 Me. 429 (as to remedies where the debt is secured by chattel mortgage); and VII, F, 4, *infra* and the title "**Chattel Mortgages**."

Relief Available.—An effort by holders of receivers' certificates which were obtained for supplies furnished by them, to make such certificates liens ahead of a prior mortgage, does not thereafter preclude such holders upon failure to succeed in their previous application to proceed against the bank at whose instance the receiver was ap-

pointed. The remedies are consistent; and until satisfaction has been had, it is proper to pursue either or both. *German Nat. Bank of Denver v. Best*, 32 Colo. 192, 203, 75 Pac. 398.

Foreclosure and Quieting Title.—The holder of a mortgage upon real estate may maintain an action to foreclose the same at the same time he is asserting title to the same premises under a quit-claim deed from the mortgagor, and may while such foreclosure action is pending maintain an action to quiet title based on such quit-claim deed. *May v. Cummings* (N. D.), 130 N. W. 828.

Constitutionality of Act and Claim For Damages Thereunder.—The institution of a proceeding attacking the constitutionality of an act does not prevent a property owner from also presenting a claim for damages for property taken thereunder. *Norcross v. City of Cambridge*, 166 Mass. 508, 44 N. E. 615, 33 L. E. A. 843.

Condemnation of Land and Eminent Domain.—Proceedings under a general road law to open a road and to condemn land therefor, and the condemnation proceedings under the eminent domain act are not antagonistic nor inconsistent, and the resort to the first remedy did not preclude a subsequent commencement of the other. *Williams v. Board of Commissioners of Routt County*, 48 Colo. 541, 111 Pac. 71.

Restitution and Ejectment.—"Where the election of a remedy assumes the existence of a particular status or relation of the party to the subject-matter of litigation, the party cannot afterwards pursue another remedy by which he assumes a different and inconsistent status or relation to the subject-matter. In restitution proceedings the relation or ownership of the property is assumed, though the question of title is not litigated. In ejectment the relation of ownership is likewise assumed, and the title is a subject of controversy. Restitution proceedings and ejectment are not inconsistent or coextensive proceedings, but they are consistent and cumulative remedies. *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 47 So. 942." And see *McKinnon v. Johnson*, 59 Fla. 332, 52 So. 288.

B. WHEN REMEDIES INCONSISTENT.—When there is a choice between two inconsistent remedies, the adoption of one becomes conclusive on him who elects and precludes a subsequent resort to the other;¹¹ such election constituting an expression on the part of the

Forms of Action Under Michigan Statute.—Plaintiff brought three actions; the first was in assumpsit claiming that defendant had aided and abetted a third party in securing from plaintiff by false pretenses a sum of money for a specific purpose; this action was begun by *capias*, and was afterwards quashed for failure to file a declaration. Plaintiff submitted to a voluntary nonsuit, but the order was not entered. Later a new and similar action was begun, whereupon defendant pleaded the pendency of the former action, which plea was sustained. Plaintiff then instituted an action of trespass on the case for the same fraud and deceit. A *capias* having been issued, defendant moved to quash the writ "upon the ground that plaintiff has by his first two prosecutions in assumpsit elected his remedy, and was thereby precluded from thereafter suing in trespass on the case for the same cause, which it is maintained is a different and inconsistent remedy. . . . At common law an action of assumpsit would not lie in this case and this declaration would be bad on demurrer for it sets up and relies on the fraud, and does not state a cause of action resting on contract." The court held however, that under the statute there was no inconsistency in plaintiff's remedies and the judgment in defendant's favor was reversed. *Mintz v. Jacob*, 163 Mich. 280, 128 N. W. 211.

11. **U. S.**—*Robb v. Vos*, 155 U. S. 13, 43, 15 Sup. Ct. 4, 39 L. ed. 52; *Greenhall v. Carnegie Trust Co.*, 180 Fed. 812, 821 (both remedies must exist and not fancied); *Crockett v. Miller*, 112 Fed. 729, 50 C. C. A. 447. **Ala.**—*Bentley v. Barnes*, 55 So. 130 (owner and mortgagee); *Fidelity & Dep. Co. of Md. v. Art Metal Constr. Co.*, 162 Ala. 323, 50 So. 186; *Calhoun v. Art Metal Constr. Co.*, 152 Ala. 607, 44 So. 876; *Southern R. Co. v. City of Attalla*, 147 Ala. 653, 41 So. 664; *Lytle v. Bank of Dothan*, 26 So. 6. **Ark.**—*Sturdivant v. Reese*, 86 Ark. 452, 111 S. W. 261; *Edgewood Distilling Co. v. Shannon*, 60 Ark. 133, 29 S. W. 147; *Bryan-Brown Shoe Co. v. Block*, 32

Ark. 458, 12 S. W. 1073. **Colo.**—*Williams v. Board of Comrs. of Routt County*, 48 Colo. 541, 111 Pac. 71; *Wilmore v. Mintz*, 42 Colo. 328, 95 Pac. 536 (irrespective of intent); *Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086. **Conn.**—*Douglass v. Galway*, 76 Conn. 683, 52 Atl. 2; *Crompton v. Beach*, 62 Conn. 25, 25 Atl. 446. **D. C.**—*Smith v. Gilmore*, 7 App. Cas. 192, 198. **Fla.**—*McKinnon v. Johnson*, 59 Fla. 332, 52 So. 288; *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 47 So. 942; *Campbell v. Kauffman Milling Co.*, 42 Fla. 328, 342, 29 So. 435. **Ga.**—*Bacon v. Moody*, 117 Ga. 207, 43 S. E. 482; *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92; *Kennedy v. Manry*, 6 Ga. App. 816, 66 S. E. 29. **Ill.**—*Kapischki v. Koch*, 180 Ill. 44, 54 N. E. 179; *Bradner, Smith & Co. v. Williams*, 178 Ill. 420, 53 N. E. 358; *American Car & Fdy. Co. v. Smock*, 91 N. E. 749. **Ind.**—*Bunch v. Grave*, 111 Ind. 351, 12 N. E. 514; *Lee v. Templeton*, 73 Ind. 315. **Ia.**—*Moon v. Hartsuck*, 137 Iowa 236, 114 N. W. 1043; *Courtney v. Courtney*, 149 Iowa 645, 129 N. W. 52; *Zimmerman v. Robinson*, 128 Iowa 72, 102 N. W. 814; *Theusen v. Bryan*, 113 Iowa 496, 85 N. W. 802; *Elm Creek Elev. Co. v. Union Pac. R. Co.*, 97 Iowa 719, 66 N. W. 1059; *Klocow v. Patten*, 93 Iowa 432, 61 N. W. 926. **Kan.**—*Ullrich v. Bigger*, 81 Kan. 756, 106 Pac. 1073; *Kansas City Live Stock Co. v. Bank of Hamlin*, 79 Kan. 761, 101 Pac. 617, 24 L. R. A. (N. S.) 490; *Remington Paper Co. v. Hudson*, 64 Kan. 43, 67 Pac. 636; *Railway Co. v. Henrie*, 63 Kan. 330, 65 Pac. 665. **La.**—*Lowenstein v. Glass*, 48 La. Ann. 1422, 20 So. 890. **Me.**—*Marsh Bros. & Co. v. Bellefeur*, 81 Atl. 79; *Clark v. Heath*, 101 Me. 530, 64 Atl. 913, 8 L. R. A. (N. S.) 144. **Mass.**—*Saco Brick Co. v. J. P. Eustis Mfg. Co.*, 207 Mass. 312, 93 N. E. 629; *Bradley v. Brigham*, 149 Mass. 141, 21 N. E. 301; *Bailey v. Hervey*, 135 Mass. 172; *Butler v. Hildreth*, 5 Mete. 49. **Mich.**—*Sullivan v. Ross' Estate*, 113 Mich. 311, 318, 71 N. W. 634, 76 N. W. 309; *McDonald v. Preston Nat. Bank*, 111

owner of the chose in action, determinative of the course he intends

Mich. 649, 70 N. W. 143; McLaughlin v. Austin, 104 Mich. 489, 62 N. W. 719. Minn.—Aho v. Republic Iron & Steel Co., 104 Minn. 322, 116 N. W. 590; Ironton Land Co. v. Butchart, 73 Minn. 39, 75 N. W. 749; *In re* Van Norman, 41 Minn. 494, 43 N. W. 334; Dyckman v. Sevaton, 39 Minn. 132, 39 N. W. 73. Miss.—Watson v. Perkins, 88 Miss. 64, 40 So. 643. Mo.—Johnson-Brinkman Com. Co. v. Missouri Pac. R. Co., 126 Mo. 344, 28 S. W. 870, 26 L. R. A. 842; Nanson v. Jacob, 93 Mo. 331, 6 S. W. 246; Stotler v. Coates, 88 Mo. 514; Estes v. Reynolds, 75 Mo. 563; Steinbach v. Murphy, 143 Mo. App. 537, 128 S. W. 207. Mont.—O'Meara v. McDermott, 115 Pac. 912; Kaufman v. Cooper, 39 Mont. 146, 101 Pac. 969; Madison River Livestock Co. v. Osler, 39 Mont. 244, 102 Pac. 325. Neb. Turner v. Grimes, 75 Neb. 412, 106 N. W. 465. N. Y.—Crossman v. Universal Rubber Co., 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 455, 21 N. E. 172; Morris v. Rexford, 18 N. Y. 552; New York Fireman's Ins. Co. v. Lawrence, 14 Johns. 45, 55; White v. Whiting, 8 Daly 23; Davenport v. Walker, 132 App. Div. 96, 116 N. Y. Supp. 411; Bowdish v. Page, 81 Hun 170, 30 N. Y. Supp. 691, *affirmed*, 153 N. Y. 104, 47 N. E. 44; McNutt v. Hilkins, 80 Hun 235, 29 N. Y. Supp. 1047. Okla.—Herbert v. Wagg, 27 Okla. 674, 117 Pac. 209. R. I.—Whipple v. Stephens, 25 B. I. 563, 57 Atl. 375. Tex.—Bauman v. Jaffray, 6 Tex. Civ. App. 483, 26 S. W. 260. Utah. Detroit H. & L. Co. v. Stevens, 20 Utah 241, 58 Pac. 193. Vt.—White v. White, 68 Vt. 161, 34 Atl. 425. Wis.—Warren v. Landry, 74 Wis. 144, 42 N. W. 247; Carpenter v. Meachem, 111 Wis. 60, 86 N. W. 552; Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698; Barth v. Loeffelholtz, 108 Wis. 562, 84 N. W. 846; Carroll v. Fethers, 102 Wis. 436, 78 N. W. 604; Bank of Lodi v. Washburn E. L. & P. Co., 98 Wis. 547, 74 N. W. 363. Eng.—*In re* Davison, L. R. 13 Q. B. Div. 50, 54.

Leading Case.—Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, refers to Washburn v. Great Western Ins. Co., 114 Mass. 175, as a leading case.

Bankruptcy Proceedings.—As to effect of rule on remedies pursued by

trustee in bankruptcy. Thomas v. Sugarman, 218 U. S. 129, 30 Sup. Ct. 650, 54 L. ed. 969, *reversing* 157 Fed. 669, 85 C. C. A. 337, 15 L. R. A. (N. S.) 1267.

Assumption of Contradictory Positions.—"A man may not take two contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again." Thompson v. Howard, 31 Mich. 309, *approved* in Kearney M. & E. Co. v. Union Pac. R. Co., 97 Iowa 719, 66 N. W. 1059.

"This rule is not inconsistent with the practice of bringing a second and different action when it appears that the plaintiff never had a right of action as first brought, and therefore could not have elected." McLaughlin v. Austin, 104 Mich. 489, 62 N. W. 719.

"A party cannot be estopped from prosecuting his action unless he has elected to proceed upon a theory entirely inconsistent with the one which later he endeavors to proceed upon." Pratt, Hurst & Co. v. Tailor, 53 Misc. 82, 103 N. Y. Supp. 1094.

Reason of Rule.—This is founded "upon the principle that the other party may otherwise be in some manner prejudiced in respect to a defense or cause of action by the abandonment of one and the resort to the other of such remedies." Crossman v. Universal Rubber Co., 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91.

Illustrations.—An illustration of this would be actions for replevin and trover, in the first of which plaintiff would affirm his ownership and title to the property seized, and in the other he would disaffirm his ownership and title and sue for conversion. Crockett v. Miller, 112 Fed. 729, 736, 50 C. C. A. 447.

Where the holder of a note treated the contract of endorsement as one of suretyship and brought suit against the maker and the indorsers jointly, and a verdict was rendered in favor

of the maker of the notes on his plea of failure of consideration, he could not subsequently treat the contract as one of guaranty and have judgment entered in the same suit against the indorsers as guarantors. *Schlittler v. Deering Harvester Co.*, 3 Ga. App. 86, 59 S. E. 342.

This question frequently arises where a purchase of property is obtained by fraud. If a seller elects to rescind the sale and proceeds to recover the property, "or for its conversion, he denies to himself the right to abandon that remedy, and seek to recover in affirmance of the sale." The effect is the same if he elects to sue for the recovery of the purchase money with knowledge of the fraud. "He then has lost his right to rescind the sale and reclaim the property." *Crossman v. Universal Rubber Co.*, 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91. See also *Bowen v. Mandeville*, 95 N. Y. 237.

Where personal property to which title has been reserved is sold under an order of a court, and the vendor who has reserved the title elects to claim a lien upon the fund, he is estopped from thereafter asserting his title as against the property, and is confined to the proceeds of the sale. *James v. Avery*, 3 Ga. App. 357, 59 S. E. 1118.

Right of De Jure Officer To Recover Salary.—Under the Washington statute a *de jure* officer who has recovered judgment against a *de facto* officer for the salary paid to him cannot recover the same from the town on failure to collect the judgment. *Samuels v. Town of Harrington*, 43 Wash. 603, 86 Pac. 1071.

Fee Bill.—After a motion to retax costs, a party cannot resort to replevin of the bill. *Leigh v. Laughlin*, 130 Ill. App. 530.

Measure of Damages.—This rule has been held to apply to the measure of damages or relief to which a party supposes himself entitled. *Ill.*—*Fairbank Co. v. Nicolai*, 167 Ill. 242, 47 N. E. 360; *Cleveland C. C. & St. L. R. Co. v. Stephens*, 74 Ill. App. 586. *Kan.*—*Leavenworth N. & S. R. Co. v. Curtan*, 51 Kan. 432, 33 Pac. 297. *Okl.*—*Herbert v. Wagg*, 27 Okla. 674, 117 Pac. 209.

Application to Defenses.—This rule is applicable though the election be in the shape of a defense to an action,

and the inconsistent course is claimed to be in the commencement of a separate action. *Detroit Heating & L. Co. v. Stevens*, 20 Utah 241, 58 Pac. 193. See also VIII, *infra*, and the title "Answers."

When Rule Inapplicable.—This rule does not preclude the bringing of a second action against the property when there is merely a mistake in having elected to sue the wrong person. *Henderson v. Bartlett*, 32 App. Div. 435, 53 N. Y. Supp. 149; *Dumois v. Mayor, etc.*, 37 Misc. 614, 76 N. Y. Supp. 161.

Action By Creditor Against Stockholder.—In Kansas a creditor has two remedies against a stockholder. "In one he could obtain an execution against the stockholder in a summary way where there was a subsisting judgment and an unsatisfied execution against the corporation. (Gen. Stat. 1901, §1310). In the other, where the corporation was dissolved, or had ceased to do business for more than one year and was deemed to be dissolved, an action could be brought by a creditor directly against a stockholder without waiting to obtain judgment against the corporation. (Gen. Stat. 1889, §1204.) In the first the judgment is rendered against the corporation in an action in which the stockholder is not a party, and this judgment is conclusive in a proceeding against a stockholder, unless it is obtained by fraud or rendered by a court without jurisdiction. The second was maintainable when a liability against the corporation had not been judicially determined, and where all the defenses which would have been open to the corporation might be made by the stockholder." In the case at bar the creditor obtained judgment against the corporation and because the execution was returned unsatisfied brought a proceeding against a stockholder to establish a stockholder's liability on the judgment. He therefore attempted to amend his petition and change his proceeding by alleging the dissolution of the corporation and basing his right of recovery against the stockholder on notes which has been merged in the judgment originally set up and made the basis of the claim against the stockholder. This was refused on the ground that when the original petition was filed plaintiff had elected and made the judgment the basis of his

to pursue, and is regarded as an irrevocable election of remedies.¹² To determine whether co-existent remedies are inconsistent the relation of the parties with reference to the right sought to be enforced as asserted by the pleadings should be considered.¹³

recovery, while in the second he ignored the judgment and asked a recovery upon the original indebtedness. *Remington Paper Co. v. Hudson*, 64 Kan. 43, 67 Pac. 636.

In Vermont "though an orator is not allowed to set up two inconsistent states of fact, and ask relief in the alternative any more than a defendant is allowed to set up inconsistent defenses, yet he may set up a single state of facts and ask relief in directly opposite alternatives, as was done in *McConnell v. McConnell*, 11 Vt. 290. There the bill was drawn in a double aspect, as the court said it might well be, so that, if the orator failed to establish one ground for relief, he could rely upon another ground, though wholly or in part inconsistent with the former." *Dietrich v. Hutchinson*, 81 Vt. 160, 69 Atl. 661.

Rule in Louisiana.—An opposition wherein the opponent alleges that he is in possession of the property in dispute is not a petitory action, and hence does not estop the opponent from afterwards bringing the possessory action. The reason why the possessory action cannot be brought after the petitory, is that the petitory action judicially admits that the adversary is in possession and therefore precludes the possessory which is founded on possession. *Williams' Heirs v. Zengel*, 117 La. 599, 42 So. 153.

12. U. S.—*In re Stewart*, 178 Fed. 463. Ark.—*Bryan-Brown Shoe Co. v. Block*, 52 Ark. 458, 12 S. W. 1073. Colo.—*Sickman v. Abernathy*, 14 Colo. 174, 23 Pac. 447. Ga.—*Brunswick Co. v. Dart*, 93 Ga. 747, 20 S. E. 631. Ill. *Garrett v. John V. Farwell Co.*, 199 Ill. 436, 65 N. E. 361, reversing 102 Ill. App. 31; *Stier v. Harms*, 154 Ill. 476, 40 N. E. 296. Ia.—*Zimmerman v. Robinson*, 129 Iowa 72, 102 N. W. 814. Mass. *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760; *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006; *Bradley v. Brigham*, 149 Mass. 141, 21 N. E. 301. Mich. *Thomas v. Watt*, 104 Mich. 201, 62 N. W. 345; *Rowley v. Towsley*, 53 Mich. 329, 19 N. W. 20; *Thompson v. How-*

ard, 31 Mich. 309. Minn.—*Bjork v. Bean*, 56 Minn. 244, 57 N. W. 657; *Dyckman v. Sevaton*, 39 Minn. 132, 39 N. W. 73. Mo.—*Long v. Long*, 111 Mo. 12, 19 S. W. 537; *Bensieck v. Cook*, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422; *Comstock v. Eastwood*, 108 Mo. 41, 18 S. W. 39. Mont.—*Kaufman v. Cooper*, 39 Mont. 146, 101 Pac. 969; *Madison River Livestock Co. v. Oaler*, 39 Mont. 244, 102 Pac. 325. N. Y. *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 21 N. E. 172; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *New York Firemen's Ins. Co. v. Lawrence*, 18 Johns. 46, 55; *Kirk v. Crystal*, 118 App. Div. 32, 103 N. Y. Supp. 17, affirmed, 193 N. Y. 622, 86 N. E. 1126; *Gilbert v. Platt*, 12 App. Div. 242, 42 N. Y. Supp. 764, affirmed, 154 N. Y. 760, 49 N. E. 1097; *McNutt v. Hilkins*, 80 Hun 235, 29 N. Y. Supp. 1047. Ohio. *Zutterling v. Drake*, 30 Ohio C. C. 561. Tenn.—*O'Bryan v. Glenn*, 91 Tenn. 106, 17 S. W. 1030. Tex.—*Cameron v. Hinton*, 92 Tex. 492, 501, 49 S. W. 1047; *Ward v. Green*, 88 Tex. 177, 30 S. W. 864; *Avery v. Texas Loan Agency* (Tex. Civ. App.), 62 S. W. 793. Wash. *Babcock Cornish & Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 713. Wis.—*Clausen v. Head*, 110 Wis. 405, 409, 85 N. W. 1028; *Fuller-Warren & Co. v. Harter*, 110 Wis. 80, 85 N. W. 698; *Barth v. Loeffelholtz*, 108 Wis. 562, 84 N. W. 846; *Carroll v. Fethers*, 102 Wis. 436, 78 N. W. 604.

See also *infra*, VII, D, 15.

In *Campbell v. Kauffman Milling Co.*, 42 Fla. 328, 29 So. 435, Taylor, C. J., citing *Bigelow on Estoppel*, said: "And where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts; the election, if made with knowledge of the facts, is in itself binding; it cannot be withdrawn without due consent; it cannot be withdrawn though it has not been acted upon by another by any change of position."

13. *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 47 So. 942.

C. **ALTERNATIVE REMEDIES.**—It is not, however, always necessary that remedies be inconsistent in order to require the choice of a remedy, and in which the choice of one precludes a resort to the other. This is so in the case of alternative remedies, both being consistent.¹⁴ But the mere commencement or pendency of one will not bar the other

14. U. S.—*Slaughter v. La Compagnie Francaises Des Cables Telegraphiques*, 119 Fed. 588, 57 C. C. A. 19, *affirming* 113 Fed. 21. Ill.—*Kapischki v. Koch*, 180 Ill. 44, 54 N. E. 179, *affirming* 79 Ill. App. 238. Mass.—*Connihan v. Thompson*, 111 Mass. 270. Minn.—*Thomas v. Joslin*, 36 Minn. 1, 29 N. W. 344. Mo.—*Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481. Utah.—*State v. Morse*, 103 Pac. 969, action at law for materials sold and suit in equity to foreclose mechanic's lien.

When in a receivership matter the parties appeared by consent and tried out the question of title, upon pleadings filed, the right to litigate the same question in an independent action is waived. *Olympic Oil Co. v. Kane*, 56 Wash. 199, 105 Pac. 477.

Promissory Note.—A payee after surrendering a note to the maker upon which there were two sureties, received a renewal note from him also with two sureties, which renewal note was the consideration for the surrender of the old note. The payee before any proceedings were instituted discovered that the signature of one surety was a forgery, but nevertheless sought to enforce the renewal note against the surety who did execute the note. It was held that the payee could not thereafter rely on the original note and recover against the other surety thereon. *Reints v. Uhlenhopp*, 149 Iowa 284, 128 N. W. 400.

Effect of Proceedings for Maintenance and For Alimony.—When a wife causes a complaint to be made by the overseer of the poor against her husband under the disorderly act to the end that he may be adjudged to support her, and also files a bill in chancery for maintenance under the divorce act, and the complaint before the police justice is prosecuted to an adjudication prior to a hearing in the court of chancery on an application for alimony and counsel fees, she will be held to have waived, for the time being, her remedy in the court of chancery in favor of the remedy in the

police court. *Roarke v. Roarke*, 77 N. J. Eq. 181, 75 Atl. 761.

Trespass or Action on Replevin Bond.—"The unauthorized seizure and retention of goods vested appellant with the right to institute an action in trespass, . . . or an action on the replevin bond. . . . Each of these remedies proceeds upon the same cause of action, and the remedies were consistent and concurrent. While different remedies were available to the appellant, the cause of action was the same and was an entirety, and could not be divided into separate and distinct claims and both remedies pursued. The appellant was required to elect his remedy, and could not split his right to recover damages and maintain two actions against the appellees upon the same cause of action." *Kapischki v. Koch*, 180 Ill. 44, 54 N. E. 179, *affirming* 79 Ill. App. 238. See also *Karr v. Barstow*, 24 Ill. 581 (as to right to bring replevin and afterwards to sue in trespass for the same transaction); *Presson v. Worthen*, 68 Ill. App. 457 (as to necessity for election between replevin and action for damages on constable's bond for wrongful taking).

Vacating Judgment and Action To Quiet Title.—Under the Washington statute a motion to vacate a judgment and a motion to quiet title involving the same relief are "concurrent remedies," the adoption of one preventing a resort to the other. *Newell v. Young*, 59 Wash. 286, 109 Pac. 801. See also *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119.

Note.—It will be observed that in using the term "concurrent remedies" in the two preceding notes, that term is confused with "alternative remedies."

Compare, however, *Stone v. Snell*, 86 Neb. 581, 125 N. W. 1108, in which it was held that the prosecution of actions of forcible entry and detainer and other actions hostile to the possession of the occupant, by one who is entitled to rent from the occupant,

or defeat the action;¹⁵ the plaintiff may, however, be compelled by order of the court at any stage of the proceedings, to elect which he will further prosecute.¹⁶

Actions involving the choice of alternative remedies differ, therefore, from those where the remedies are inconsistent, as where one action is founded on affirmance, and the other upon the disaffirmance of a contract,¹⁷ and where the mere bringing of an action on one theory is in some jurisdictions held to be such a decisive act as would waive a resort to and defeat an action based on a theory inconsistent therewith.¹⁸

D. AVAILABILITY AND KNOWLEDGE.—Both remedies must have been available when the election was made,¹⁹ and it must appear that the

may in the event of failure in those actions nevertheless be followed by resort to action for rent.

15. *Connihan v. Thompson*, 111 Mass. 270 (citing 1 Chit. Pl. (6th Am. ed.) 243; *Otto v. Young*, 227 Mo. 193, 219, 127 S. W. 9.

16. *U. S.*—*Slaughter v. La Compagnie Francaises De Cables Telegraphiques*, 119 Fed. 588, 57 C. C. A. 19, affirming 113 Fed. 21. *Mass.*—*Connihan v. Thompson*, 111 Mass. 270. *N. Y.*—*Bogers v. Vosburgh*, 4 Johns. Ch. 84; *Livingstone v. Kane*, 3 Johns. Ch. 224. *Utah.*—*State v. Morse*, 103 Pac. 969, but the court has no authority to make the election for a party.

17. *Connihan v. Thompson*, 111 Mass. 270.

Election Between Legal and Equitable Remedies.—"When a suit is brought in equity, and one is pending for the same cause in a court of law, the defendant may put the complainant to his election whether he will proceed at law or in equity, if the remedy at law is co-extensive and equally beneficial with the remedy in equity." *Roarke v. Roarke*, 77 N. J. Eq. 181, 75 Atl. 761; *Way v. Bragaw*, 16 N. J. Eq. 213, 217, 84 Am. Dec. 147. And see *infra*, VII, F.

18. *Connihan v. Thompson*, 111 Mass. 270. And see *supra*, III.

19. *Ala.*—*Calhoun County v. Art Metal Constr. Co.*, 152 Ala. 607, 44 So. 876; *Southern R. Co. v. City of Attalla*, 147 Ala. 653, 41 So. 664. *Fla.*—*Hays v. Weeks*, 57 Fla. 73, 48 So. 997. *Ill.*—*Mark v. Schumann Piano Co.*, 105 Ill. App. 490, affirmed, 208 Ill. 282, 70 N. E. 226. *Ia.*—*Wells v. Western Union Tel. Co.*, 144 Iowa 605, 123 N. W. 371; *Fisk v. City of Keokuk*, 144 Iowa 187, 122 N. W. 896; *Zimmerman v. Robin-*

son, 128 Iowa 72, 102 N. W. 814. *Kan.*—*McKim v. Carre*, 72 Kan. 461, 83 Pac. 1105. *Me.*—*Clark v. Heath*, 101 Me. 530, 64 Atl. 913. *Mich.*—*Bryant v. Kenyon*, 123 Mich. 151, 81 N. W. 1093. *E. I.*—*Whipple v. Stephens*, 25 R. I. 563, 57 Atl. 375. *Tex.*—*Bandy v. Cates*, 44 Tex. Civ. App. 38, 97 S. W. 710. *W. Va.*—*Dudley v. Barrett*, 66 W. Va. 363, 66 S. E. 507.

In order to apply the doctrine of election of remedies, the party must actually have at command two inconsistent remedies. *Elliott v. Collins*, 6 Idaho 266, 55 Pac. 301.

"The inconsistency of the remedies is essential to preclude the resort to one after having adopted another, and the party must actually have had two remedies," and not merely supposed that he had. *Bradner, Smith & Co. v. Williams*, 178 Ill. 420, 427, 53 N. E. 358.

A remedy to which there exists a good defense is not an available remedy. *Babeock, Cornish & Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 713. And see *infra*, VIII.

Court Without Jurisdiction.—If the court in which the first action is brought was without jurisdiction, there is no waiver of rights. *Garrett v. John V. Farwell Co.*, 199 Ill. 436, 65 N. E. 361, reversing 102 Ill. App. 31. Compare *Kearney Mill. & Elev. Co. v. Union Pac. R. Co.*, 97 Iowa 719, 66 N. W. 1059; *Bradley-Watkins Co. v. Kalamazoo Circuit Judge*, 144 Mich. 142, 107 N. W. 875; *Nield v. Burton*, 49 Mich. 53, 12 N. W. 906 (holding that the election is binding though the court in which the first action was brought had no jurisdiction). In *Board of Education v. Day*, 128 Ga. 156, 167, 57 S. E. 359, 364, the court writes:

party when making the election was cognizant of his rights,²⁰ and of all the facts in the case.²¹

"It has been said that to the general rule as to the conclusiveness of an election there are certain exceptions, though in respect to them there is some conflict among the adjudications. Some of these suggested exceptions are, where the first suit is brought in a court which does not possess or acquire jurisdiction." The court in this case did not, however, discuss these exceptions, contenting itself with the statement that they existed.

Two Courses Must Be Open.—"It is not the mere fact of having previously brought some action against a defendant to obtain relief, upon such a transaction, which would determine the application of the doctrine of election; it would be the fact that a plaintiff, with two courses open to him, had, by his previous action, declared his election or decision, to affirm, or to disaffirm, the transaction, as the case might be. The right to make an election must actually exist and if it shall appear that it did not, then it is quite immaterial, in its bearing upon a subsequent action, that some previous action, looking to a remedy for the plaintiff's loss, had been brought." *Henry v. Herrington*, 193 N. Y. 218, 222, 86 N. E. 29.

Both Remedies Must Be Available. "The doctrine is well established that there can be no choice between two inconsistent remedies unless there are in fact two remedies to choose from, and they are really inconsistent, in that one is suitable to deal with relations between the parties of one character and the other with relations of a different inconsistent character." *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1.

"It seems well settled that the doctrine of election of remedies has no application when the remedy chosen is not available, and we think a remedy is not available when there is a good defense to it. Whether or not the defense is invoked or waived does not change the election." *Babcock-Cornish & Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 713.

20. *Wells, Fargo & Co. v. Robinson*, 13 Cal. 134, 143; *Murphy v. Hutchinson*, 93 Miss. 643, 48 So. 178; *Mad-*

den v. Louisville, etc. R. Co., 66 Miss. 238, 6 So. 181.

Knowledge of Rights.—"An election of remedies presupposes knowledge of the two remedies, and, as between two causes of action, the one on contract and the other for fraud, a tort, the rule presupposes a knowledge of the existence of the facts giving a right of action in tort for the fraud." *In re Stewart*, 178 Fed. 463.

In New York it is held that, "to constitute a conclusive election of remedies as to the legal effect of an instrument, the party chargeable therewith must be shown, at the time he brings an action at law thereon, to have had full knowledge of such legal effect, to deprive him of the right to maintain a subsequent action to reform said instrument upon the ground of mutual misapprehension as to its legal effect. The knowledge of such legal effect of the instrument, as it stands, is in itself deemed a fact, with knowledge of which party seeking relief is not chargeable, until such effect has been determined in the first action." *Baird v. Erie R. Co.*, 129 N. Y. Supp. 329, 347.

Bankruptcy Proceedings.—A creditor who has filed a claim and afterwards discovers that he was deprived of his property by the fraud of the bankrupt may withdraw his claim and pursue his remedy on the fraud. *In re Stewart*, 178 Fed. 463, 468. See also *Standard Oil Co. v. Hawkins*, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739. But when at the time of filing the claim, the creditor had knowledge of the fraudulent acts of the bankrupt, he cannot afterwards claim the stock or its profits specifically. *In re Jacob Berry & Co.*, 174 Fed. 409, 98 C. C. A. 360, *affirming* 146 Fed. 623. And see *Thomas v. Taggart*, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. ed. 845.

21. U. S.—*United States v. Yuen Pak Sune*, 183 Fed. 260, 266; *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 7 Fed. 401. Ala.—*Fidelity & Dep. Co. v. Art Metal Const. Co.*, 162 Ala. 323, 50 So. 186. Colo.—*Williams v. Board of Comrs.*, 48 Colo. 541, 111 Pac. 71; *Wilmore v. Mintz*, 42 Colo. 328, 95 Pac. 536. Conn.—*Bulkley v. Morgan*,

E. WHO MAY EXERCISE RIGHT.—There is a conflict of authority as to who has the right to make a choice of remedies as the representative of the owner of the claim. A trustee in bankruptcy has been held

46 Conn. 393. **Fla.**—*American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 47 So. 942. **Ia.**—*Courtney v. Courtney*, 149 Iowa 645, 129 N. W. 52; *Zimmerman v. Robinson*, 128 Iowa 72, 102 N. W. 814. **Mass.**—*Hewitt v. Hayes*, 205 Mass. 356, 91 N. E. 332; *Connihan v. Thompson*, 111 Mass. 270. **Mich.**—*Black v. Miller*, 75 Mich. 323, 42 N. W. 837; *Thompson v. Howard*, 31 Mich. 309. **Minn.**—*Aho v. Republic Iron & Steel Co.*, 104 Minn. 322, 116 N. W. 590. **Mo.**—*Johnson-Brinkman Com. Co. v. Missouri Pac. R. Co.*, 126 Mo. 344, 28 S. W. 870, 26 L. R. A. 842, reversing 52 Mo. App. 407. **Mont.**—*Madison River Livestock Co. v. Osler*, 39 Mont. 246, 102 Pac. 325; *Kaufman v. Cooper*, 39 Mont. 149, 101 Pac. 969. **N. Y.**—*Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216; *Conrow v. Little*, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693 (these cases distinguish *Equitable Co-operative Fdry. Co. v. Hersee*, 103 N. Y. 25, 9 N. E. 487, in which case plaintiff did not have full knowledge of the facts); *Baird v. Erie R. Co.*, 129 N. Y. Supp. 329, 346. **Tenn.**—*O'Bryan v. Glenn*, 91 Tenn. 106, 17 S. W. 1030. **Tex.**—*Jirou v. Jirou* (Tex. Civ. App.), 136 S. W. 493. **Vt.**—*Bertoli v. Smith*, 69 Vt. 425, 38 Atl. 76. **Eng.**—*Clough v. London N. W. R. Co.*, L. R. 7 Exch. 36. See also *infra*, VII, D, 15.

Intent.—An election once made with knowledge of the facts, between co-existent remedial rights which are inconsistent, is irrevocable and conclusive, irrespective of intent. *Kennedy v. Manry*, 6 Ga. App. 816, 66 S. E. 29; *Rowe v. Weichselbaum Co.*, 3 Ga. App. 504, 60 S. E. 275.

Knowledge of the Facts.—Plaintiff began an action in replevin and for damages. In order to obtain information as to the whereabouts of some of the property sought to be replevied, he incurred certain expenditures, and sought by amended petition to make them part of his claim. These on defendant's application were stricken out as not proper elements of damage. The replevin action then proceeded to judgment with those items omitted. Thereafter plaintiff brought the present

action for damages based on the items stricken out in the previous action. Defendant contended plaintiff had elected his remedy and could not recover. *Ellison, J.*, writing for the court, said: "He contends that the case should be determined from the standpoint of election of remedies, and governed by the law applicable thereto. And that plaintiffs having voluntarily chosen the remedy of replevin, they can only recover such damages as may be properly allowable in such an action. But it should be borne in mind that when plaintiffs made their election to sue in replevin, they did not know of defendant's conduct with Funk whereby the latter was put in position to do him damage. An election of remedies refers to existing conditions when the election is made. And presupposes knowledge on the part of the elector." *Haughwout v. Royse*, 122 Mo. App. 72, 98 S. W. 101.

One who makes his election "with a knowledge at least, of the more important facts affecting his rights" cannot thereafter abandon the first election and "choose the opposite remedy." *Moline Plow Co. v. Rodgers*, 53 Kan. 743, 37 Pac. 111.

Action Induced by Fraud.—"It may be conceded that, if the plaintiff had been induced to bring the attachment suit by false information from Underwood or the attaching creditors, as to what had become of the mowers, on discovery of the actual facts it might recover the specific property, and that an election induced by fraud would not be binding." *Moline Plow Co. v. Rodgers*, 53 Kan. 743, 37 Pac. 111.

Attachment and Replevin.—When an attachment suit is hastily brought upon the advice of an attorney, without time, as shown by the record, for an investigation of the facts, and before judgment, the action is dismissed, the conclusion being reached that the action was improvidently brought, a plaintiff would not be estopped by such election from prosecuting an action in replevin, in the absence of intervening rights, injury or change in position by anybody by reason thereof. *Johnson-Brinkman Com. Co. v. Missouri Pac. R.*

to possess such authority.²² It may also be made by the attorney at law of a party when engaged as such in the particular matter wherein the election was made.²³ It has been denied to a creditor who was pursuing the property of his debtor which has been wrongfully converted by another.²⁴

F. WHO AFFECTED BY ELECTION.—The doctrine of election of remedies applies solely to the parties to a contract, as for instance, where there has been a breach of contract by one of the parties thereto. It has no application as between one of the parties to a contract and a third person, a stranger to the contract.²⁵

III. CHOICE HOW MANIFESTED.—The general rule is that any decisive act by a party with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies; the bringing of an action being an unequivocal method of indicating

Co., 126 Mo. 344, 28 S. W. 870, *reversing* 52 Mo. App. 407, and approving *Johnson-Brinkman Co. v. Central Bank*, 116 Mo. 558, 22 S. W. 813; *Lapp v. Ryan*, 23 Mo. App. 463; *Anchor Mill. Co. v. Walsh*, 20 Mo. App. 107.

Effect of Filing Claim.—When one having knowledge of the essential facts files a verified proof of claim upon an assigned estate, such being decisive in affirmance of the sale, a party will be bound by it, but the filing of a mechanic's lien would not be conclusive evidence of an election. *Droege v. Ahrens & Ott Mfg. Co.*, 163 N. Y. 466, 57 N. E. 747.

Failure To Discontinue Previous Actions.—Where a ward institutes proceedings against her guardian and bondsmen to recover the proceeds of a sale of real property and also against the guardian for an accounting, and afterwards becoming acquainted with additional facts institutes a proceeding to set aside the sale of the property and no longer prosecuted the former suits but did not discontinue them, the right to vacate the sale was held not to be concluded by the institution of the former suits. *Jirou v. Jirou* (Tex. Civ. App.), 136 S. W. 493.

Chinese Deportation.—A proceeding to deport a Chinese alien is a civil and not a criminal proceeding. The resort to a remedy treating such alien as an applicant for entry from the Dominion of Canada and the making of an order directing his return to that jurisdiction is not such an election of remedies as precludes a subsequent hearing and the making of an order for his deportation to China, when the full facts

were not known at the time the first proceedings were had, and the second proceeding being the only course which could properly have been followed. *United States v. Yuen Pak Sune*, 183 Fed. 260.

22. *Dittmore v. Cable Milling Co.*, 16 Idaho 298, 101 Pac. 593. See also *State Bank of Chicago v. Cox*, 143 Fed. 91, 74 C. C. A. 285, where the right was exercised and not directly questioned.

Waiving Tort.—*Dittmore v. Cable Milling Co.*, 16 Idaho 298, 101 Pac. 593.

23. *James v. Avery*, 3 Ga. App. 357, 59 S. E. 1118.

24. *Blackshear v. Burke*, 74 Ala. 239; *Lewis v. Dubose & Co.*, 29 Ala. 219; *Dittmore v. Cable Milling Co.*, 16 Idaho 298, 101 Pac. 593.

"The creditors have no right to waive the tort, or to surrender the right to recover back the property, or to release the damages against the tortfeasor. Those are rights which appertain to the owner of the property alone, and his creditors cannot defeat them by bringing a garnishment proceeding against him who may have the funds arising from the sale of the property. *Lundie v. Bradford*, 26 Ala. 512. Until the owner of the property has made his election to sue for the money, which may be done by bringing an action for it, the person having the money cannot in any just sense, be deemed his debtor." *Lewis v. Dubose*, 29 Ala. 219. See remarks on this case in *Dittmore v. Cable Co.*, *supra*.

25. *Kuechle v. Springer*, 145 Ill. App. 127, in which it was held, that a decree canceling a deed for fraud,

election;²⁸ but in order to bind a party by an election, there must

does not prevent an action against a third party for damages in inducing the plaintiff to execute the deed, such third party having no legal interest in the suit for cancellation and not being a necessary party to that action.

28. **U. S.**—Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. ed. 52; Van Winkle v. Crowell, 146 U. S. 42, 50, 51, 13 Sup. Ct. 18, 36 L. ed. 880. **Ala.** Hickman v. Richburg, 122 Ala. 638, 26 So. 136; Lehman v. Van Winkle, 92 Ala. 443, 8 So. 870. *Compare*, however, cases on p. — *infra*, that the mere bringing of a suit is not determination of the right of election. **Colo.**—Cole v. Smith, 26 Colo. 506, 58 Pac. 1089. **Conn.** Compton v. Beach, 62 Conn. 25, 25 Atl. 446. **Ga.**—Board of Education v. Day, 128 Ga. 156, 57 S. E. 359, 363; Kennedy v. Manry, 6 Ga. App. 816, 60 S. E. 29. **Ill.**—Gray v. St. John, 35 Ill. 222 (is at least *prima facie* evidence); Daniels v. Smith, 15 Ill. App. 339. **Ind.** O'Donald v. Constant, 82 Ind. 212; Benson v. Liggett, 78 Ind. 452. **Ia.** Courtney v. Courtney, 149 Iowa 645, 129 N. W. 52; Zimmerman v. Robinson, 128 Iowa 72, 102 N. W. 814; Thensen v. Bryan, 113 Iowa 496, 85 N. W. 802; Kearney M. & E. Co. v. Union Pac. R. Co., 97 Iowa 719, 723, 66 N. W. 1059 (discontinuance of the action is immaterial). **La.**—Lowenstein v. Glass, 48 La. Ann. 1422, 20 So. 890. **Mass.** Frisch v. Wells, 200 Mass. 429, 86 N. E. 775; Washburn v. Great Western Ins. Co., 114 Mass. 175; Connihan v. Thompson, 111 Mass. 270; Butler v. Hildreth, 5 Metc. 49. **Mich.**—Mintz v. Jacob, 163 Mich. 280, 128 N. W. 211 (this rule is statutory in Michigan); Thomas v. Watt, 104 Mich. 201, 206, 62 N. W. 345; Nield v. Burton, 49 Mich. 53, 12 N. W. 906; Thompson v. Howard, 31 Mich. 309. **N. M.**—*In re Dye's Estate*, 113 Pac. 839, abandonment of appeal and prosecution of another action. **N. Y.**—*In re Garver*, 176 N. Y. 386, 68 N. E. 667; Droege v. Ahrens & Ott Mfg. Co., 163 N. Y. 466, 57 N. E. 747, *reversing* 34 App. Div. 631, 54 N. Y. Supp. 1099; Conrow v. Little, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 457, 21 N. E. 172; Moller v. Tunker, 87 N. Y. 166; Sanger v. Wood, 3 Johns. Ch. 416, 421; Henderson v. Bartlett, 32 App. Div. 435, 53 N. Y. Supp.

149; Niles v. Iroquois Realty Co., 57 Misc. 443, 109 N. Y. Supp. 712. **Ohio.** Zutterling v. Drake, 30 Ohio C. C. 561. **Tex.**—Cameron v. Hinton, 92 Tex. 492, 49 S. W. 1047; Hudgins v. Samson, 72 Tex. 228, 10 S. W. 104; Hanner v. Summerhill, 6 Tex. Civ. App. 764, 26 S. W. 906. **Vt.**—White v. White, 68 Vt. 161, 34 Atl. 425. **Wash.**—Babcock-Cornish & Co. v. Urquhart, 53 Wash. 168, 101 Pac. 713; Smith v. Gray, 52 Wash. 255, 100 Pac. 339. **Wis.**—Ludington v. Patton, 111 Wis. 208, 86 N. W. 571; Clausen v. Head, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933.

Compare, however, Spurr v. Home Ins. Co., 40 Minn. 424, 42 N. W. 206, in which it was held a misconception by reason of failure to correctly apprehend the legal construction of the instrument sued on would bar a subsequent action, and VI. F.

Act of Election.—Since the choice of remedies "is merely mental, any unambiguous act consistent with one and inconsistent with the other of the elective positions will be deemed conclusive evidence of such election." Fox v. Wilkinson, 133 Wis. 337, 113 N. W. 669; Smeesters v. Schroeder, 123 Wis. 116, 101 N. W. 363.

Any decisive act of the party with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies. Sanger v. Wood, 3 Johns. Ch. (N. Y.) 416.

Effect of Notice.—Merely giving notice of rescission of a contract does not prevent an action for damages. Del Vecchio v. Savelli, 10 Cal. App. 79, 101 Pac. 32.

And giving notice of garnishment without a further pursuit of the remedy does not present a proceeding in equity to subject certain property to the payment of judgments. W. A. Jordan Co. v. Sperry Bros., 141 Iowa 225, 119 N. W. 692.

After an election is once made as was done by commencing the first action, the law then fixed the rights of the plaintiff as to the nature of the remedy it might pursue, and limited it to such a remedy as would not be inconsistent with that action. Babcock, Cornish & Co. v. Urquhart, 53 Wash. 168, 101 Pac. 713.

Dismissal Without Trial.—"The

have been begun a form of action under which some relief could have been obtained had it proceeded to an adjudication between the parties.²⁷ If there be two actions pending at the same time an election may be compelled which is ordinarily conclusive.²⁸

Acts constituting election need not be with the other party personally, as for instance a suit against him personally;²⁹ it may be an unequivocal dealing with the property itself inconsistent with an intention to restore it, or a suit against another person, which proceeds upon

commencement of an action to enforce a lien on certain machinery, although the action was dismissed by the plaintiffs without a trial on the merits, was inconsistent with their ownership of the property and was an election to treat the title as not in them." *Kearney Mill Co. v. Union Pac. R. Co.*, 97 Iowa 719, 723, 66 N. W. 1059, citing *Van Winkle v. Crowell*, 146 U. S. 42, 13 Sup. Ct. 18, 36 L. ed. 880; *Lehman v. Van Winkle*, 92 Ala. 443, 8 So. 870.

Form of Affidavit on Motion for Examination To Frame Complaint.—A statement in an affidavit for examination of a party so as to frame a complaint, that plaintiff intended to seek a rescission and cancellation of the contract, does not prevent the bringing of an action for damages for fraud instead. *Heckendorn v. Romadka*, 138 Wis. 416, 120 N. W. 257.

Reason for Rule.—"Where one is in a situation in which he may elect between two inconsistent proceedings, the choice of the position which he will take must be made before bringing suit, or in doing so. He has no right to bring either action except by selecting and determining to occupy a position consistent with that action and inconsistent with the other. If, with actual knowledge or notice of the substantial facts, he chooses the position which he will occupy, and which will authorize him to appeal to the courts for one of the remedies, and does, in fact, proceed in court to enforce such remedy, it would seem to be little short of trifling with judicial procedure to allow him at his mere option to change his mind, dismiss his suit, repudiate the position which he has thus solemnly taken, assume another directly inconsistent with it, and ask the courts to enforce a remedy based on his new election. If he may

change his mind once after having assumed and thus declared his position and based his suit upon it, why may he not do so again? And where is the limitation upon decision and redecision, selection and reselection, and vacillation between inconsistent positions and remedies, as it may appear to the litigant from time to time that his changes are better in one direction or the other? Can he be allowed to swim hither and thither in a sea of legal uncertainty, until he has been transfixed by the harpoon of a final judgment?" *Board of Education v. Day*, 128 Ga. 156, 57 S. E. 359, 363.

Infringement of Copyright.—The publication of a notice by the owner of a copyright that the sale of a publication at less than the stated price will be treated as an infringement of the copyright law, will prevent the maintenance of a proceeding for an injunction for the prevention of the sale of such books. *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15, 77 C. C. A. 607, affirming 139 Fed. 155.

27. **U. S.**—*Water, Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41, 90 C. C. A. 547. **Ill.**—*Drainage Dist. No. 1 v. Dowd*, 132 Ill. App. 499. **N. Y.** *McNutt v. Hilkins*, 80 Hun 235, 29 N. Y. Supp. 1047; *Mutual Auto, etc., Co. v. Beard*, 59 Misc. 174, 110 N. Y. Supp. 416.

An action seeking to hold certain special partners of a firm as general partners, is not barred because of a previous action which failed by reason of defects in the organization of the partnership. *Patterson v. Youngs*, 129 N. Y. Supp. 673.

28. *Nysegander v. Lowan*, 124 Ind. 584, 24 N. E. 355; *Moller v. Tuska*, 87 N. Y. 166.

29. *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 7 Fed. 401.

an unequivocal affirmance of the contract, and seeks relief for its enforcement.³⁰

There is authority, however, holding that there is no estoppel before rendition of judgment, and that if the action is dismissed before judgment and before the rights of others had intervened, and the defendant is in no way injured in consequence thereof, there is no reason for estopping a plaintiff from prosecuting another remedy.³¹

30. *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 7 Fed. 401.

31. *Ala.*—*Register v. Carmichael*, 53 So. 799; *Hunnicut v. Higginbotham*, 138 Ala. 472, 35 So. 469, 100 Am. St. Rep. 45. Compare, however, Alabama cases cited under III, *supra*. *Ill.*—*Gibbs v. Jones*, 46 Ill. 319, action dismissed without prejudice. *Minn.*—*Spurr v. Home Ins. Co.*, 40 Minn. 424, 42 N. W. 206. *Mo.*—*Johnson-Brinkman Com. Co. v. Missouri Pac. R. Co.*, 126 Mo. 344, 28 S. W. 870, 26 L. R. A. 842, reversing 52 Mo. App. 407; *Johnson-Brinkman Com. Co. v. Central Bank*, 116 Mo. 558, 22 S. W. 813; *Steinbach v. Murphy*, 143 Mo. App. 537, 128 S. W. 207; *Lapp v. Ryan*, 23 Mo. App. 436; *Anchor Mill Co. v. Walsh*, 20 Mo. App. 107. *Eng.*—*Priestly v. Fernie*, 3 H. & C. 977, 34 L. J. Ex. 173. And see: *Ind.*—*Nysewander v. Lowan*, 124 Ind. 584, 24 N. E. 355. *Va.*—*Sangster v. Com.*, 17 Gratt. 124. *Eng.*—*Curtis v. Williamson*, L. R. 10 Q. B. 57.

In *Illinois*, the statute permits a change in the form of action upon terms. *Flower v. Brumbach*, 131 Ill. 646, 651, 23 N. E. 335. The *Illinois* courts have not gone as far as the *New York* courts in holding a party concluded by the bringing of an action where the remedies may be regarded as inconsistent and irreconcilable. *Stier v. Harms*, 154 Ill. 476, 40 N. E. 296.

In *Iowa*, under the present system of pleading a plaintiff may by amendment before judgment convert his petition from one form of action to another though inconsistent form. *Denecke v. Henry F. Miller & Son (Iowa)*, 119 N. W. 380.

Bringing of Action Not Sufficient. "An election to be conclusive must be efficacious to some extent at least. The mere bringing of a suit is not determinative of the right." *Register v. Carmichael (Ala.)*, 53 So. 799.

Action Not Conclusive.—The question was whether the mere assertion of

a claim "upon the ground that it is covered and included in a contract as written is so inconsistent with a claim that the contract be so reformed as to include and cover such relief as to make it a conclusive election of the remedy, and bar the plaintiff of any right to seek relief upon the ground of mistake in the drawing of the written contract. We think the weight of authority is against the conclusiveness of the election." *Hillerich v. Franklin Ins. Co.*, 111 Ky. 255, 260, 63 S. W. 592.

Action Prosecuted to Judgment.—"Where a party has inconsistent remedies, an election of one, especially where it is prosecuted to judgment, is a bar to the other." *In re Ablowich*, 118 App. Div. 626, 103 N. Y. Supp. 699, 39 Civ. Proc. 183, citing *Droege v. Ahrens & Ott Mfg. Co.*, 163 N. Y. 466, 57 N. E. 747; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 21 N. E. 172, 10 Am. St. Rep. 479, 4 L. R. A. 145.

On reversal of judgment the case stands as if no verdict or judgment had been rendered, and there is in such case no estoppel by the judgment. *Hillerich v. Franklin Ins. Co.*, 111 Ky. 255, 260, 63 S. W. 592. See also *Louisville & N. R. Co. v. Cooper*, 19 Ky. L. Rep. 1152, 42 S. W. 1134.

In Nature of Estoppel.—In *Missouri*, it is settled "that an election is in the nature of an estoppel, and unless it is shown by the record of a final judgment, or contains the elements of an estoppel *in pais* owing to intervening rights, it will not include the party against whom it is invoked." *Trimble v. Union Nat. Bank*, 71 Mo. App. 467, citing numerous local cases. See also *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. ed. 1055; *Bolton M. Co. v. Stokes*, 82 Md. 50, 33 Atl. 491.

IV. APPLICATION OF PRINCIPLE. — A. REMEDIES BASED ON CONTRACT. — 1. Assumpsit or Account. — When there is a promise to account for money had and received, the action may be either assumpsit or account.³²

2. Assumpsit or Covenant. — When a cause of action for money paid accrues by reason of a breach of covenant, such action may be either in assumpsit or on the covenant to recover damages for the breach.³³

3. Covenant or Debt. — Where there is a penalty and covenant in the same deed, an action will lie either in debt for the penalty or covenant for the damages.³⁴ Or where a party covenants for the payment of a certain sum of money, and at the same time, and as part of the same transaction gives a note for the payment of the money, an action will lie either on the covenant or the debt.³⁵

4. Contract or Quantum Meruit. — An action for breach of contract and on *quantum meruit* have been held to be inconsistent remedies, and while upon a wrongful discharge the injured party may treat the contract as terminated and sue upon *quantum meruit*, or may stand upon the contract and sue for its breach, both remedies are not open to him, and upon electing one he cannot avail himself of the other.³⁶

Under the Kansas statute in the case of a building contract, there may be joined in a complaint a cause of action on the contract with one on *quantum meruit*, and it has been held to be an abuse of discretion on the part of the court to deny to a plaintiff the right to take the opinion of the jury on both issues, under proper direction that the plaintiff is not entitled to recover on both counts.³⁷

32. *Canfield v. Merrick*, 11 Conn. 425; *Tousey v. Preston*, 1 Conn. 175; *Wetmore v. Woodbridge*, Kirby (Conn.) 164.

See generally the titles "Account and Accounting;" "Assumpsit."

33. U. S. — *Wm. W. Bierce v. Hutchins*, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. ed. 828, reversing 16 Hawaii 717. Mass. — *Oakes v. Manufacturer's, etc., Ins. Co.*, 135 Mass. 248. N. Y. *Douglass v. Waer*, Anthon's N. P. 179; *Weaver v. Bentley*, 1 Caines 46.

See generally the titles "Assumpsit;" "Covenant."

34. Ark. — *McLaughlin v. Hutchins*, 3 Ark. 207. Mass. — *Perkins v. Lyman*, 11 Mass. 76, 6 Am. Dec. 158. N. Y. *Noyes v. Phillips*, 60 N. Y. 408, 412; *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350. Pa. — *New Hallard Turnpike Co. v. Lancaster County*, 71 Pa. 442; *Dick v. Gaskill*, 2 Whart. 184.

See generally the titles "Covenant;" "Debt."

35. *Byrd v. Knighton*, 7 Mo. 443.

36. *James v. Parsons, Rich & Co.*, 70 Kan. 156, 78 Pac. 438.

"When a contract . . . is entered into and is breached by one of the parties, the other party may sue upon his contract and recover on the contract, in so far as it is performed, as well as the value of his bargain, in so far as it is unperformed, provided he can show a loss of profits, or he may, because of such breach, waive the contract and sue as upon a *quantum meruit* and recover the value of his labor or services. *Noyes v. Pugin*, 2 Wash. St. 653, 27 Pac. 548; *Chase v. Smith*, 35 Wash. 631, 77 Pac. 1069. He cannot pursue both remedies, for they bear a different measure of damage." *Gabrielson v. Hague Box & Lbr. Co.*, 55 Wash. 342, 104 Pac. 635.

37. *Water, Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41, 90 C. C. A. 547.

Under the New York Code a judgment in favor of the defendant on a building contract, because of failure of proof of performance by plaintiff, is not a bar to a subsequent action on *quantum meruit*.³⁸

B. AFFIRMANCE OR DISAFFIRMANCE OF CONTRACT.—1. Statement of General Rule.—Where one has the option to either affirm or disaffirm a contract,³⁹ or to affirm or disaffirm a sale, and thereby fix the relative status of the parties to the contract, and exercises this option, he is bound by his election, regardless of the effect upon the rights of others, and regardless of the knowledge or conduct of other parties in interest.⁴⁰

2. By Vendor.—Upon breach of an executory contract of sale the vendor has three remedies: (1) He may store the property and sue for the purchase price; (2) he may sell the property as agent for the vendee and recover any deficiency resulting; (3) he may keep the property as his own and recover the difference between contract price and the market price at the time and place of delivery.⁴¹ These

38. *Maeder v. Wexler*, 43 Misc. 19, 87 N. Y. Supp. 400.

In *Water, Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41, 90 C. C. A. 547, the court said: "The authorities abundantly support the proposition that, when judgment goes for the defendant in an action on express contract on the ground that the contract had not been completed by the plaintiff, 'such judgment is not a bar to a second action to recover the reasonable value of the same services.'" *Citing, U. S.—City of Davenport v. Allen*, 120 Fed. 172. *Minn.—Rossman v. Tilly*, 80 Minn. 160, 83 N. W. 42, 81 Am. St. Rep. 247. *Mo.—Arthur Fritsch M. Co. v. Goodwin Mfg. Co.*, 100 Mo. App. 414, 74 S. W. 136. *N. J.—Kirkpatrick v. McElroy*, 41 N. J. Eq. 539, 7 Atl. 647. *N. Y.—Marsh v. Masterton*, 101 N. Y. 401, 5 N. E. 59. *Tex.—Henrietta Bank v. Barnett* (Tex. Civ. App.), 25 S. W. 456. *Wash. Buddress v. Schaefer*, 12 Wash. 310, 41 Pac. 43. The justice writing this opinion rests on the theory of a mistaken remedy and proceeds to say that the pursuit of a remedy that never existed until the court so adjudges does not preclude a litigant from afterwards pursuing a remedy for relief to which he is entitled. See also *infra*, V.

39. *Cal.—Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351 (holding that "a party may remain silent after discovery of the fraud and affirm the contract with knowledge of such fraud,

as this can only extinguish the right to rescind, leaving his other rights unimpaired, and by bringing an action for deceit before he has complied with the terms of the contract on his part, he merely restricts the extent of any recovery which might be authorized.'). *Mont.—Madison River Livestock Co. v. Osler*, 39 Mont. 244, 102 Pac. 325. *N. Y.—Whiting v. Derr*, 121 App. Div. 239, 105 N. Y. Supp. 854; *Kirk v. Crystal*, 118 App. Div. 32, 103 N. Y. Supp. 17, *affirmed*, 193 N. Y. 622, 86 N. E. 1126 (effect of filing mechanic's lien). *Vt.—Corey v. Boynton*, 82 Vt. 257, 72 Atl. 987; *Farrar v. Powell*, 71 Vt. 247, 251, 44 Atl. 344; *Pawlet v. Kelly*, 69 Vt. 398, 38 Atl. 92; *White v. White*, 68 Vt. 161, 34 Atl. 425; *Flinn v. St. John*, 51 Vt. 334, 345. *Wash.—Reiff v. Coulter*, 47 Wash. 678, 92 Pac. 436, which involved the right to compel the performance of a contract after the parties had elected to rescind under the terms of the contract.

40. *Kennedy v. Manry*, 6 Ga. App. 816, 66 S. E. 29.

41. *Van Brocklen v. Smeallie*, 140 N. Y. 70, 79, 35 N. E. 415; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Hayden v. Demetz*, 53 N. Y. 426; *Isaac v. Terry & French Co.*, 56 Misc. 536, 107 N. Y. Supp. 136 (*reversed* on other grounds, 125 App. Div. 532, 109 N. Y. Supp. 792). See also, *Murray v. Hutchinson*, 14 Ont. App. (Can.) 489.

remedies are not concurrent, and the vendor after electing one of them cannot thereafter adopt a different one.⁴²

3. By Vendee.—When part of the purchase money is paid on an executory contract, and the seller refuses to complete his part of the contract, the purchaser may either affirm the contract by bringing an action for failure to perform, or disaffirm it *ab initio*, and bring an action for money had and received to his use.⁴³

C. REMEDIES IN TORT.—1. Trespass or Case.—It is the rule in common law jurisdictions that when an injury is directly inflicted by a forcible act, such as a blow, or an act of violence committed on the property or chattel of another, there is generally no choice of actions, and trespass is the only remedy.⁴⁴ But when the injury is effected by means flowing from the act of defendant, but not operating by the very force and impulse of that act, the action may be either trespass or case.⁴⁵

2. Replevin or Trespass.—Replevin and trespass are not inconsistent remedies, and though property be taken under the replevin, if it be returned and the action dismissed, it will not prevent an action for trespass.⁴⁶

3. Actions for Personal Injuries.—When the cause of action for injuries sustained survives and is revived in the name of the personal representative, it is not contemplated that in addition thereto an action for the same wrongful act as cause of death can also be maintained, and a disposition of the one action will prevent the maintenance of the other.⁴⁷

42. *Bridgford v. Crocker*, 60 N. Y. 627; *Gray v. Central R. R. of N. J.*, 82 Hun 523, 31 N. Y. Supp. 704; *Isaacs v. Terry & French Co.*, 56 Misc. 536, 107 N. Y. Supp. 136 (reversed on other grounds, 125 App. Div. 532, 109 N. Y. Supp. 792).

Amendment of Petition.—In Iowa, it is held that the bringing of an action to recover the contract price does not prevent plaintiff from thereafter amending his petition and asking for damages for breach of contract. *Red-head Bros. v. Wyoming Cattle Investment Co.*, 126 Iowa 410, 414, 102 N. W. 144.

43. **U. S.**—*Reusens v. Mexican Natl. Constr. Co.*, 23 Blatch. 19, 22 Fed. 522; *Shepherd v. Hampton*, 3 Wheat. 200, 4 L. ed. 369. **Conn.**—*Lyon v. Annable*, 4 Conn. 350. **Me.**—*Appleton v. Chase*, 19 Me. 74. **Mass.**—*Brown v. Harris*, 2 Gray 359; *Hill v. Rewee*, 11 Metc. 268. **N. Y.**—*Wheeler v. Board*, 12 Johns. 363. **Pa.**—*Smethurst v. Woolston*, 5 Watts. & S. 106. **Eng.** *Dutch v. Warren*, 1 Stra. 406, 93 Eng. Reprint 598 (the facts in case are

wrongfully stated in 2 Burr. 1010, 97 Eng. Reprint 679).

44. *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570, injury to a fishery. See also *Dodson v. Mock*, 20 N. C. 146, 32 Am. Dec. 675; *Waterman v. Hall*, 17 Vt. 128, 42 Am. Dec. 484. See generally the titles "**Case (the Action of Trespass on the)**"; "**Trespass.**"

45. *Waterman v. Hall*, 17 Vt. 128, 42 Am. Dec. 484, where the court referring to the celebrated "*Squib Case*," (*Scott v. Shepherd*, 3 Wils. K. B. 403, 95 Eng. Reprint 1124, s. c. 2 Wm. Bl. 892, 96 Eng. Reprint 925), thought that though trespass was properly adjudged to lie in that case, an action on the case would have been proper.

46. *Stier v. Harms*, 154 Ill. 476, 40 N. E. 296. It is to be noted that this is in a jurisdiction where the mere bringing of an action is an irrevocable election.

47. *Louisville R. Co. v. Raymond's Admr. (Ky.)*, 123 S. W. 281; *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 S. W. 236, 56 Am. St. Rep. 385, 34 L. R. A. 785; *Brammer's Admr.*

Joinder of Causes of Action.—In an action charging negligence the joinder of causes of action setting up different degrees of negligence, is not a joinder of inconsistent claims, in that claiming the benefit of one, necessarily waives the other. They are inconsistent only in that though one for precautionary purposes claim the benefit of both, he can have in the ultimate, the benefit of but one.⁴⁸

4. Remedies Against Tort Feasors.—Proceedings against wrongdoers may be either against them all jointly or against all or any of them separately.⁴⁹ If suit be brought against all jointly and judgment is rendered, an action cannot afterwards be maintained against any of them separately, or if the suit be brought against them separately and judgment is rendered, the plaintiff cannot afterwards seek his remedy in a joint action.⁵⁰

v. Norfolk & West. R., 107 Va. 206, 57 S. E. 593; *Anderson v. Hotel Hygeia Co.*, 92 Va. 687, 24 S. E. 269.

At common law when death ensued immediately upon the infliction of injuries, there could be no recovery, and when there was pending an action for injuries, and death subsequently ensued, the cause of action abated. *Louisville R. Co. v. Raymond's Admr.* (Ky.), 123 S. W. 281; *Brammer's Admr. v. Norfolk & West. R. Co.*, 107 Va. 206, 57 S. E. 593.

48. *Louisville & Nashville R. Co. v. Markee*, 103 Ala. 160, 171, 15 So. 511, 49 Am. St. Rep. 21; *Astin v. Chicago, M. & St. P. R. Co.*, 143 Wis. 477, 128 N. W. 265; *Whitney v. Chicago & N. W. R. R. Co.*, 27 Wis. 327.

See the title "Joinder and Splitting of Actions."

The joinder in a complaint of two causes of action each setting up negligence, but of different degrees, does not involve the question of election of remedy, the assertion of one not necessarily prejudicing the assertion of the other, and it is error to require a plaintiff to elect upon which cause of action he will rely. *Astin v. Chicago, M. & St. P. R. Co.*, 143 Wis. 477, 128 N. W. 265.

The court in *Astin v. Chicago, St. P. & M. R. Co.*, 143 Wis. 477, 128 N. W. 265, discusses at considerable length the question of alleging the different degrees of negligence in the same complaint by means of separate causes of action and its effect as a choice of remedies and concludes as follows: "We do not overlook the fact that it is given in *Shearman & R. on Negligence* that where the facts of a case like this are of doubtful

construction and plaintiff by not understanding his case has predicated it on the wrong theory of actionable misconduct, he may amend and stand on the right one, keeping in mind that the final choice will necessarily be binding so as to waive any other cause of action. If the writer intended by that to say that the party, when the facts of his case are susceptible of a double construction, cannot, under any circumstances, have it submitted to the jury to draw the proper inference, he confuses the matter with those situations where the doctrine of election, strictly so-called, applies, and the courts cited do not bear out the text, as has been seen."

49. *Atlantic & Pac. R. Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. ed. 485; *Sessions v. Johnson*, 95 U. S. 347, 24 L. ed. 596.

See the title "Parties."

Several Liability.—"The rule is established as to all that class of actions which comes under the head of 'torts' that one tort feasor is not discharged by an action or judgment against his co-tort feasor. Nothing short of satisfaction for the injury will relieve all the wrong doers from liability. The same rule is applicable to contracts. If two or more persons are severally liable for the same debt, payment of the debt alone discharges the debtor, and the maintenance of an action and recovery of a judgment against one does not debar the creditor from suing in a separate action others liable for the same debt." *First Nat. Bank of Brooklyn v. Wallis*, 84 Hun 376, 32 N. Y. Supp. 382, 65 N. Y. St. 588.

50. *Sessions v. Johnson*, 95 U. S.

There is a difference of opinion as to the right of recovery against joint *tort feorsors* when the injured party seeks to hold them severally, the American courts holding that there may be a recovery separately against each, but that the injured party can have but one satisfaction.⁵¹ The English courts, however, state the rule that a judgment in an action against one of two joint *tort feorsors* is a bar to an action against the other for the same cause,⁵² whether such judgment be satisfied or not.⁵³

347, 24 L. ed. 598; *Gawne v. Bicknell*, 162 Fed. 587.

51. U. S.—*Birdsell v. Shaliol*, 112 U. S. 445, 5 Sup. Ct. 244, 28 L. ed. 768; *Sessions v. Johnson*, 95 U. S. 349, 24 L. ed. 597; *Phoenix Ins. Co. v. The Atlas*, 93 U. S. 302, 23 L. ed. 863; *New England Mut. Marine Ins. Co. v. Dunham*, 3 Cliff. 332, 18 Fed. Cas. No. 10,155; *Power v. Baker*, 27 Fed. 396; *Collard v. Delaware, etc., R. Co.*, 6 Fed. 246. Ala.—*DuBose v. Marx*, 52 Ala. 506. Colo.—*Woodworth v. Gorsline*, 30 Colo. 186, 69 Pac. 707. Conn.—*Vincent v. McNamara*, 70 Conn. 332, 39 Atl. 444. Del.—*Norfolk Lumb. Co. v. Simmons*, 2 Marv. 329, 43 Atl. 163. Fla.—*American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 123, 47 So. 942. Ia.—*Cushing v. Hederman*, 117 Iowa 637, 91 N. W. 940, 94 Am. St. Rep. 320; *Home Savings Bank v. Otterbach*, 135 Iowa 157, 112 N. W. 769. Ky.—*Louisville, etc., Mail Co. v. Barnes*, 117 Ky. 860, 79 S. W. 261, 111 Am. St. Rep. 273; *United Society of Shakers v. Underwood*, 11 Bush. 271, 21 Am. Rep. 217. Me.—*Cleveland v. City of Bangor*, 87 Me. 259, 32 Atl. 892, 47 Am. St. Rep. 326 (the later cases overrule *White v. Philbrick*, 5 Me. 147, 17 Am. Dec. 214, which follows the English rule). Md.—*State v. Boyce*, 72 Md. 140, 19 Atl. 366, 20 Am. St. Rep. 459, 7 L. R. A. 273. Mass.—*Knight v. Nelson*, 117 Mass. 458; *Elliott v. Hayden*, 104 Mass. 181. Mo.—*Arnett v. Missouri Pac. R. Co.*, 64 Mo. App. 368. N. J.—*Kennealy v. Leary*, 67 N. J. L. 435, 51 Atl. 475. N. Y.—*Russell v. McCall*, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 814; *First National Bank of Brooklyn v. Wallis*, 84 Hun 376, 32 N. Y. Supp. 382, 65 N. Y. St. 588. Tenn.—*Turner v. Brock*, 6 Heisk. 50. Wash.—*Abb v. Northern Pac. Ry. Co.*, 28 Wash. 428, 68 Pac. 954, 92 Am. St. Rep. 864. W. Va.—*Griffie v. McClung*, 5 W. Va. 131;

Bloss v. Plymale, 3 W. Va. 393. Wis.—*Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 836.

See, however, *Hunt v. Bates*, 7 R. I. 217, 82 Am. Dec. 592, which follows the English rule, and the decision in *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17, which bases the rule not on the ground that the parties were joint *tort feorsors*, but that they were collaterally liable for the same injury. This rule laid down in *Hunt v. Bates*, *supra*, is, however, now limited to cases growing out of trover and trespass, and is not applicable to all joint torts; and in *Parmenter v. Barstow*, 21 R. I. 410, 43 Atl. 1035, it is held that with this exception joint *tort feorsors* may be sued separately.

The only American jurisdiction which still follows the English rule is Virginia. See *Petticolas v. City of Richmond*, 95 Va. 456, 28 S. E. 566; *Wilkes v. Jackson*, 2 Hen. & M. (Va.) 455; *Ammonett v. Harris*, 1 Hen. & M. (Va.) 488.

Leading Case.—*Lovejoy v. Murray*, 3 Wall. (U. S.) 1, 18 L. ed. 129, where all the prior English and American cases are discussed by Justice Miller.

52. *Brinsmead v. Harrison*, L. R. 7 C. P. 547, 553.

53. *Brinsmead v. Harrison*, L. R. 7 C. P. 547, 552.

In citing *Brown v. Wootton* (Cro. Jac. 73, 79 Eng. Reprint 62) in support of this doctrine, Kilby, C. B., in *Brinsmead v. Harrison*, *supra*, said: "This appears to me to be a satisfactory and binding authority: and the more so because I find that one hundred and fifty years afterwards, it is quoted in a book of the highest authority, viz.: Comyn's Digest, which alone would make it a satisfactory guide for us upon the present occasion. But it does not stop there, for I find *Brown v. Wootton* and all the other cases referred to in *King v.*

D. MATTERS ACTIONABLE IN EITHER CONTRACT OR TORT.—1. Contract and Tort Inconsistent Remedies.—A remedy cannot be based both on the contract and on a tort, and while in a proper case the tort may be waived and action brought on the contract, the remedies being inconsistent, an action brought in either of those forms will preclude a subsequent resort to the other form.⁵⁴ It is also held that if an

Hoare (13 M. & W. 494), where the question was fully and elaborately considered in the Court of Exchequer, and a judgment was pronounced by one of the most learned judges that ever sat in Westminster Hall."

54. Cal.—Wingard v. Banning, 39 Cal. 543. Mass.—Cooper v. Cooper, 147 Mass. 373, 17 N. E. 892, 9 Am. St. Rep. 721. Mich.—First Nat. Bank v. Sweet, 136 Mich. 615, 99 N. W. 861; McLaughlin v. Austin, 104 Mich. 489, 62 N. W. 719; Thomas v. Watt, 104 Mich. 201, 62 N. W. 345. N. Y.—Dav-enport v. Walker, 132 App. Div. 96, 116 N. Y. Supp. 411; Wm. A. Thomas Co. v. Holst, 120 N. Y. Supp. 747; Butts v. Collins, 13 Wend. 139, 154. Vt.—Elwell v. Martin, 32 Vt. 217. Wis. Barth v. Graf, 101 Wis. 27, 76 N. W. 1100. Eng.—Smith v. Baker, L. R. 8 C. P. 350.

Legislative Authority To Abolish Forms of Action.—"The legislature has the power to prevent recovery for a tort in an action in form *ex contractu* if it chooses to do so." Mintz v. Jacob, 163 Mich. 280, 128 N. W. 211; Hallett v. Gordon, 122 Mich. 567, 573, 81 N. W. 556, 82 N. W. 827.

"A mere breach of contract cannot be sued on as a tort, but for tortious acts, independent of the contract, a man may be sued in tort, though one of the consequences is a breach of his contract. Ashley v. Root, 4 Allen 504. Suppose a lessor, who has covenanted to keep the leased premises in repair, should tortiously fire a cannon near the premises, breaking the windows, and otherwise injuring them. It would not be an answer to an action of tort to set up that the plaintiff had an action on the covenants of the lease. He could pursue either remedy. In the case at bar, the tortious acts of the city had no connection with, or reference to, its contract. They were independent acts, which gave the plaintiff a right to an action of tort, even if he had (which we need not decide) a concur-

rent remedy upon his contract." Stock v. Boston, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430.

Waiver of the Tort.—Under the circumstances above stated one may be said to waive the tort and sue in contract. "But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained." Cooper v. Cooper, 147 Mass. 370, 373, 17 N. E. 892, 9 Am. St. Rep. 721, citing Milford v. Com., 144 Mass. 64, 10 N. E. 516; Earle v. Coburn, 130 Mass. 596; Brown v. Holbrook, 4 Gray (Mass.) 102; Jones v. Hoar, 5 Pick. (Mass.) 285; Ferguson v. Harrington, 9 B. & C. 59, Met. Con. 9, 10, 7 E. C. L. 330; 1 Chit. Con. (11th Am. ed.) 87.

Averment of Tort in Action on Contract.—If a plaintiff elects to waive the tort and sue in assumpsit, "he would yet have to declare specially averring the tort." Farwell v. Myers, 59 Mich. 179, 183, 26 N. W. 328; Tregent v. Maybee, 54 Mich. 226, 19 N. W. 962. See also Heber v. Heber's Est., 139 Wis. 472, 121 N. W. 328.

"Not only in cases of implied, but also in cases of express contracts, if they create a duty, *case* will lie; for although there be an express contract, a party is not bound to resort to that contract—he may declare on the tort and say the party has neglected his duty." Butts v. Collins, 13 Wend. (N. Y.) 139, 154.

Pleadings Determine Nature of Action.—Whether the tort is waived and the action brought on contract is to be determined from the pleadings. Plaintiff alleges that "he was the owner of the hogs, the character of the ownership, the taking of the same for the benefit of the defendant, that their value was \$7 per head, and that all were of the value of \$350, a demand for the value and a refusal, and closes with a prayer for a recovery of the alleged value." He stated such facts

act is of an ambiguous character, which may or may not be done with the intention of adopting and affirming the wrongful act, the question whether or not the tort has been waived becomes rather a matter of fact than of law.⁵⁵

2. Choice When Fraud Exists.—When one enters into a contract induced by the fraudulent representations of another,⁵⁶ or property

as were necessary to sustain an action for a recovery upon the implied contract which the law raises, and none indicating a purpose to rely on the tort, except in using the words, "did convert the same to her own use and benefit." "There is no specific allegation of wrong or fraud, or of injury to the plaintiff from the tortious taking. Neither does he allege or claim any damages by reason of the tort, but the amount which he claims is confined exactly to the alleged value of the hogs. The prayer of the petition also indicates an intention of the pleader to waive the tort and rely on the implied promise; and even the words quoted in regard to the conversion are not inconsistent with that form of action. They may be treated as surplusage, and do not necessarily fix the character of the action. As the law vests him with the election of the kind of action he shall bring, it devolved upon him to make his purpose plain by his pleadings, and not mislead the defendant. The defendant, as we think he had a right to, proceeded upon the theory that it was a cause of action *ex contractu*, and the plaintiff's reply shows more clearly perhaps than anything else, that he so treated and intended it. . . . It is clear from these allegations that at this time the plaintiff was proceeding upon the theory that the tort was waived, and the action was one upon the implied contract." *Smith v. McCarthy* 39 Kan. 308, 13 Pac. 204.

Sale and Tort.—Where conversion of property by a bailee is set up by plaintiff and he pleads the execution of a bill of sale of the property upon the agreement of the bailee to pay a fixed and definite amount therefor, such plaintiff cannot subsequently, if unsuccessful in his action, claim in another action that title to the property never passed from him and that the property was destroyed through the negligence of the bailee. *Turner v.*

Grimes, 75 Neb. 412, 106 N. W. 465. See also, *supra*, II, B.

Landlord's Liability for Injury to Tenant's Property.—An allegation in a complaint that the defendant had expressly agreed to protect plaintiff against damage by leakage, which complaint is dismissed, is not such an election to sue on the contract, as will prevent a subsequent action based on the common law liability of the defendant to protect plaintiff in the quiet and peaceable enjoyment of the premises. *Pratt, Hurst & Co. v. Tailor*, 53 Misc. 82, 103 N. Y. Supp. 1094.

When Action on Tort Not Bar to Subsequent Action on Contract.—When one having the right to sue either in tort or for breach of contract, elects the former remedy, and the case is dismissed for want of jurisdiction, the election to proceed in tort does not prevent a subsequent suit on the contract. *Louisville & Nashville R. Co. v. Pferdmenges, Poyer & Co.*, 8 Ga. App. 81, 68 S. E. 617.

55. *Smith v. Baker*, L. R. 8 C. P. 350, 355, in which the court found "as a matter of fact" that the plaintiff had waived the tort and had proceeded on contract.

56. *Sheldon v. S. S. Uncle Sam*, 18 Cal. 526, 534, 79 Am. Dec. 193; *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351; *Stroud v. Life Ins. Co. of Virginia*, 148 N. C. 54, 61 S. E. 626.

Fraudulent Contract.—A party "is not restricted to his right to rescind his contract of sale on discovery of the fraud practiced upon him, but may bring assumpsit for money had and received (Lord v. French, 61 Me. 420); or he may have other remedies (*Edwards v. Owen*, 15 Ohio 500; *Meeker v. Potter*, 5 N. J. L. 586)." *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351.

Contract Induced by Fraudulent Representations.—When a party is induced to enter into a contract upon fraudulent representations, the injured party may upon discovery of the fraud rescind

of another is wrongfully obtained through false and fraudulent representations, the tort may be waived and action brought upon contract.⁵⁷ There are also circumstances wherein an action would lie on an implied contract for the return of money paid on a fraudulent contract, or suit brought for the tortious violation of a duty owed to the purchaser.⁵⁸ In the first action all the parties implicated must be joined, but in an action on the tort the action may be brought against either of the parties implicated.⁵⁹

3. Election When Extension of Credit Based on Fraudulent Statement.—When goods are sold and credit extended relying upon statements of the purchaser that are false and fraudulent, the seller may either disaffirm the sale and proceed to recover the goods, or he may waive the tort and proceed immediately in assumpsit for the purchase price, without waiting for the termination of the extension of credit.⁶⁰

the sale and return the property, or may retain the property and prosecute his claim for damages for false and fraudulent representations. *Del Vecchio v. Savelli*, 10 Cal. App. 79, 101 Pac. 32.

Effect of Filing Claim in Bankruptcy. A creditor of a bankrupt does not waive his right of action to recover damages for false pretenses or representations by proving his claim in the bankruptcy court. *Frey v. Torrey*, 175 N. Y. 501, 67 N. E. 1082; *Maxwell v. Martin*, 130 App. Div. 80, 114 N. Y. Supp. 349, nor does the filing of a claim in insolvency proceedings prevent the bringing of an action for wrongfully diverting proceeds of a sale of merchandise. *Farmers & Merchants Bank v. Wood Bros. & Co.*, 143 Iowa 635, 118 N. W. 282, 120 N. W. 625.

Form of Complaint.—"One who has been induced by the fraudulent representations of another to enter into a contract may affirm or disaffirm it. If he disaffirms it and asserts the fraud, he cannot in the same action, turn it into an action of assumpsit and recover as for an implied promise." *Bedier v. Fuller*, 106 Mich. 342, 64 N. W. 331.

Action Involving Fraud.—Where plaintiff claims that he was induced to enter into a contract for the sale of his property while he was in such a state of intoxication as not to be competent to enter into a legal contract he may elect to rescind the contract and sue for the rescission of the contract, or may affirm the contract and sue for the value of the property. If he elects to rescind he may pro-

ceed in several ways, first, by a suit in equity; second, by an offer to return the money he has received, coupled with a demand for the restoration of his property, after which if defendant did not consent to a restoration, an action in replevin or trover would lie; third, he may without a formal rescission of the contract, maintain an action to recover the difference between the value of the property and the price received. *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 46 Am. St. Rep. 550, 22 L. R. A. 846.

57. *Ala.*—*Upchurch v. Norsworthy*, 15 Ala. 705. *Ga.*—*Rhodes Furniture Co. v. Jenkins*, 2 Ga. App. 475, 58 S. E. 897. *La.*—*Morgan's L. & T. R. & S. Co. v. Stewart*, 119 La. 392, 408, 44 So. 138. *Mich.*—*Farmers' Nat. Bank v. Fonda*, 65 Mich. 533, 32 N. W. 664. *Neb.*—*Hart v. Barnes*, 24 Neb. 782, 40 N. W. 322. *N. C.*—*Stroud v. Life Ins. Co. of Virginia*, 148 N. C. 54, 61 S. E. 626. *Vt.*—*Elwell v. Martin*, 32 Vt. 217. *Wis.*—*Barth v. Graf*, 101 Wis. 27, 35, 76 N. W. 1100.

There is no case, however, "which authorizes a party to first turn a contract into a tort, and then shift it back into the form of a new contract other than the original one." *Emerson v. Detroit Steel & Spring Co.*, 100 Mich. 127, 58 N. W. 659.

58. *Old Dominion Copper M. & S. Co. v. Bigelow*, 188 Mass. 315, 74 N. E. 653.

59. *Old Dominion Copper M. & S. Co. v. Bigelow*, 188 Mass. 315, 74 N. E. 653.

60. *Heilbronn v. Herzog*, 165 N. Y.

There is, however, authority that while upon discovery of the fraud the agreement may be disregarded, and action on the tort for injury occasioned by the fraud, may be immediately begun, but if the wrong be waived, action in *assumpsit* will not immediately lie, as upon affirmation of the contract the parties are bound by its terms.⁶¹

4. Conversion.—*a. General Rule.*—Where there is a conversion of property, or the proceeds are converted,⁶² or where a pledgee un-

98, 58 N. E. 759, *reversing* 33 App. Div. 311, 53 N. Y. Supp. 841; *Wigand v. Sichel*, 4 Abb. Dec. (N. Y.) 592, 3 Keyes, 120, 33 How. Pr. 174; *Kayser v. Sichel*, 34 Barb. 84; *Roth v. Palmer*, 27 Barb. (N. Y.) 652.

There is furthermore a well recognized distinction in these cases as between a disaffirmance of sale with all its incidents and a mere rescission of the credit upon which the sale was made. *Heilbronn v. Herzog*, 165 N. Y. 98, 58 N. E. 759, *reversing* 33 App. Div. 311, 53 N. Y. Supp. 841.

Failure To Perform Promise To Furnish Security.—When property is sold under an agreement whereby the purchaser pays down a portion of the purchase price and agrees to furnish security for the balance on a certain day, at which time he is to receive the deed of the property, but by fraudulent means obtains possession of the deed and fails to furnish the security, the seller may waive the contract and sue immediately. His action, however, should be special on the contract to furnish the security and not in general *assumpsit*. *Ascotney Bank v. Ormsby*, 28 Vt. 721.

61. *Mass.*—*Allen v. Ford*, 19 Pick. 217. *Mich.*—*Dunks v. Fuller*, 32 Mich. 242; *Jewett v. Petit*, 4 Mich. 508; *Galloyay v. Holmes*, 1 Dougl. 330, 338. *Eng.*—*Ferguson v. Carrington*, 9 B. & C. 59, 17 E. C. L. 330.

62. *Cal.*—*Latillade v. Orena*, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219; *Fratt v. Clark*, 12 Cal. 89; *Fountin v. City of Sacramento*, 1 Cal. App. 461, 82 Pac. 637. *Mass.*—*Brown v. Magorty*, 156 Mass. 209, 30 N. E. 1021. *Mich.*—*McCormick Mach. Co. v. Waldo*, 128 Mich. 135, 87 N. W. 55; *Grinnell v. Anderson*, 122 Mich. 533, 81 N. W. 329. *N. H.*—*Hill v. Davis*, 3 N. H. 384. *N. Y.*—*McGoldrick v. Willets*, 52 N. Y. 612; *Berly v. Taylor*, 5 Hill 577; *Abbott v. Blossom*, 66 Barb. 353 (where the wrongdoer used the prop-

erty for his own benefit and changed its condition and character). *N. C.* *Brittain v. Payne*, 118 N. C. 989, 24 S. E. 711; *Timber, etc., Co. v. Brooks*, 109 N. C. 698, 14 S. E. 315; *Wall v. Williams*, 91 N. C. 477; *Logan v. Wallis*, 76 N. C. 416. *Wis.*—*Heber v. Heber's Est.*, 139 Wis. 472, 121 N. W. 328; *Barth v. Graf*, 101 Wis. 27, 35, 76 N. W. 1100; *Van Oss v. Synon*, 85 Wis. 661, 56 N. W. 190. *Eng.* *Smith v. Baker*, L. R. 8 C. P. 350, 355.

Rule in California.—In *Bechtel v. Chase*, 156 Cal. 707, 711, 106 Pac. 81, the court in applying this rule says: "The plaintiff seeks to bring the case within the rule that where personal property is wrongfully converted, the injured party may 'waive the tort and sue in *assumpsit*.' In many jurisdictions this doctrine is limited to cases where the wrongdoer has sold the property or otherwise converted it into money, in which event the plaintiff may maintain an action for the proceeds. In this state, however, as in a number of others, a broader rule enables one whose goods are wrongfully taken and used by another to sue in *assumpsit* for their value as for goods sold and delivered. (*Roberts v. Evans*, 43 Cal. 380; *Lehmann v. Schmidt*, 87 Cal. 15, [25 Pac. 161]; *Chittenden v. Pratt*, 89 Cal. 178, [26 Pac. 626]). But the application of this rule, even in its more liberal form, cannot be extended to a case where plaintiff has voluntarily parted with his property in exchange for something received by him in return. The very basis of the 'waiver of tort' is that plaintiff consents to the taking of his property and affirms the act of the wrongdoer. He treats it as a sale, and recovers the value due him under an implied contract of sale. But where he has actually agreed to an exchange, which is executed, his affirmation of the transaction is an affirmation of it as a whole. Having parted with his property for an agreed consideration, he cannot, while rely-

lawfully disposes of property in his possession, the action may be

ing upon his transfer as one made pursuant to contract, hold the defendant to the payment of any other consideration than the one agreed upon. No contract will be implied by the law as against an express contract not disavowed by either party. So long as plaintiff treats the transfer of the notes to Foster as valid, his only remedy for the fraud alleged by him is by means of an action in tort to recover damages therefor."

In Illinois, it is settled law, that one who obtains the goods of another and converts them into money, or applies them to his own use, is liable for the tort, or the owner may waive the tort and sue in assumpsit on the common counts as for goods sold and delivered. *City of Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090; *Toledo, W. & W. R. Co. v. Chew*, 67 Ill. 378; *Shober & C. Lith. Co. v. Schedler*, 63 Ill. App. 48; *Farson v. Hutchins*, 62 Ill. App. 439.

Where cattle are delivered by their owner to another for fattening, which are to be redelivered at a certain time, at which time the owner is to pay for feeding them, and the party to whom they are so delivered sells them, action may be brought for the tort or the tort may be waived and action brought as for money had and received for his use, *Staat v. Evans*, 35 Ill. 455.

When Accounting Also Remedy.—When parties occupy the relation of guardian and ward, and property of the estate is sold by the guardian and the proceeds thereof converted to his own use, such sale is a conversion and the ward may waive the tort and sue in assumpsit, or under some circumstances, for an accounting. *Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219.

Intendment Favors Jurisdiction.—In an action pending in a justice's court where there is a question as to whether the complaint is on contract or tort, and it being open to either construction, it will be construed to be an action on implied contract in favor of the jurisdiction of the court. *Britain v. Payne*, 118 N. C. 989, 24 S. E. 711.

Effect on Court of Another State. Where a guardian, without authority of

court, sells a mortgage belonging to his ward, and afterwards converts the proceeds to his own use, the ward, or the court and a new guardian may elect to sue the defaulter's bondsmen for the full amount of the defalcation; if they do so, a court in another state may respect the election thus made, and dismiss a subsequent action by the ward to foreclose the mortgage on which the defaulter realized the money converted. *Gentry v. Bearss*, 38 Neb. 742, 130 N. W. 428.

Wrongful Taking.—"There is no doubt that an owner of land whose timber is wrongfully taken from it and sold or converted from it by trespass may waive the tort and recover the value of the timber upon the common counts. He may recover upon a *quantum valebat*, if not sold, and for money had and received, if sold. The timber having been converted into personality by severance its true owner may recover its value in assumpsit." *Parks v. Morris, Layfield & Co.*, 63 W. Va. 51, 59 S. E. 753. This is also the rule in New Hampshire. See *Hill v. Davis*, 3 N. H. 384; *Chauncey v. Yeaton*, 1 N. H. 151. Compare, *Jones v. Hoare*, 5 Pick. (Mass.) 285, it was held assumpsit was not maintainable unless the property be sold and the wrongdoer receive the money. To same effect, *Willet v. Willet*, 3 Watts (Pa.) 277.

Sale of Joint Property.—"One joint owner of personal property can only sell his own interest in it; if he assumes to sell the interest of the other owners they may repudiate it and bring trover for its conversion, or they may ratify the sale and sue him for their share of the money received. *Tyler v. Taylor*, 8 Barb. 585; *Wilson v. Reed*, 3 Johns. 175; *Nowlen v. Colt*, 6 Hill 461; *Cochran v. Carrington*, 25 Wend. 409." *Small v. Robinson*, 9 Hun (N. Y.) 418.

Alleging Receipt of Money.—"Whether the owner, whose property has been tortiously taken, can waive the tort, and bring his action as for property sold and delivered, while the wrongdoer still keeps the property in his possession, the cases do not agree. But they all agree that if the wrongdoer sell the property, and receive the money therefor, an action lies at the

in tort, or the tort may be waived and suit brought on contract.⁶³

b. *Conflict as to Right of Election.*—There is, however, conflict of authority as to the right of election where the wrong-doer retains possession of the property, and it has not been converted into money, the weight of authority being that even in such case there is nothing to prevent the owner suing upon contract, or of treating the taking as wrongful and suing for the wrong.⁶⁴ Others state the rule that unless

suit of the owner, for money had and received, and that such an action is a waiver of the tort. *Purnam v. Wise*, 1 Hill 234, 240, note a. *Schroepel v. Corning*, 2 Seld. 112. *Roth v. Palmer*, 27 Barb. 652. In such an action it was never necessary to state in the complaint how, or under what circumstances, the money came to the defendant's hands." *Harpending v. Shoemaker*, 37 Barb. (N. Y.) 270, 291.

Complaint and Amendment Considered Together.—A complaint charged: "1. That the defendant, on January 2, 1853, was indebted to one C. B. J., \$910, for lumber sold, and for money had and received, and that afterward, on February 6, then next following, Jackson assigned his account against the defendant for the lumber, and for the money, to the plaintiff. 2. That on January 3, 1858, the defendant was further indebted to Jackson, \$910, for 5,200 feet of lumber belonging to him, which defendant had sold and otherwise disposed of, and appropriated the proceeds thereof to his own use, and that, afterward, Jackson sold and assigned his account, against the defendant, for the lumber so disposed of, etc., to the plaintiff." Plaintiff subsequently amended and charged "that the defendant, the lumber being in his hands, under a contract to work it up, etc., 'wasted and destroyed it, and converted it to his own use.'" This, while charging a tortious disposal, was held, nevertheless, to be on contract, and was considered with the original complaint. *Jones v. Gregg*, 17 Ind. 84.

English Rule.—Where a sheriff sold goods on a *fi. fa.*, action was brought against him by the assignee of a bankrupt for money had and received on the grounds that he had wrongfully sold such property. Objection was made that the action should have been trover, especially as the money had been paid over to the execution creditor before commencement of the suit. It was held that a party was not

bound to sue in tort, especially where by suing on contract the defendant is not prejudiced. It was furthermore stated by one of the court that bringing in assumpsit the acts of the sheriff were not thereby affirmed, the claim for damages for the wrong being merely waived. *Young v. Marshall*, 8 Bing. 43, 21 E. C. L. 215.

Action for Share in Crops.—In Michigan, it is well settled, "that a tenant in common may maintain assumpsit against his co-tenant for his share of the crops. Such crops are divisible and the share of each easily ascertainable, and the refusal to recognize the right of the co-tenant amounts to a conversion. The tort may be waived, and assumpsit brought. It is not like the case of tenants in common of a chattel, where one has as good a right to possession as the other." *Loomis v. O'Neal*, 73 Mich. 582, 41 N. W. 701. To same effect, see *McLaughlin v. Salley*, 46 Mich. 219, 9 N. W. 256; *Coe v. Wager*, 42 Mich. 49, 3 N. W. 248; *Fignet v. Allison*, 12 Mich. 328.

63. *Bell v. Bank of California*, 153 Cal. 234, 243, 94 Pac. 889; *Rhodes Furniture Co. v. Freeman*, 2 Ga. App. 473, 58 S. E. 696.

64. U. S.—*Derk P. Yonkerman Co. v. C. H. Fuller's Ad. Agency*, 135 Fed. 613; *Phelps v. Church of Our Lady Help of Christians*, 99 Fed. 683, 40 C. C. A. 72 (where the property is converted to the beneficial use of the wrongdoer). Cal.—*Lehmann v. Schmidt*, 87 Cal. 15, 25 Pac. 161; *Roberts v. Evans*, 43 Cal. 380; *Halleck v. Mixer*, 16 Cal. 574; *Fratt v. Clark*, 12 Cal. 89; *Fountain v. City of Sacramento*, 1 Cal. App. 461, 82 Pac. 637. Idaho.—*Ditterman v. Cable Milling Co.*, 16 Idaho 298, 101 Pac. 593. Ill.—*City of Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090; *Edwards v. Schillingers Bros.*, 153 Ill. App. 219. Mo.—*Gordon v. Bruner*, 49 Mo. 570. See note, *infra*, as to Missouri rule. N. Y.—*Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272,

the property has been sold and converted into money or other thing

18 Am. St. Rep. 803, 8 L. R. A. 216, *affirming*, 49 Hun 560, 2 N. Y. Supp. 348. N. D.—*Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133. Ohio.—*Barker v. Cory*, 15 Ohio 9. Pa.—*Dundas v. Muhlenberg's Exrs.*, 35 Pa. 351. Tex.—*Pridgin v. Strackland*, 8 Tex. 427, 58 Am. Dec. 124. Wis.—*Kalekhoff v. Zoehrlant*, 40 Wis. 427; *Norden v. Jones*, 33 Wis. 600 (discussing the earlier cases stating a different rule). Can.—*Re Mount v. Mara*, 2 Ont. W. R. 501.

The New York courts in the earlier cases did not consider this view settled in that state. *Tryon v. Baker*, 7 Lans. 511.

Stolen Certificate of Deposit.—T. was the owner of a certificate of deposit payable to order and after endorsing it with directions that it be paid to the order of W. & Co., transmitted it to them by mail, though without their knowledge and request. The paper was stolen on the way and never reached W. & Co., but their names were forged upon it and the paper reached defendant's hands in the ordinary course of business, who collected the money thereon supposing themselves to be the owners. It was held that T. could either sue defendants in trover for conversion or recover the amount in an action for money had and received. *Talbot v. Bank of Rochester*, 1 Hill (N. Y.) 295.

On Rescission of Contract.—When a contract for the purchase of personal property is rescinded, and the purchaser refuses to return the property to the vendor upon demand, it amounts to a conversion, and action may be brought for the tort or it could be waived and *assumpsit* brought. *Aldine Mfg. Co. v. Barnard*, 84 Mich. 632, 48 N. W. 280. The action may be on the common counts (*Aldine Mfg. Co. v. Barnard*, *supra*; *McLaughlin v. Salley*, 46 Mich. 219), even though the declaration does not set forth the waiver of the tort (*Aldine Mfg. Co. v. Barnard*, *supra*; *McDonald v. McDonald*, 67 Mich. 122, 34 N. W. 276).

In Missouri, the rule laid down in *Gordon v. Bruner*, 49 Mo. 570, which supports the text, is overruled by the case of *Sandeen v. Kansas City*, etc., R. Co., 79 Mo. 278. And see also Ed-

wards v. Albrecht, 42 Mo. App. 497; *Sandeed v. Kansas City*, etc., R. Co., *supra*, though a justice's court action. discusses the main proposition as involving the jurisdiction of the court, and the court in *Edwards v. Albrecht*, *supra*, says that *Gordon v. Bruner* is overruled by the *Sandeed* case. Compare, however, *Crane v. Murray*, 106 Mo. App. 697, 704, 80 S. W. 280, citing *Gordon v. Bruner*, *supra*.

Rule in Mississippi.—The rule as laid down by the earlier cases in Mississippi do not altogether favor the view stated in the text. See *O'Conley v. City of Natchez*, 1 Smed. & M. 31, 46; *Mhoon v. Greenfield*, 52 Miss. 434. Simrall, C. J., writing for the court in the latter case, after stating the rule that there must be a sale and realization of money by the trespasser to allow a waiver of the tort, and recovery in *assumpsit*, said: "A further modification is, sufficient time must have elapsed, with concurrence of circumstances, to justify the inference that they have been converted into money; then the presumption may be indulged of a sale." However, in *Evans v. Miller*, 58 Miss. 120, 125, after referring to the cases above cited, the court said: "A more liberal, and we think a more sensible rule, is laid down by the later text writers and sustained by many courts, to the effect that the tort may be waived and *assumpsit* maintained whenever the property taken has been converted either into money or into any other beneficial use by the wrongdoer, and especially where it has been so applied to his own use as to lose its identity. It is impossible to perceive any valid objection to this doctrine."

"If one may sue in *assumpsit* for goods delivered and converted, and recover the value, and for goods wrongfully taken and sold for money, we can see no good reason why the value of goods tortiously taken and converted, but not sold, may not be recovered in the same form of action. The principle is, that the injured party may, at his election, sue in trespass or trover for the tort, or waive it, and sue as upon an implied promise to pay the value of the property converted." *Alsbrook v. Hathaway*, 3 Sneed (Tenn.) 454.

of value, the owner is put to his action on the tort, and cannot recover in *assumpsit* as for money had and received.⁶⁵

65. **Ala.**—Calhoun County v. Art. Metal Constr. Co., 152 Ala. 607, 44 So. 876; Smith v. Jernigan, 83 Ala. 256, 3 So. 515; Fuller v. Duren, 36 Ala. 73, 76 Am. Dec. 318; Pike v. Bright, 29 Ala. 332. **Ark.**—Chamblee v. McKenzie, 31 Ark. 155; Bowman v. Browning, 17 Ark. 599. **Conn.**—Ayres v. French, 41 Conn. 142, 151; Tucker v. Jewett, 32 Conn. 563. **Del.**—Hutton v. Wetherald, 5 Harr. 38. **Ga.**—Woodruff v. Zaban, 133 Ga. 24, 65 S. E. 123; Southern R. Co. v. Boon Steel Range Co., 122 Ga. 658, 50 S. E. 438; Bates v. Bigby, 123 Ga. 727, 51 S. E. 717; Buchanan v. McClain, 110 Ga. 477, 35 S. E. 665; Jones v. Smith, 62 Ga. 345; Rhodes Furniture Co. v. Jenkins, 2 Ga. App. 475, 58 S. E. 897; Rhodes Furniture Co. v. Freeman, 2 Ga. App. 473, 58 S. E. 696. **Ill.**—Kellogg v. Turpie, 93 Ill. 265, 34 Am. St. Rep. 163; Morrison v. Rogers, 3 Ill. 317; Morris v. Jamieson, 99 Ill. App. 32. **Ia.**—Bever v. Swecker, 138 Iowa 721, 116 N. W. 704; Moses v. Arnold, 43 Iowa 187, 22 Am. Rep. 239. **Ky.**—Guthrie v. Wickliffe, 1 A. K. Marsh. 83. **Md.**—Stockett v. Watkins, 2 Gill & J. 326, 343. **Mass.**—Berkshire Glass Co. v. Wolcott, 2 Allen 227; Jones v. Hoar, 5 Pick. 285 (compare Hunt v. Boston, 183 Mass. 303, 67 N. E. 244). **Mich.**—Lyon v. Clark, 129 Mich. 381, 88 N. W. 1046; McCormick Mach. Co. v. Waldo, 128 Mich. 135, 87 N. W. 55; Thompson v. Bronk, 126 Mich. 455, 85 N. W. 1084; Grinnell v. Anderson, 122 Mich. 533, 81 N. W. 329; Tolan v. Hodgeboom, 38 Mich. 624; Watson v. Stever, 25 Mich. 386. **Minn.**—Brady v. Brennan, 25 Minn. 210, where, however, the question was not raised by the evidence. **Mo.**—Sandeem v. Kansas City, etc., R. Co., 79 Mo. 278. Compare note as to Missouri rule, *supra*. **N. H.**—Smith v. Smith, 43 N. H. 536; Mann v. Locke, 11 N. H. 246. **N. J.**—Randolph Iron Co. v. Elliott, 34 N. J. L. 184; Budd v. Hiler, 27 N. J. L. 43. **Pa.**—Pearsoll v. Chapin, 44 Pa. 9; Willet v. Willet, 3 Watts 277. **Vt.**—Kidney v. Persons, 41 Vt. 386; Stearns v. Dillingham, 22 Vt. 624.

Compare, Aldine Mfg. Co. v. Barnard, 84 Mich. 632, 48 N. W. 280, where the purchaser rescinds the contract but refuses to return the property.

For a discussion of the authorities as to what is equivalent to money, so as to permit an action in *assumpsit*, see Kidney v. Persons, 41 Vt. 386.

Judge Anderson in Calhoun County v. Art Metal Constr. Co., 152 Ala. 607, 44 So. 876, discussing the rule, said: "These views are not in conflict with the rule laid down in the case of Hickman v. Richburg, 122 Ala. 638, 26 So. 136, and cases there cited. There the plaintiff had the right to confirm the sale and recover the property; but in the case at bar the plaintiff could not maintain *assumpsit*, and could not be precluded from an action for conversion, upon the doctrine of election, by bringing an action that could not be maintained."

In Maine, the rule stated is, that the wrongdoer must have received some benefit from the tort other than its use. Balch v. Patten, 45 Me. 41; Webster v. Drinkwater, 5 Me. 319, 17 Am. Dec. 238.

Effect of Waiving Tort When Contract Not Maintainable.—Action was brought to recover the value of personalty described in the petition, which alleged "that plaintiffs were the owners of the property, and that defendants wrongfully and tortiously took possession of the property and converted it to their own use and 'carried said personal property away, thereby converting same to their own use, with the intent to deprive the plaintiffs of said personal property.' Plaintiffs alleged that the value of the property was \$3,365.85 at the time of the conversion, and made the following allegations: 'Wherefore, waiving the tort and suing for the value of said personalty, plaintiffs bring this suit and pray joint and several judgment for the value of said personal property, together with interest on said value from the 3rd day of February, 1906, the date of said conversion.'" Defendant demurred to the petition on the ground, among others, "that while the plaintiffs might have a right of action *ex delicto* against the defendants, they are restricted to that form of action, and have no cause of action *ex contractu* for the value of the property alleged to have been converted as against the defendants." The

5. Conversion or Replevin. — Where property is wrongfully taken or detained an action either for conversion or to recover the property may be maintained;⁶⁶ or when money or property is wrongfully trans-

demurrer being overruled, defendants appealed. It was held that plaintiffs had expressly waived the tort; "and since their only right of action arises *ex delicto*, the action as brought was not maintainable, and the court erred in not sustaining the demurrer of the defendants. Whatever may be the plaintiffs' reasons for waiving the tort, their action cannot be treated as an action *ex delicto* in the face of their express and absolute waiver of the tort, even though this kind of an action is the only one they have the right to maintain. The effect of their express and unconditional waiver of the tort is to prevent the action being treated as an action *ex delicto*. The court could not treat it as an action *ex delicto* with the plaintiffs' consent any more than it could against their consent." *Woodruff v. Zaban*, 133 Ga. 24, 65 S. E. 123.

Where one wrongfully takes the personal property of another and converts it into money, the latter has a right of action *ex delicto* for the wrong done him; though he is not restricted to that form of action, but may as a general rule waive the tort and sue in assumpsit for money had and received to his use. *Cragg v. Arendale*, 113 Ga. 181, 38 S. E. 399.

"Where goods have been taken tortiously, and sold by the wrongdoer, or he has, in any manner, received the value thereof, so as to be chargeable as for money received to the use of the owner, the owner may elect to waive the tort and affirm such sale or disposition, and maintain an action for the money so received; but if there has been no such sale, or disposition, from which a promise to pay may be implied, there can be no contract, for the breach of which an action may be maintained. *Bowman v. Browning*, 17 Ark. 599, and cases there cited." *Chamblee v. McKenzie*, 31 Ark. 155, 158.

When an action in assumpsit is improperly brought in such a case and is dismissed before judgment, it is not a bar to an action for the tort, there being in such case no election of remedies. *Holmes v. Smith*, 149 Mich. 327, 112 N. W. 912.

When Property Taken Is Money.—

"Where the property taken is money, it might be recovered in an action for money had and received, without waiting for the formality of a sale of it, an event which would not be likely to occur." *Tryon v. Baker*, 7 Lans. (N. Y.) 511.

Failure To Object to Defective Plea.

"Defendants pleaded as a counterclaim, that 'the said plaintiff had and received of these defendants four steers, each of the age of three years, and there and then of the just and full value of the \$120, which said sum the plaintiff was owing to these defendants at and before the commencement of this action.' This counterclaim is badly pleaded, for it does not show a sale of the steers, nor how they were had and received by plaintiff. No exception, however, was taken to it, and the defendants introduced evidence that plaintiff had, without their consent, taken the steers from their possession and sold them. There was no direct evidence that plaintiff actually received anything on such sale, nor for how much he sold them. After the evidence was in, plaintiff moved to strike it out as incompetent, irrelevant and immaterial, and because it tends to prove a claim for damages arising out of tort, and not a counterclaim. If the facts had been properly pleaded, proof of them would have been relevant and material, and the real ground of objection is the absence of proper allegations in the answer, and it was as apparent before as after it was received. Where the objection is thus apparent, if the party makes no objection to the evidence when offered, it is discretionary with the court to grant or refuse a motion to strike out." *Brady v. Brennan*, 25 Minn. 210.

66. Ga.—*Rowe v. Weichselbaum*, 3 Ga. App. 504, 60 S. E. 275. Ill.—*Brunner v. Dyball*, 42 Ill. 34. Ind.—*Moore v. Baker*, 4 Ind. App. 115, 30 N. E. 629, 51 Am. St. Rep. 203. N. Y.—*Davenport v. Walker*, 132 App. Div. 96, 116 N. Y. Supp. 411; *Baumann v. Jefferson*, 23 N. Y. Supp. 685. Va.—*Tide-water Quarry Co. v. Scott*, 105 Va. 160, 52 S. E. 835.

ferred by the holder, the owner has his remedy in conversion or replevin against either the wrong-doer or the person who wrongfully comes into possession of the property;⁶⁷ but the remedies are not concurrent and the pursuit of one precludes a subsequent resort to the other.⁶⁸

Where several persons are guilty of converting or detaining the same property the owner may bring separate actions against the wrong-doer and pursue his remedy until he receives satisfaction.⁶⁹

6. Matters Having Contractual Inception.—There is another class of cases where there has been a conversion of property, but the property has not been sold, where the tort may be waived and assumpsit brought for the value of the goods converted.⁷⁰ To this class belong cases where a contract may exist, and at the same time a duty is superimposed or arises out of the circumstances surrounding or attending the transaction, the violation of which duty would constitute a tort. The reason why in such cases the tort may be waived and

Compare Moss v. Marks, 70 Neb. 701, 97 N. W. 1031, holding that where a party brought conversion, and as soon as he discovered he had the right of replevin, discontinued the first action, there was no such election of remedies as prevented the maintenance of the replevin action.

67. *Jones v. Lincoln First Nat. Bank*, 3 Neb. (Unof.) 73, 90 N. W. 912; *Baker v. Wasson*, 59 Tex. 149; *Rodriguez v. Trevino*, 54 Tex. 198.

68. *Jones v. Lincoln First Nat. Bank*, 3 Neb. (Unof.) 73, 90 N. W. 912.

Compare, however, *In re Pierson's Estate*, 19 App. Div. 478, 46 N. Y. Supp. 557, where a member of a firm of stockholders converted stock of a customer, and subsequent thereto dies, the customer has a choice of remedies, either to bring his action upon an implied contract against the surviving member of the firm; or in tort against the estate of the partner committing the wrong. If he brings his action against the surviving partner and the judgment be unsatisfied, he may still bring an action for the tort against the estate of the deceased partner. The judgment which he obtains against the surviving member of the firm, however, is conclusive as to the amount of damages incurred.

69. *Woolworth v. Gorsline*, 30 Colo. 186, 197, 69 Pac. 705. See also *supra*, VII, C, 4.

70. *Tuttle v. Campbell*, 74 Mich. 652, 662, 42 N. W. 384.

Sale of Securities on Speculative Ac-

count.—"Where a broker sells securities which he is carrying for a customer on a speculative account, the customer may either sue in conversion, or waive the tort and sue for damages for a breach of contract." *Barber v. Ellingwood*, 122 N. Y. Supp. 369, citing *Baker v. Drake*, 52 N. Y. 211, 13 Am. Rep. 507; *Stearns v. Marsh*, 4 Denio (N. Y.) 227, 47 Am. Dec. 248.

Remedies Available.—"The right to rescind a contract and recover that which has been parted with under it does not exist in a case like the present. That specific right is available only in cases of fraud, undue influence, or duress. When the brokers, after purchasing the shares ordered and paid for by the claimant, wrongfully converted them, the claimant had an election of remedies: (1) It might have brought an action of tort for the conversion. (2) It might have waived the tort and sued for the proceeds of the shares if in money—and also have followed such proceeds as a trust fund in the hands of the brokers or their bankrupt estate. (3) Assuming that it was the obligation of the brokers under their contract, not only to purchase the shares, but to deliver them, the claimant had the right to treat the conversion as a breach of contract and sue for damages. Similarly, it had the right to treat the conversion as a discharge of the contract and sue in assumpsit upon the implied contract to refund the money paid." *In re Brown*, 175 Fed. 789, 99 C. C. A. 345.

assumpsit maintained is that the relation of the parties, out of which the duty violated grew, had its inception in contract.⁷¹

71. *Cal.*—*De La Guerra v. Newhall*, 55 Cal. 21. *Md.*—*Stockett v. Watkins*, 2 Gill & J. 326, 343. *Mich.*—*Castner v. Darby*, 128 Mich. 241, 87 N. W. 199; *St. John v. Antrim Iron Co.*, 122 Mich. 68, 80 N. W. 998; *Newman v. Olney*, 118 Mich. 545, 77 N. W. 9; *Aldine Mfg. Co. v. Barnard*, 84 Mich. 632, 641, 48 N. W. 280; *Tuttle v. Campbell*, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652. *Wis.*—*Heber v. Heber*, 139 Wis. 472, 121 N. W. 328; *Dow v. Deissner*, 105 Wis. 385, 80 N. W. 940, 81 N. W. 671; *Huganir v. Cotter*, 102 Wis. 323, 78 N. W. 423; *Norden v. Jones*, 33 Wis. 600.

See also *Foster v. Stewart*, 3 Maule & S. 191, 105 Eng. Reprint 582.

Nature of Relations.—"These relations are usually those of trust and confidence, such as those of agent and principal, attorney and client, or bailee and bailor. When an owner in common of personality has the exclusive possession of the property, he is a bailee of his co-owner's share. In such case there is a contract of bailment implied between the parties, the law implying a delivery from the nature of the case, and the peculiar rights which one owner in common has to such property when reduced to his possession. He takes it and holds it upon the trust and confidence that he will care for it and use it, if he uses it, in an ordinarily careful manner, and will not sell or convert his co-owner's share to his own use. If he violates this trust and confidence by converting the property to his own use, his co-owner may bring trover for the conversion, or, waiving the tort, may sue in assumpsit to recover its value. This has been the settled law in this state for many years, and was explicitly declared in *Fiquet v. Allison*, 12 Mich. 323, 86 Am. Dec. 54, which case is decisive of this. See also *Coe v. Wager*, 42 Mich. 49; *McLaughlin v. Salley*, 46 Mich. 219; *Evans v. Miller*, 58 Miss. 120, 38 Am. Rep. 313." *Tuttle v. Campbell*, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652.

Existence of Contractual Relation.

Where a contractual relation exists between the parties, such for instance as bailor and bailee, whereby the possession of property is rightfully ob-

tained, a tort arising out of the possession of such property may be waived, and assumpsit maintained, on the implied promise to discharge the duty imposed under the contract. *De Loach Mill Mfg. Co. v. Standard Sawmill Co.*, 125 Ga. 377, 54 S. E. 157.

Effect of Election on Recovery.

"The declaration complains of defendant 'in a plea of trespass on the case upon premises,' and at the close claims damages 'arising out of such express contract for the fraud so committed by the defendant against plaintiffs.' The declaration is not in form in trover. It, however, states facts which show a conversion. Plaintiffs had two remedies open to them, viz.: To sue in trover for conversion, or to waive the tort and bring assumpsit. *Tuttle v. Campbell*, 74 Mich. 652 (42 N. W. 384, 16 Am. St. Rep. 652). The facts set forth in the declaration are applicable either to an action of trover or to an action for breach of contract. Defendant had committed a breach of contract in failing to ship the lumber as agreed. If the declaration had been in trover, or an action on the case for fraud, the measure of damages in each case would have been the value of the lumber at the time of its appropriation by the defendant. If it was worth more than the contract price at the time of its conversion, that worth is the measure of damages. If it was worth less, that worth is the measure. If it was worth the same, then the purchase price becomes the measure. If the declaration is based upon the contract, for a breach thereof, which we think it is, it is difficult to see why the measure of damages is not the same. In either form of action they have lost their property. It has been appropriated by the defendant. Their loss is not what they paid for it, but its worth when wrongfully disposed of by the defendant." *Trotter v. Tousey*, 131 Mich. 624, 92 N. W. 544.

Landlord's Obligation To Repair.—It is the settled rule in Maryland "that when a landlord has agreed to make repairs there is a duty resting on him to do so, and upon his failure the tenant may sue on his contract or bring an action on the case founded in tort for neglect of that duty." *Thompson*

7. **Assumpsit or Replevin.**—If there be fraud in the making of a contract of sale of personalty, the injured party has the choice of two remedies; the sale may be disaffirmed and the goods retaken, or the sale may be affirmed and action brought for the agreed price.⁷² In this class of cases these remedies though repugnant may both be pursued under some circumstances, as where no goods were taken, or having taken the goods or a part of them, they had been returned to the defendant and the action dismissed; thereupon an action in assumpsit on the contract for the purchase and sale of the goods could be maintained,⁷³ for the reason that where nothing is taken by the writ, no estoppel arises either by record or *in pais*.⁷⁴ But, when a part of the goods are taken under a writ of replevin, and they are retained, assumpsit to recover for the portion of the goods not obtained under the writ will not lie.⁷⁵

Assumpsit and replevin have been held not to be inconsistent remedies, and though the proceeding be pending in a state where the mere bringing of an action is an irrevocable election, the discontinuance of the one would not prevent a proceeding on the other.⁷⁶

v. Clemens, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580.

Tenants in Common.—This rule has also been applied to co-tenants or tenants in common. *Mich.*—*Tuttle v. Campbell*, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652; *Loomis v. O'Neal*, 73 Mich. 582, 41 N. W. 701; *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54. *Pa.*—*Winton Coal Co. v. Pancoast Coal Co.*, 170 Pa. 437, 33 Atl. 110. *W. Va.*—*Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

The doctrine that there can be no conversion between co-tenants applying only to things in their nature so far indivisible that the share of one cannot be distinguished from that of another, and not to such articles as grain or money, which are susceptible of convenient division. *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54.

72. *Wm. W. Bierce v. Hutchins*, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. ed. 828, reversing 16 Hawaii 717; *Dickson v. Patterson*, 160 U. S. 584, 16 Sup. Ct. 373, 40 L. ed. 543; *Stier v. Harris*, 154 Ill. 476, 40 N. E. 296; *Fisher v. Brown*, 111 Ill. App. 486.

73. *Stier v. Harms*, 154 Ill. 476, 40 N. E. 296; *Fisher v. Brown*, 111 Ill. App. 486.

74. *Fisher v. Brown*, 111 Ill. App. 486.

Doctrine of Estoppel in Pais.—"If a person with knowledge of the facts in-

vokes a judicial remedy upon one theory, as regards a particular subject-matter,—for example, that it produced a contract of one character,—and compels his adversary, at considerable expense, to successfully defend against such theory, it would be inequitable, at least, to permit such person to again use a judicial remedy, though consistent with the other, to recover on a different cause of action than at first alleged,—one not affected by the doctrine of *res adjudicata* or the election of remedies, but proceeding upon the theory that the transaction in question produced a contract differing somewhat from that first alleged. The defendant might, in some circumstances, invoke the equitable principle of estoppel *in pais* against the vexatious litigation." *Rowell v. Smith*, 123 Wis. 510, 521, 102 N. W. 1.

75. *Fisher v. Brown*, 111 Ill. App. 486.

76. *Edwards v. Schillinger Bros. Co.*, 153 Ill. App. 219.

Under a contract of conditional sale title was not to pass to the vendee until the purchase price had been paid and a bill of sale given. After paying some of the instalments there was a breach which entitled the vendor to treat the contract as an agreement for goods sold and delivered and to sue at once for the price, or in tort for conversion, or in replevin for their specific recovery. While plaintiff could

8. Assumpsit or Trespass.—Where a cause of action may be brought either in assumpsit or trespass, an action in assumpsit will bar an action for the tort, even though the court in which the action was brought would not have had jurisdiction of an action for trespass.⁷⁷

9. Assumpsit or Trover.—While assumpsit and trover in their ulterior results may afford identically the same remedy, the selection of one remedy will prevent a subsequent resort to the other.⁷⁸

resort to either of these remedies he could not resort to all. *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775.

77. *Roberts v. Moss*, 32 Ky. L. Rep. 525, 106 S. W. 297.

78. "The action of assumpsit had its foundation on the promise of the defendant, either express or implied, to pay for the property taken at a fair valuation. The record shows that in that suit the contesting parties made the usual efforts of litigants to obtain a final determination of the issue by verdict and judgment. In rendering a verdict for the plaintiffs the jury must have found that the defendant, either expressly or by implication, assumed to pay for the property; its value forming the basis of their verdict. In trover the measure of damages is the value of the property which the defendant has appropriated by the wrongful conversion, with interest thereon from the date of the conversion to the verdict. It thus becomes apparent that these actions, in their ulterior results, may afford identically the same remedy; the selection of either being a question of expediency dependent upon the character of the proof which it is in the power of the plaintiff to adduce." *Walsh v. Chesapeake & O. Canal Co.*, 59 Md. 423, 427.

One who has elected to waive the tort, and to treat as purchaser one who has wrongfully converted his property, is not thereby estopped to assert, in defense of an action for trover, title derived from a sale of property under the proceedings instituted by him to collect his debts, although, except for his election, he might have asserted a different title. *Rowe v. Weichselbaum Co.*, 3 Ga. App. 504, 60 S. E. 275.

When Trover and Assumpsit Both Maintainable.—Plaintiff delivered to defendant under a contract 2113 cords of wood. The agreement provided that as fast as 100 cords should be sold

defendant he should pay plaintiff \$500. After such delivery plaintiff began an action of assumpsit to recover the price of the wood as had been sold by defendant prior to the commencement of the action, and obtained judgment which was unpaid. It furthermore appeared that 512 cords which had not then been disposed of by defendant was subsequent thereto sold by him. This action was in trover for the conversion of the 512 cords so disposed of. The contention was that plaintiff by his first action had made a binding election, and that by bringing the action in assumpsit had waived the tort and elected to treat the title to all of the wood as having passed to defendant, the circuit court held there was an election and that plaintiff could not maintain trover. The court in reversing the judgment said: "The important question is the one determined by the circuit court: i. e., did the plaintiff, by bringing the action of assumpsit, waive the tort, and elect to treat the title of all this wood as having passed to defendant? It is to be noted that as to the wood then unsold, and in defendant's hands, no tort has been committed for plaintiff to waive. It is clear, therefore, that the action of assumpsit could not have waived such a tort. Was there an election on other grounds? Did the bringing of the action amount to an election to treat the title of all the wood as having passed to defendant? A similar consideration seems controlling of this question. The plaintiff could not, of his own volition, make a complete sale of the wood to defendant. The defendant was not liable under the contract except for such wood as had been sold. He was not liable in tort except for wood sold after he was in default in his payments, and was liable neither in assumpsit nor in trover for wood remaining unsold. The election to waive such torts as had

10. Action on the Case or Assumpsit.—An action to recover damages for breach of a contract not under seal, has been held to be assumpsit, and where at the time of the breach fraud is also committed by the party violating the contract, action on the case will lie. If the latter action is brought, the right to sue in assumpsit is lost, such action not being based on the contract, but on the fraudulent acts of the wrong-doer.⁷⁹

11. Assumpsit or Rescission.—After bringing action to recover the price of goods sold, alleging a valid contract of sale, plaintiff cannot maintain an action to recover for fraud in the purchase and claiming a rescission of the contract.⁸⁰ And although in case the contract for the sale of goods is procured by fraud, the vendor may affirm or rescind the contract and bring his action for the price of the goods and also damages for the fraud,⁸¹ he cannot if he elects to rescind the contract and obtains a decree to that effect, thereafter bring an action for damages for the fraud.⁸²

It is not always true that the mere bringing of a suit for rescission will bar an action for damages.⁸³ While that is the general rule when the action is prosecuted to judgment it is not without exceptions.⁸⁴

12. Attachment or Detinue.—After the issuance of an attachment and a levy thereunder, an action of detinue for the same property will not lie though the attachment be released.⁸⁵

13. Remedies Against Public Service Corporations.—There are

been committed was not an election to waive any torts which defendant might commit in the future. Was the ineffectual attempt to recover in *assumpsit* a sum not due a waiver of a future tort? We think not." *Bryant v. Kenyon*, 123 Mich. 151, 81 N. W. 1093.

79. *Bates v. Bates Mach. Co.*, 230 Ill. 619, 82 N. E. 911.

80. *Theusen v. Bryan*, 113 Iowa 496, 85 N. W. 802.

Action To Reform Contract.—Taking any step to enforce a contract is a conclusive election not to rescind it on account of anything known at the time. Such a situation is presented by the prosecution of an action to reform a contract for a period of two years after the discovery of the fraud. That being an unequivocal affirmation of the contract and a waiver of the fraud. *Pfeiffer v. Marshall*, 136 Wis. 51, 116 N. W. 871, citing numerous local cases.

81. *Bacon v. Moody*, 117 Ga. 207, 43 S. E. 482.

82. *Bacon v. Moody*, 117 Ga. 207, 43 S. E. 482.

"Taking any step to enforce a contract is a conclusive election not to rescind it on account of anything known

at the time," and after being defeated in an action to reform a contract, an action to avoid the contract on the ground of fraud is not maintainable. *Pfeiffer v. Marshall*, 136 Wis. 51, 116 N. W. 871.

83. *Ind.*—*Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355. *Mich.* *Lenox v. Fuller*, 39 Mich. 268; *Warren v. Cole*, 15 Mich. 264. *Minn.*—*Kraus v. Thompson*, 30 Minn. 64, 14 N. W. 266. *Eng.*—*Newham v. Stevenson*, 10 C. B. 713, 70 E. C. L. 712.

But see *Del Vecchio v. Savelli*, 10 Cal. App. 79, 101 Pac. 32, that an action for one will bar the other, but a mere notice of rescission without adopting the remedy does not constitute an election. *Smith v. Gray*, 52 Wash. 255, 100 Pac. 339.

84. *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355.

85. *Fuller v. Eames*, 108 Ala. 464, 19 So. 366. To same effect, *Thomason v. Lewis*, 103 Ala. 426, 15 So. 830; *Montgomery Iron Wks. v. Smith*, 98 Ala. 644, 13 So. 525; *Lehman, Durr & Co. v. Van Winkle*, 92 Ala. 443, 8 So. 870; *Tanner v. Hale*, 89 Ala. 628, 7 So. 187.

numerous other instances where an action as for tort, or an action as for breach of contract, may be brought by the same party upon the same state of facts.⁸⁶ A conspicuous illustration of the rule is the case of a common carrier,⁸⁷ but the rule applies also to other public service corporations,⁸⁸ and those engaged in similar employ-

86. Cooley on Torts (3d ed.) 56; Owens v. Chicago, R. I. & P. R. Co., 139 Iowa 538, 117 N. W. 762; Pittsburgh City v. Grier, 22 Pa. 54, 65, 60 Am. Dec. 65; Livingston v. Cox, 6 Pa. 360.

In Ansell v. Waterhouse, 2 Chitty 1, 6 M. & S. 385, 18 R. R. 413, 18 E. C. L. 469, 105 Eng. Reprint 1286, the court after stating that a common carrier may be charged *ex delicto*, continued: "Anciently indeed, it was the only form of declaring; it is only in modern times that another form has been adopted by declaring as upon a special contract. The plaintiff may so declare if he thinks fit, but he is not obliged to do so; he may adhere to the ancient practice."

Remedy Ex Contractu or Ex Delicto. "In suing a common carrier for the breach of a contract for the carriage and delivery of goods, the action may be, in form, *ex contractu* or *ex delicto*. The plaintiff may bring assumpsit, counting upon the non-performance of the agreement which the defendant made with him; or he may bring case and count upon the violation of the public duty which the defendant owes." St. Louis, I. M. & S. R. Co. v. Heath, 41 Ark. 476.

In cases of bailment at common law, there has always been a choice of forms of action, between actions on the case and assumpsit. Case lies for breach of duty and assumpsit for breach of promise. A duty arises out of a promise and the law implies a promise out of most duties. While the forms of action have been abolished by the codes, all the rights and remedies known to the law have been preserved. Farmers' Nat. Bank v. Fonda, 65 Mich. 533, 32 N. W. 664; Hart v. Barnes, 24 Neb. 782, 40 N. W. 322.

Principle Affecting Choice.—Assumpsit is a concurrent remedy with case, wherever there is an express or implied contract, and where the duty for whose breach the action is brought would not be implied by law by reason of the relation of the parties,

whether such relations arose out of a contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract and not in tort,—when otherwise, case is an appropriate remedy. Nevin v. Pullman Palace Car Co., 106 Ill. 222, 236, 46 Am. Rep. 683.

Action for Personal Injuries.—Where a railroad corporation agrees for a consideration to carry a passenger over its road, and by its negligence an injury results to the passenger, he may at his election, sue upon the contract or the tort. Pennsylvania R. Co. v. Peoples, 31 Ohio St. 537.

87. U. S.—Whittenton Mfg. Co. v. Memphis & O. R. Co., 21 Fed. 896. Ark. St. Louis, I. M. & S. R. Co. v. Heath, 41 Ark. 476. Cal.—Sheldon v. S. S. Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193. Ia.—Owens v. Chicago, R. I. & P. R. Co., 139 Iowa 538, 117 N. W. 762. Mont.—Nelson v. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642. Pa. Dungan v. Read, 167 Pa. 393, 31 Atl. 639. Va.—Chesapeake & O. R. Co. v. Stock & Sons, 104 Va. 97, 51 S. E. 161.

Uncertainty Regarding Form of Action.—"Where the language of the petition is equivocal, and there is doubt whether the pleader intended to claim for tort rather than for breach of contract, the doubt will be resolved by construing it as an action in tort. Railroad v. Portrait Co., 122 Ga. 11 (9 S. E. 727, 106 Am. St. Rep. 87); Railroad v. Hurst, 36 Miss. 660 (74 Am. Dec. 785); Railroad v. Kemp, 61 Md. 619 (48 Am. Rep. 134). This rule, of course, will not be extended to prevent the defendant in an action of tort from pleading by way of defense any contract with the plaintiff which, if valid, has the effect to waive the performance of the duty for a breach of which damages are demanded. Railroad Co. v. Pace, 69 Ark. 256 (63 S. W. 62), and cases there cited." Owens v. Chicago, R. I. & P. R. Co., 139 Iowa 538, 544, 117 N. W. 762.

88. Hoehle v. Allegheny Heating Co.,

ments.⁸⁹ It may arise either regarding the transportation of passengers,⁹⁰ or of goods and chattels.⁹¹

The choice of remedies lies with the injured party; the defendant cannot insist upon any particular form of action.⁹²

In jurisdictions where it is held that if the first action is dismissed before judgment it does not act as a bar, a second action may be brought on a theory inconsistent with the first action.⁹³

Rule in Indiana.—In Indiana there is some difference in the application of the rule, the authority there being to the effect that if the liability grow out of an implied contract, there may be, in a proper case, election between an action on the contract or in tort,⁹⁴ but if there be a special contract, written or oral, there is no right of election the action must be on the contract.⁹⁵

14. Election for Purposes of Counterclaim.—The right to waive the tort and sue in assumpsit is not limited to the bringing of the action, but it may also be waived for the purpose of enabling the injured party to set up his claim as an offset, when, without such waiver, he could not because of its tort nature use it as a counterclaim.⁹⁶

5 Pa. Super. 21, where the cases covering this matter are discussed.

89. *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 230, 46 Am. Rep. 688.

90. *Cal.*—*Sheldon v. S. S. Uncle Sam*, 18 Cal. 526, 79 Am. Dec. 193. *Ga.* *Caldwell v. Richmond R. Co.*, 89 Ga. 550, 15 S. E. 678. *Ohio.*—*Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537. *Pa.* *McCall v. Forsyth*, 4 Watts & S. 172.

91. *Ark.*—*St. Louis, I. M. & S. R. Co. v. Heath*, 41 Ark. 476. *Md.*—*Baltimore & Ohio R. Co. v. Pumphrey*, 59 Md. 390. *Miss.*—*Waters v. Mobile & O. R. Co.*, 74 Miss. 534, 21 So. 240.

92. *Morgan's Louisiana & T. R. & S. S. Co. v. Stewart*, 119 La. 392, 407, 44 So. 138; *Ansell v. Waterhouse*, 2 Chitty 1, 6 M. & S. 385, 18 R. R. 413, 18 E. C. L. 469, 105 Eng. Reprint 1286.

93. *Gibbs v. Jones*, 46 Ill. 319; *Gould v. Blodgett*, 61 N. H. 115. See also *supra*, III.

94. *Parrill v. Cleveland, etc. R. Co.*, 23 Ind. App. 638, 55 N. E. 1026, and cases cited.

95. *Parrill v. Cleveland, etc. R. Co.*, 23 Ind. App. 638, 648, 55 N. E. 1026, citing and reviewing at length numerous Indiana cases as well as those from various jurisdictions.

96. *Rothschild v. Mack*, 115 N. Y. 1, 21 N. E. 726; *Coit v. Stewart*, 50 N. Y. 17; *Slade v. Montgomery*, 53 App. Div. 343, 65 N. Y. Supp. 709;

Braithwaite v. Akin, 3 N. D. 365, 56 N. W. 133.

The rule permitting a counterclaim is also recognized in jurisdictions limiting the right of election to cases where the property has been converted into money. *Becker v. Northway*, 44 Minn. 61, 46 N. W. 210; *Brady v. Brennan*, 25 Minn. 210.

Form of Counterclaim.—"The answer must set up the facts constituting the counterclaim. But facts which show a cause of action for a wrong do not make out a case of assumpsit, and, unless the case is in assumpsit, there is no legal counterclaim. To establish a cause of action in assumpsit, the waiver must be averred either expressly or by the manner of stating the cause of action, for without the waiver no cause of action in assumpsit arises. . . . The waiver is an indispensable element in the cause of action." *Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133.

"Where the answer is susceptible of either construction, the defendant, by using his cause of action as a counterclaim, in a case where it would be a valid counterclaim only on the basis of an election to counterclaim for breach of contract, evinces his election to hold the plaintiff responsible for the violation of his contract and not for the tort." *Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133.

E. EQUITABLE REMEDIES.—1. Accounting and Rescission.—Accounting and rescission under the same instrument are inconsistent remedies and a resort to one operates as a bar to the other.⁹⁷ But it has been held that where under a deed of trust given to secure a mortgage, the mortgagee elected to have the property sold and at such sale bought in the property, he nevertheless might also sue for specific performance of a contract made by the mortgagor to convey the property to him.⁹⁸

2. Reformation and Specific Performance.—One who is defeated in an action for reformation of a contract is not prevented from maintaining an action for specific performance of the contract.⁹⁹

F. REMEDY AT LAW OR IN EQUITY.—1. Right of Choice.—Parties have in some cases the right to pursue their remedy either at law or

When Election Irrevocable.—"The cases appear to hold that the election is irrevocably made when the pleading is served, provided the pleader has full knowledge of the facts." The court refrains from expressing its opinion on the question, merely citing the cases which support the proposition. *Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133.

97. *Anderson v. Chicago Trust & Sav. Bank*, 195 Ill. 341, 63 N. E. 203; *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177.

After the bringing of an action for an accounting, based on an alleged fraud, against one of the parties to a transaction, it is not possible thereafter to maintain an action against another of the parties to rescind a contract of employment and to recover back money paid thereunder. *Heckscher v. Blanton*, 111 Va. 648, 69 S. E. 1045, in which several parties were joint owners of real estate the title to which stood in the name of a trustee without power of sale. The trustee with the acquiescence of the owners employed a broker to sell the property and pay a commission therefor. After the property was sold the joint owners sued the trustee for an accounting, alleging a secret agreement between him and the broker for a division of the commission. Several years thereafter, and having during all that time knowledge of the facts and the fraud, an action was brought against the broker for a rescission of the contract of employment and to recover back the commission paid him. It was held that the beginning of an action against one of two joint tortfeasors with knowledge

of all the facts is such an election as will thereafter prevent the second action. But it is held that the beginning of an action for the annulment of a lease and damages for false representations, does not constitute an election to rescind, so as to prevent the lessee from setting up a counterclaim for damages for fraudulent representation in inducing them to make the lease in an action by the landlord in summary proceedings to recover possession of the property. The principle would apply if the lease had actually been rescinded by the lessee and action brought for a return of the money paid. *Houston Merc. Co. v. Powell & King*, 130 N. Y. Supp. 274, 72 Misc. 358.

Rights of Intervenor.—Under the Washington statute giving an intervenor a right to unite with a plaintiff or defendant, or to demand relief adversely to both, the dismissal of an action to cancel a mortgage for the reason that plaintiff had previously prosecuted an inconsistent remedy, does not prevent the intervenor from suing to foreclose the mortgage. *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177.

Where one after a knowledge of all the facts files a bill for an accounting, thereby electing to affirm a sale, and sets up all the facts, he will not be permitted thereafter to shift his position and ask for a rescission of the contract. *Anderson v. Chicago Trust & Sav. Bank*, 195 Ill. 341, 63 N. E. 203.

98. *Gamble v. Martin* (Tex. Civ. App.), 129 S. W. 386.

99. *Whalen v. Stuart*, 123 App. Div. 446, 108 N. Y. Supp. 355.

in equity. A resort to one remedy will, however, bar a subsequent resort to the other.¹

The choice of remedies between an action at law or suits in equity applies only to original suits.²

2. Damages and Specific Performance.—A suit for specific performance of a contract bars an action for damages based on the contract.³

3. Action on Contract and for Reformation.—The bringing of an action at law upon a contract which results in a non-suit or a discontinuance, or anything short of a determination upon the merits after both sides rest, will not be a bar to a subsequent action to reform the contract and for relief upon the reformed contract.⁴

1. *Carr v. Arnold*, 239 Ill. 37, 87 N. E. 870; *Illinois Cent. R. Co. v. Hodges*, 113 Ill. 323.

Injunction and Damages for Breach of Contract.—After the rendition of a judgment awarding damages for breach of contract, the court will not entertain an application for an injunction restraining the defendant from an act which constitutes a breach thereof. *Saintor v. Ferguson*, 1 Macn. & G. 286, 41 Eng. Reprint 1275.

2. *Marsh Bros. & Co. v. Bellefleur (Me.)*, 81 Atl. 79; *Laranssini v. Carquette*, 24 Miss. 151.

3. *Zutterling v. Drake*, 30 Ohio C. C. 561.

Specific Performance and Damages for Breach.—"One cannot have damages for the breach of a contract and a decree also for its specific performance. Not because they are inconsistent. On the contrary they are alternative. Both are in affirmance of the contract, and indeed, remedy in both forms might be sought in one and the same action. . . . But if the plaintiff institute separate actions, he cannot carry both to judgment and satisfaction and may be compelled by order of the court at any stage of the proceedings, to elect which he will further prosecute." *Slaughter v. La Compagnie Francaises Des Cables Telegraphique*, 119 Fed. 588, 57 C. C. A. 19, *affirming* 113 Fed. 21. See also *Mo.*—*Otto v. Young*, 227 Mo. 193, 219, 127 S. W. 9. *N. Y.*—*Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294, 26 N. E. 261; *Balleisen v. Schiff*, 121 App. Div. 285, 105 N. Y. Supp. 692. *Eng.* *Fox v. Scard*, 33 Beav. 327, 55 Eng. Reprint 394.

4. *U. S.*—*Northern Assur. Co. v.*

Grand View Bldg. Assn., 203 U. S. 106, 27 Sup. Ct. 27, 51 L. ed. 109. *Fla.* *Florida Home Ins. Co. v. Bozeman*, 58 Fla. 424, 50 So. 413. *Ill.*—*McCloskey v. McCormick*, 44 Ill. 336. *Ky.*—*Hill-erich v. Franklin Ins. Co.*, 111 Ky. 255, 63 S. W. 592 (petition amended after reversal by judgment); *Neuenberger v. Neuenberger*, 16 Ky. 710, 29 S. W. 617 (cancellation and reformation). *Minn.* *Spurr v. Home Ins. Co.*, 40 Minn. 424, 42 N. W. 206. *Mo.*—*Johnson-Brinkman Co. v. Missouri Pac. R. Co.*, 126 Mo. 344, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840; *Steinbach v. Murphy*, 143 Mo. App. 537, 128 S. W. 207; *Anchor Mill Co. v. Walsh*, 20 Mo. App. 107. *Neb.*—*Lansing v. Commercial Union Assur. Co.*, 4 Neb. (Unof.) 140, 93 N. W. 756. *N. Y.*—*Baird v. Erie R. Co.*, 129 N. Y. Supp. 329, 346.

Reason for Rule.—"While some of the authorities in holding that an adverse judgment in an action at law upon a contract bars a subsequent suit for reformation use expressions tending to show that the doctrine of election of remedies was in the mind of the court, a careful examination of these cases will, I think, show that they were decided upon the ground that the judgment in the prior action was one upon the merits, and that a new action under these circumstances for reformation was inconsistent with the adjudication in the prior action which, when so crowded to final determination upon the merits, constituted in a sense a conclusive election of remedies." *Baird v. Erie R. Co.*, 129 N. Y. Supp. 329, 346.

Where an insurance company, as defendant to a bill in equity filed against it for reformation and correction of an

4. Rights Under Chattel Mortgage.—*a. Attachment and Foreclosure.*—In some jurisdictions the suing out of an attachment is held to waive the lien of the mortgage and deprives the mortgagee of the right to bring foreclosure proceedings,⁶ while others hold that by reason of statutory provision, the legal title not passing to the mortgagee, he being a mere lien holder, there is no inconsistency, and that obtaining an attachment does not prevent a foreclosure of the mortgage.⁶

b. Trover and Foreclosure.—It has also been held that trover and foreclosure are inconsistent remedies and cannot both be pursued, either together or in succession.⁷

V. INTERPOSING ELECTION AS A DEFENSE.—Election of remedies may be pleaded as a defense.⁸

alleged mistake in a policy of fire insurance issued by it, interposes a plea to such bill, alleging that the complainant had already instituted his suit at law upon such policy, claiming recovery thereon in the form that the same was written, and that such suit at law was still pending, and that complainant had thereby elected to stand upon said contract as written, and was thereby forever precluded and estopped from maintaining a suit for reformation of such policy, such plea is properly overruled, when it appears to the chancellor at the hearing thereof that the alleged suit at law by the complainant was not upon the policy as the same was written, but that such policy was declared upon in such suit at law in the form that such bill for reformation sought to make it bear. In such a case there is no inconsistency between the two remedies; the suit in equity for reformation being ancillary to and in aid of the suit at law upon the policy sought to be reformed. *Florida Home Ins. Co. v. Bozeman*, 58 Fla. 424, 50 So. 413.

5. Ark.—*H. B. Claffin Co. v. Bretzfelder*, 69 Ark. 271, 62 S. W. 905; *Cox v. Harris*, 64 Ark. 213, 41 S. W. 426, 62 Am. St. Rep. 187. **Me.**—*Whitney v. Farrar*, 51 Me. 418. **Mass.**—*Evans v. Warren*, 122 Mass. 303. And see *Cochrane v. Rich*, 142 Mass. 15, 6 N. E. 781. **Minn.**—*Dyckman v. Sevatonson*, 39 Minn. 132, 39 N. W. 73. **N. H.**—*Haynes v. Sanborn*, 45 N. H. 429. **Okla.**—*Dix v. Smith*, 9 Okla. 124, 60 Pac. 303, 50 L. R. A. 714.

Reason of Rule.—This rule is based on the common law doctrine that the legal title to the mortgaged property

is in the mortgagee. See the cases cited above.

In Montana it is held that there is no right of attachment until after the remedy by foreclosure sale under the mortgage lien, and if there be attempted a levy which is void, the lien of the mortgagee is unaffected. *Chicago T. & T. Co. v. O'Marr*, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4; *Largey v. Chapman*, 18 Mont. 563, 46 Pac. 808.

6. Ill.—*Barchard v. Kohn*, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803. **Ind.**—*Byram v. Stout*, 127 Ind. 195, 28 N. E. 687. **Ia.**—*Stein v. McAuley*, 147 Iowa 630, 125 N. W. 336, cases on both sides of the question and a full discussion thereof will be found in the opinion in this case. **Kan.**—*Kansas City Live Stock Com. Co. v. Bank of Hamlin*, 79 Kan. 761, 101 Pac. 617, 24 L. R. A. (N. S.) 490 (*explaining National Bank v. First Nat. Bank*, 57 Kan. 115, 45 Pac. 79); *State Bank of Clyde v. Mottin*, 47 Kan. 455, 28 Pac. 200, 27 Am. St. Rep. 306. **Mich.**—*Bateman v. Grand Rapids & I. R. Co.*, 96 Mich. 441, 28 N. W. 28; *Thurber v. Jewett*, 3 Mich. 295. **Neb.**—*First Nat. Bank v. Johnson*, 68 Neb. 641, 94 N. W. 837, 4 Am. & Eng. Cas. 485. **N. Y.**—*Sterling v. Rogers*, 25 Wend. 658; *Elder v. Rouse*, 15 Wend. 218. **N. D.**—*Madson v. Rutten*, 16 N. D. 281, 113 N. W. 872, 13 L. R. A. (N. S.) 554. **S. C.**—*Satterwhite v. Kennedy*, 3 Strobb. 457. **Tex.**—*Howard v. Parks*, 1 Tex. Civ. App. 603, 21 S. W. 269.

And see *Crossman v. Universal Rubber Co.*, 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91.

7. Kennedy v. Manry, 6 Ga. App. 816, 66 S. E. 29.

8. Babcock-Cornish & Co. v. Urqu-

Plea Under General Issue. — The question of estoppel by election may be raised under the plea of general issue, without notice.⁹

Objection Must Be Timely. — The objection that there had been an election of remedies cannot for the first time be presented on appeal.¹⁰

VI. ELECTION OF REMEDY WITH REFERENCE TO PARTY DEFENDANT. — A party dealing with an agent, without knowledge of such agency, may after discovery of the principal, elect within a reasonable time to treat the after discovered principal as the party to the contract and proceed against him as such,¹¹ or to treat the agent as his debtor and proceed against him.¹² After such right is exercised and action brought against either, the other cannot be sued regardless of the result of the action.¹³ If an agent without authority of his principal pays moneys of his principal to an irresponsible third party, an action therefor will lie against the agent, notwithstanding the principal may have also attempted to collect from such third party.¹⁴ Nor has the rule of election any application where

hart, 53 Wash. 168, 101 Pac. 713. And see *Western Inv. Co. v. Davis*, 16 Fed. 187, reversing 7 Ind. Ter. 152, 104 S. W. 573; *Luddington v. Patton*, 111 Wis. 208, 86 N. W. 571.

Basis of Election. — "The defense of waiver by election arises where the remedies are inconsistent, as where one action is founded on an affirmation and the other upon the disaffirmance of a voidable contract or sale of property." *Connihan v. Thompson*, 111 Mass. 270.

9. *Thomas v. Watt*, 104 Mich. 201, 206, 62 N. W. 345. See also *Button v. Trader*, 75 Mich. 295, 42 N. W. 834; *Farwell v. Myers*, 59 Mich. 179, 26 N. W. 328; *Nield v. Burton*, 49 Mich. 53, 12 N. W. 908 (where the plea of general issue alone was interposed); *Faye v. Patch*, 132 Mass. 105, 109; and the title "Estoppel."

10. *Easton v. Somerville*, 111 Iowa 164, 82 N. W. 475.

11. *Jones v. New York Guaranty & I. Co.*, 101 U. S. 622, 25 L. ed. 1030; *Ford v. Williams*, 21 How. (U. S.) 287, 16 L. ed. 36.

The doctrine of election of remedies has no application to a case where after a judgment for goods sold and delivered was obtained against a husband, which was unsatisfied, it was discovered that he was merely acting as agent for his wife. An action for the goods might nevertheless be brought against the wife. *Spaeth v. De Witt*, 123 N. Y. Supp. 195.

12. *Armstrong v. Stokes*, L. R. 7 Q. B. 598; *Smethurst v. Mitchell*, 1 El.

& El. 622, 105 E. C. L. 62, 28 L. J. N. S. (Q. B.) 241; *Thomson v. Davenport*, 9 Barn. & C. 78, 86, 109 Eng. Reprint 30; *Paterson v. Gandasequi*, 15 East 62, 104 Eng. Reprint 768.

13. Conn.—*Jones v. Aetna Ins. Co.*, 14 Conn. 501. Ga.—*Garrard v. Moody*, 48 Ga. 96. Mass.—*Kingsley v. Davis*, 104 Mass. 178. Miss.—*Murphy v. Hutchinson*, 93 Miss. 643, 48 So. 178. N. Y.—*Cobb v. Knapp*, 71 N. Y. 348; *McGraw v. Godfrey*, 56 N. Y. 610, 14 Abb. Pr. (N. S.) 397. Eng.—*Priestly v. Fernie*, 3 Hurl. & C. 977.

Compare *Bartlett v. First Nat. Bank*, 156 Ill. App. 415, 420, affirmed, 247 Ill. 490, 93 N. E. 337, holding that merely bringing suit against the principal after the relation has been disclosed is no bar to a suit against the agent.

14. Ark.—*Wood v. Claiborne*, 82 Ark. 514, 102 S. W. 219. N. Y.—*Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 21 N. E. 172, 10 Am. Rep. 479, 4 L. R. A. 145. W. Va.—*Vance v. Kirk*, 29 W. Va. 344, 1 S. E. 717.

To bar such right of action it is not sufficient to show a judgment; it must appear that plaintiff has received his money, or the value thereof. Ala.—*Carew v. Lillienthal*, 50 Ala. 44. Ark.—*Wood & Henderson v. Claiborne*, 82 Ark. 514, 102 S. W. 219. Ga.—*Equitable Life Assn. v. May*, 82 Ga. 646, 9 S. E. 597. N. Y.—*Crossman v. Universal Rubber Co.*, 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 21 N. E. 172, 10 Am. Rep. 479, 4 L. R. A.

there was merely a mistake in having elected to sue the wrong person.¹⁵ But when a party persists in his erroneous course after his true remedy is disclosed to him, he may be held bound by his election.¹⁶

VII. REVIEW.—If error be committed by the court in compelling an election of remedies, such error cannot be taken advantage of on appeal by the party upon whose application the election was ordered.¹⁷

145; *First Nat. Bank v. Wallis*, 84 Hun 376, 32 N. Y. Supp. 382. W. Va.—*Vance v. Kirk*, 29 W. Va. 344, 1 S. E. 717.

Where a person received funds wrongfully converted by a bank employe for the liquidation of a personal debt of such employe, knowing that they were bank funds, and of their misuse, the bank may proceed against either or both parties and the institution of proceedings against the employe would not preclude proceedings against the receiver of the bank's funds. *Home Savings Bank v. Otterbach*, 135 Iowa 157, 112 N. W. 769.

15. *Kingsbury v. Kettle*, 90 Mich. 476, 51 N. W. 541; *Fifield v. Edwards*, 39 Mich. 264; *Henderson v. Bartlett*, 32 App. Div. 435, 53 N. Y. Supp. 149; *Wilson v. Ewald*, 61 Misc. 286, 113 N. Y. Supp. 687; *Dumois v. Mayor of New York*, 37 Misc. 614, 76 N. Y. Supp. 161.

Action was brought and judgment by default recovered against the president of a corporation, and part of the judgment paid. This judgment was subsequently vacated and action discontinued, and an action brought against the corporation. It was held that there being no cause of action against the defendant in the first action, the only cause of action which existed was against the defendant in the present action, the doctrine of election of remedies did not apply. *Class Journal Co. v. Valveless Inner Tube Co.*, 130 N. Y. Supp. 244.

16. *People ex rel. Warschauer v. Dalton*, 29 Misc. 154, 60 N. Y. Supp. 876, *affirmed*, 52 App. Div. 371, 65 N. Y. Supp. 342.

17. *May v. Cummings* (N. D.), 130 N. W. 828.

CIVIL DAMAGE LAWS.—See *Intoxicating Liquors*.

Vol. V

CIVIL RIGHTS

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I. DEFINITIONS AND DISTINCTIONS. — Civil rights are those rights which the municipal law will enforce, at the instance of private individuals, for the purpose of securing to them the enjoyment of their means of happiness.¹ They are those rights which have no relation to the establishment, support, or management of the government. They consist in the power of acquiring and enjoying property, or exercising the paternal and marital powers and the like.²

II. CIVIL REMEDIES FOR VIOLATION OF CIVIL RIGHTS.

A. ACTION ON THE CASE. — 1. When Proper. — An action on the case for the penalty provided by the statute is the proper form where the penalty is uncertain in amount.³

2. The Declaration. — a. *Need Not Declare Upon Statute.* Though there is a statute declaring that all persons are entitled to equal accommodations in public places, and providing punishment as for a misdemeanor for any one who violates the law, plaintiff in suing for damages for an injury to him resulting from violation of the rules laid down, need not declare upon or refer to the statute, as it is declaratory of the common law.⁴

b. *Necessity for Alleging Plaintiff Is Citizen.* — If the action for the penalty is restricted to "any citizen," the complaint must allege that the plaintiff is a "citizen."⁵

c. *Alleging the Right and the Wrong.* — (1.) *Necessity for Allegation.* A complaint alleging a distinction because of color and race must set forth the nature of the right invaded, and the wrong and injury done by the discrimination.⁶

1. *Percey v. Powers*, 51 N. J. L. 432, 17 Atl. 969, 14 Am. St. Rep. 693.

2. *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683.

Illustrations. — "Among civil rights is the right to prosecute and defend actions in the courts of the commonwealth according to the established rules of practice. . . . The statutory right of a party to testify in his own behalf is a civil right." *Percey v. Powers*, 51 N. J. L. 432, 17 Atl. 969, 14 Am. St. Rep. 693.

As distinguished from a political right, a civil right is a right accorded to every member of a district, community or nation, while a political right is a right exercisable in the administration of government. *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143.

Distinguished From Natural Rights. Civil rights are distinguishable from natural right, which would exist if there were no municipal law, while others are outside of its scope, and still others are enforceable under it as civil rights.

Percey v. Powers, 51 N. J. L. 432, 17 Atl. 969, 14 Am. St. Rep. 693.

3. *Baylies v. Curry*, 30 Ill. App. 105, affirmed, 128 Ill. 287, 21 N. E. 595. See the title "Case (The Action of Trespass on the)."

4. *Ferguson v. Gies*, 82 Mich. 358, 46 N. W. 718, 21 Am. St. Rep. 576, 9 L. R. A. 589.

5. *Lewis v. Hitchcock*, 10 Fed. 4, Civil Rights Act of March 1, 1875; *Fuller v. McDermott*, 87 N. Y. Supp. 536.

Failure to so allege may be cured by amendment. *Lewis v. Hitchcock*, 10 Fed. 4, 6.

6. A complaint alleging that "defendants injuriously and unlawfully made a distinction on account of the color and the supposed race of R. so as to damage, and actually damaging, the standing, comfort and happiness of the above named plaintiff," does not set forth the nature of the right invaded and the wrong or injury done. *Redding v. Railroad Co.*, 5 S. C. 67.

Injury by Defendant Not Shown.

(II.) **Sufficiency of Allegations.** — (A.) **DENIAL OF ACCOMMODATIONS.** — The complaint in an action for a penalty for denial of equal accommodations, advantages or privileges of a hotel or inn should sufficiently aver what accommodations, advantages or privileges were denied.⁷

(B.) **DENIAL OF RIGHT TO VOTE.** — If the denial of plaintiff's right to vote is the right invaded, the complaint should not only allege that the plaintiff was a duly qualified voter, but should allege registration where the law requires this as a prerequisite to voting.⁸

d. **Necessity for Alleging Wilfulness or Maliciousness.** — The complainant, in an action under the federal statute, need not allege that defendant acted maliciously, wilfully, fraudulently or corruptly in refusing to register a colored person under color of a state law.⁹

e. **Allegations as to Parties Committing Acts.** — A complaint charging unlawful discrimination against a colored person because of his race or color must contain an averment that defendant did the act complained of or that his agent in doing the act was acting within the scope of his authority.¹⁰

3. **Burden of Proof.** — Though a statute provides for prosecution of the invasion of civil rights by either indictment or civil action, one suing for damages need not prove his case beyond a reasonable doubt.¹¹

4. **Costs.** — A statute providing for the recovery of a penalty and costs for the invasion of the civil rights of another governs, as to the costs, though there is a general statute as to costs.¹²

But a complaint by a colored person setting up that after being sworn as a juror defendant signed a written objection to serving on the jury with the colored man, and thereupon he was excused by the judge on stipulations by the attorneys, sets up no cause of action, where it shows no abusive language towards him in his presence, or shows that he abused or assaulted plaintiff or tried to expel him from the jury. The injury, if any, was caused by the excusing by the judge on stipulation of the attorneys. *McPherson v. McCarrick*, 22 Utah 232, 61 Pac. 1004.

7. An averment that the defendant failed and refused to allow the plaintiff to take lodging or meals at said inn or hotel is sufficiently specific. *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146.

To say that this place was an "inn" is enough, as this term has a fixed and definite legal signification. *Lewis v. Hitchcock*, 10 Fed. 4, 6; *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146.

Charge Under Videlicet Repugnant. A description of the place where the accommodations were refused as a certain inn, to wit, "a restaurant at No.

9 Chatham Street," is sufficient, though the word restaurant has no fixed and definite legal signification. If the averment as to the restaurant was repugnant to the preceding matter it would be rejected and would not vitiate the complaint. *Lewis v. Hitchcock*, 10 Fed. 4, 7.

Minor as Plaintiff. — That articles were necessities need not be alleged. *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146.

8. *Wiley v. Sinkler*, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. ed. 84.

9. *Anderson v. Myers*, 182 Fed. 223, 229.

10. *Anderson v. Rawlings*, 18 Ohio C. C. 381, 10 Ohio Cir. Dec. 112.

Refusal To Sell Theater Ticket to Negro. — A petition in such a case must aver that the ticket seller was acting within the scope of his authority. *Anderson v. Rawlings*, 18 Ohio C. C. 381.

A partnership is not a person under a statute making "any person" violating its provisions liable to damages. *Hargo v. Meyers*, 4 Ohio C. C. 275.

11. *Deveaux v. Clemens*, 9 Ohio Cir. Dec. 647, 17 Ohio C. C. 33.

12. *Jones v. Broadway Roller*, etc.

B. MANDAMUS. — If a child has been refused admittance to a school because of his race or color, mandamus will lie to compel his admission,¹³ without a formal demand and refusal, the duty being a public one.¹⁴ Likewise, if no school facilities have been provided it will lie to compel the performance of the statutory duty to furnish equal school facilities.¹⁵ But where the school authorities are invested with discretion to determine whether a child is white or black when assigning children to separate schools and an appeal from their decision is given, mandamus will not lie until the remedy by appeal is exhausted.¹⁶

Showing of the Petition. — The petition for the writ of mandamus must state facts sufficient to authorize the issuance of the mandate.¹⁷

The Relator. — The father of the child is the proper party to institute mandamus proceedings to compel the admission where it has been wrongfully excluded from school,¹⁸ or to compel the establishment of schools for colored children.¹⁹ But any citizen of the school district may also enforce the right.²⁰

The Respondent. — The superintendent of schools and the board of education have been held to be unnecessary parties to the proceedings,²¹ the only necessary party being the teacher. "Teachers cannot

Co., 136 Wis. 595, 118 N. W. 170, 19 L. R. A. (N. S.) 907. See generally the title "Costs."

13. Cal.—*Tape v. Hurley*, 66 Cal. 473, 6 Pac. 129; *Ward v. Flood*, 43 Cal. 36. Kan.—*Board of Education v. Tinnon*, 26 Kan. 1. Ill.—*People v. Alton*, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. 95; *People v. Mayor, etc. of City of Alton*, 179 Ill. 615, 54 N. E. 421; *People v. Board of Education*, 127 Ill. 613, 21 N. E. 187. Ia.—*Dove v. Ind. S. Dist. of K.*, 41 Iowa 689; *Clark v. Board of Directors*, 24 Iowa 266. Mich.—*People v. Board of Education*, 18 Mich. 400. N. C.—*Lowery v. Board of Trustees*, 140 N. C. 33, 52 S. E. 267, 272. N. J.—*State ex rel. Pierce v. Union, etc. Trustees*, 46 N. J. L. 76. Nev.—*State v. Duffy*, 7 Nev. 342, 8 Am. Rep. 713.

See generally the title "Mandamus."

14. Where the purpose of the school authorities to exclude colored children from all the buildings but one, contrary to the statute, because they were colored children, is clear from the records of the school authorities, the parents of such child may institute mandamus proceedings to compel their admission without showing a formal demand and refusal to admit the children before instituting the proceedings. *People v. Board of Education*, 127 Ill. 613, 21 N. E. 187.

15. *Maddox v. Neal*, 45 Ark. 121, 55 Am. Rep. 540.

16. *Eubank v. Boughton*, 98 Va. 499, 36 S. E. 529.

17. A petition showing that the relator and his wife are residents of a certain ward and that his children are eligible and qualified to be admitted as pupils in said school, and that at a regular term of such school relator took his children to said school and applied to have them admitted as pupils, which application was refused by the teacher of the school for the reason that his children were colored and that said school was established by the school board for white pupils, states a cause of action. *Marion v. Territory*, 1 Okla. 210, 32 Pac. 116.

See generally the title "Mandamus."

18. *People v. Board of Education*, 127 Ill. 613, 21 N. E. 187; *People v. Board of Education*, 18 Mich. 400, 412.

19. *Maddox v. Neal*, 45 Ark. 121, 55 Am. Rep. 540.

20. In *People v. Board of Education*, 127 Ill. 613, 21 N. E. 187, the court said it entertained no doubt that any citizen of the school district might, with equal right of law (to the father) have maintained the petition, though he had no legal interest in the result.

21. *Tape v. Hurley*, 66 Cal. 473, 6 Pac. 129.

justify a violation of law on the ground that a resolution of the board of education required them to do so."²²

C. **QUO WARRANTO.**—Under a statute providing that if "any corporation exercises rights not conferred by law," the attorney general may institute quo warranto proceedings to determine by what right the board of education adopted and enforced rules providing for the maintenance of separate schools for school children and excluded colored children from schools provided for white children.²³

D. **INJUNCTION.**—If the law does not permit separate schools for white and colored children, the school authorities will be enjoined at the suit of the tax payers from maintaining separate schools and teachers for several colored children where they can easily be accommodated in the school provided for white children.²⁴ And the federal courts may enjoin state officers from obeying a state law declared unconstitutional because not providing for a fair share of taxes for the support of the colored schools.²⁵

III. CRIMINAL PROSECUTION.—A. **ALLEGATIONS OF THE INDICTMENT.**—1. **Alleging Right or Privilege Invaded.**—The indictment should allege the particular right or privilege invaded.²⁶

2. **Alleging Discrimination By Reason of Race or Color.**—An indictment in the United States courts for infringement of the civil rights of a colored citizen should allege that such citizen was a person

22. *Tape v. Hurley*, 66 Cal. 473, 6 Pac. 129.

23. *People v. Board of Education*, 101 Ill. 308, 40 Am. Rep. 196. See the title "*Quo Warranto*."

But the right to file an information in the nature of a *quo warranto* in the name of the attorney general is not a matter of right upon showing *ex parte* a *prima facie* case showing refusal to admit colored children to certain schools and requiring them to attend certain other schools, the court may issue a rule nisi and allow respondents a hearing through counter affidavits. *People v. McFall*, 26 Ill. App. 319.

24. *Chase v. Stephenson*, 71 Ill. 383.

25. *Claybrook v. Owensboro*, 16 Fed. 297.

26. An indictment for preventing and hindering certain colored persons "in the free exercise and enjoyment of their several and respective right and privilege to the full and equal benefit of all laws and proceedings then and there enacted," etc., is fatally defective for vagueness and generality. *United States v. Cruikshank*, 1 Woods 308, 25 Fed. Cas. No. 14,837, affirmed, 92 U. S. 542, 23 L. ed. 588.

Right Sufficiently Alleged.—An in-

dictment charging defendants with conspiring to injure, oppress, threaten and intimidate certain voters, on account of their race, color, and previous condition of servitude, in the free exercise and enjoyment of a right and privilege which they then and there had, and which was then and there secured to them by the constitution and laws of the United States is good, without averring in terms that the right injured is "the right not to be discriminated against on account of race, etc." *United States v. Lackey*, 99 Fed. 952.

Discrimination Charged but Acts Charged not Showing Discrimination.

An indictment for discrimination in the furnishing of separate coaches or compartments for white and colored passengers, the discrimination alleged being "that a colored passenger was forced and compelled to travel and remain in the baggage car from M. to P., which had no fire, seats or other accommodations like those of the car or partition set apart for the white passengers," but not charging that the baggage car was set apart for the use of colored passengers; only that colored passenger was forced and compelled to travel therein, is demurrable.

of color,²⁷ and that he was deprived of the particular civil right invaded by reason of his race, color or previous condition of servitude.²⁸

3. Showing Defendant Within Terms of Statute.—If the statute makes passenger railroads only indictable for failure to provide separate accommodations at depots for both races, the indictment should allege that defendant railroad was a passenger railroad,²⁹ and that it maintained a depot at the place in question.³⁰

4. Allegations as to Lack of Reason for Refusal of Privileges. Under a state statute providing for the full enjoyment by all persons of the accommodations and privileges of inns, barber shops, and all public conveniences, an indictment should aver that there was no good reason for the refusal to give the accommodations desired.³¹

5. Alleging Citizenship of Persons Injured.—An indictment³² or information for violation of a statute providing for equal civil rights for "all citizens" must allege that the person injured was a "citizen," so as to show that he was entitled to the benefits of the act.³³

6. Allegations Where Invasion of Civil Rights Is Under State Law. An indictment for the invasion of civil rights under color of a state law must aver that the person whose rights were invaded came within the operation of the law and subjected him to its provisions.³⁴ But

Louisville, etc. R. Co. v. Com., 117 Ky. 345, 78 S. W. 167.

27. United States v. Sanges, 48 Fed. 78, an indictment under U. S. Rev. St., §1977, for conspiracy by individuals to deprive a citizen of the United States of the right to be a witness.

28. United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; United States v. Sanges, 48 Fed. 78; United States v. Cruikshank, 1 Woods 308, 25 Fed. Cas. No. 14,897, *affirmed*, 92 U. S. 542, 23 L. ed. 588.

Such an averment is not a matter of form but of substance and must be charged positively. United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588.

Insufficient Allegation of Denial of Rights by Reason of Race or Color. An allegation that the persons injured in their civil rights were of the African race, and that the intent of defendants was to deprive them of the exercise and enjoyment of the rights enjoyed by white citizens does not sufficiently allege that they were deprived of civil rights by reason of their race, color or previous condition of servitude. Such an allegation should not be left to inference. United States v. Cruikshank, 1 Woods 308, 25 Fed.

Cas. No. 14,897, *affirmed*, 92 U. S. 542, 23 L. ed. 588.

29. St. Louis R. Co. v. State, 68 Ark. 251, 57 S. W. 796.

30. St. Louis, etc. R. Co. v. State, 68 Ark. 251, 57 S. W. 796.

31. An indictment for violation of a statute providing for the full enjoyment by all persons of the accommodations and privileges of inns, barber shops, by refusal to shave a colored man, though it alleges defendant "knowingly, wilfully and unlawfully refused to shave a colored man," is insufficient, where it is not averred that there was no good reason for such refusal, and it not being averred that at the time and immediately after the alleged refusal he proceeded to shave others, as for all that appears in such an indictment there might have been good reasons for his refusal. State v. Hall, 72 Iowa 525, 34 N. W. 315.

32. United States v. Taylor, 3 Fed. 563.

33. Messenger v. State, 25 Neb. 674, 41 N. W. 638.

34. United States v. Jackson, 3 Sawy. 59, 28 Fed. Cas. No. 15,459.

Where the California laws imposed a tax on foreign miners, an indictment against a tax collector for depriving

the state law need not be specially pleaded in an action in the federal courts, as they will take judicial notice of the statute.³⁵

7. **Language of Statute.** — If a statute makes the exclusion of any person from certain places by reason of their race, color or previous condition of servitude, a misdemeanor, an indictment in the language of the statute and containing averments as to time, place, person and other circumstances is sufficient, without particularly alleging the means of exclusion.³⁶ But it is not sufficient to charge the offense of violating a statute requiring railroads to provide separate waiting rooms of equal and sufficient accommodations for both races in the words of the statute. How the accommodations were not "equal and sufficient" must be shown by averment.³⁷

B. **JOINT INDICTMENT.** — If a statute makes it an indictable offense for failure of the railroad to furnish certain accommodations at its depot, and also makes the station agent liable to indictment for failure to perform duties in connection with the duty devolving upon the railroad, an indictment joining the railroad and station agent is open to the objection of misjoinder of parties.³⁸

C. **DUPPLICITY.** — An indictment is not open to the objection of charging two distinct offenses where it merely charges a violation of the statute in two distinct ways.³⁹

D. **SUBSTITUTION OF INDICTMENTS.** — Though a state statute authorizes the substitution of a subsequent indictment for a previous indictment where the two indictments are for the same offense, or for the same matter, an indictment charging a violation of a separate coach law in a distinct way from the first indictment, cannot be substituted for the first indictment.⁴⁰

a Chinaman of his rights under color of a state law, and setting out the state law under which the illegal tax was collected, is not sufficient unless it avers that the Chinaman was a foreign miner and within the terms of the statute. *United States v. Jackson*, 3 Sawy. (U. S.) 59, 26 Fed. Cas. No. 15,459.

35. An indictment for the infringement of the right to testify against white persons is good where it avers that in a certain criminal prosecution for burglarizing the premises of a certain negro by white persons, the plaintiff, being a colored person and a citizen, was denied, by the laws of Kentucky, the right to testify against the white persons. It need not aver that the "white citizens" enjoyed the right which is alleged to have been denied the colored person. The Kentucky statute is a public statute and will be noticed judicially without pleading it.

United States v. Rhodes, Abb. 28, 27 Fed. Cas. No. 16,151.

36. *Chesapeake & O. R. Co. v. Com.*, 119 Ky. 519, 84 S. W. 566; *People v. King*, 110 N. Y. 418, 18 N. E. 245, 6 Am. St. Rep. 389, 1 L. R. A. 293, *affirming*, 42 Hun 189.

37. *Choctaw, etc. R. Co. v. State*, 75 Ark. 279, 87 S. W. 426; *St. Louis, etc. R. Co. v. State*, 68 Ark. 251, 57 S. W. 796.

38. *St. Louis, etc. R. Co. v. State*, 68 Ark. 251, 57 S. W. 796.

39. *Chesapeake, etc. R. Co. v. Com.*, 21 Ky. L. Rep. 228, 51 S. W. 180, *affirmed*, 179 U. S. 338, 21 Sup. Ct. 101, 45 L. ed. 244, holding sufficient an indictment charging a failure to have separate coaches for both races, and a failure to designate by lettering which cars are designated for white, and which for colored, passengers.

40. *State v. Welbon*, 66 Ark. 510, 51 S. W. 829.

CLAIM AND DELIVERY.—See *Replevin*.

CLERK OF COURT.—See *Courts*.

CLERK AND SOCIETIES.—See *Associations*.

COGNOVIT.—See *Costs*.

COLLATERAL ATTACK.—See *Judgment*.

Vol. V

COLLISION

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CROSS-REFERENCE:

Admiralty.

I. INTRODUCTORY STATEMENT.— This article treats of the remedies for damages done by maritime collision. This term, as usually employed in the law, means the impact of ship with ship. In a less restricted sense it includes the contact of a ship with other structures, fixed or floating. Collision is a maritime tort,¹ and liability for its consequences depends upon the law of negligence.²

1. See the title "Admiralty," Vol. I, p. 397.

2. Marsden's *Collisions at Sea* (fifth ed.), ch. 1; 2 Beven on Negligence, ch. V.

Suits may be brought in the admiralty,³ or at common law.⁴ Admiralty procedure is the better adapted to this class of cases, and actions at law are comparatively rare.

II. PROCEDURE IN ADMIRALTY.—Collision causes follow the general course of admiralty procedure,⁵ and may be prosecuted either *in rem*,⁶ or *in personam*,⁷ or through the application of the "Limited Liability Act,"⁸ by means of which all claims growing out of the disaster may be determined in a single proceeding.⁹

A. PLEADING.—**1. Parties.**—**a. Libelants.**—The master may sue in his own name for all interested in property lost or damaged while in his charge.¹⁰ All persons damnified in property or person by the collision may sue accordingly,¹¹ such as the ship owners, whether of record or otherwise,¹² both personally, and as bailee of the property lost or damaged while in their charge¹³ (and this right has not been affected by the Harter Act);¹⁴ owners or consignees of the cargo;¹⁵ either by direct suit in an original proceeding,¹⁶ or by intervention in a pending suit at any time before the fund is actually distributed;¹⁷ members of the crew, or passengers, for effects lost or personal injuries sustained;¹⁸ personal representatives, for damages by reason of loss

3. Admiralty rule 15.

4. See the title "Admiralty," Vol. I, p. 373.

5. See the title "Admiralty," Vol. I, p. 408-580.

6. See the title "Admiralty," Vol. I, p. 413; Admiralty rule 15.

7. See the title "Admiralty," Vol. I, p. 418; Admiralty rule 15.

8. See the title "Shipping."

9. General admiralty rules 54-58.

10. The Mercedes, 108 Fed. 559.

11. Marsden's Collisions at Sea (fifth ed.) 96.

12. The Commander-in-chief, 1 Wall. (U. S.) 43, 17 L. ed. 609; The Ilos, Swabey (Eng.) 100; 2 Parsons' Sh. & Ad. 370.

13. "The Beaconsfield having been sunk in a collision with the Britannia, her master and owner, as bailees of her cargo, proceeded against the Britannia for damages done to such cargo. This they had a perfect right to do. It is perfectly well settled that the carrier is so far the representative of the owner that he may sue in his own name, either at common law or in admiralty, for a trespass upon or injury to the property carried. If a cargo be damaged by collision between two vessels, the owner may pursue both vessels, or either, or the owner of both or either; and in case he proceed

against one only, and both are held in fault, he may recover his entire damages of the one sued." The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. ed. 993.

14. "In the maritime law, however, we understand this duty and right of representation to be well settled in respect of all cargo interests, up to delivery of the shipment, inclusive of the right, as bailee, to sue for the benefit of cargo owners, for injuries caused by others to their property. Whether this duty arises either out of the special nature and hazards of the service or general doctrine of bailment, we believe it does not rest on the measure of liability for carriage and delivery under the bill of lading, and that the duty in question to care for all cargo interests involved in any disaster or injury (and consequent right of representation for their protection) remains unaffected by the act referred to." Erie & Western Trans. Co. v. Chicago, 178 Fed. 42, 101 C. C. A. 170.

15. The Vaughan, 14 Wall. 258, 20 L. ed. 807; McKinlay v. Morrish, 21 How. 343, 16 L. ed. 100; Lawrence v. Minturn, 17 How. 100, 15 L. ed. 58.

16. Duncan v. The C. H. Foster, 1 Fed. 733.

17. The Commander-in-Chief, 1 Wall. 43, 17 L. ed. 609.

18. Briggs v. Day, 21 Fed. 727.

of life, where the cause of action survives or a right of action is given by local law;¹⁹ a mortgagee;²⁰ or the endorsee of the bill of lading.²¹

Insurers who by payment of the loss have become subrogated to a right of action may prosecute it either in the name of the insured or in their own names.²²

Separate, or several, rights of action may be prosecuted separately,²³ but all interested in a single cause of action must join as libelants.²⁴

Interest. — One who holds claims for collision damages as a mere assignee for purposes of litigation and has no real interest therein will not be permitted to sue in the admiralty.²⁵

b. *Claimants and Respondents.* — If the libel is *in rem*, the owners, or their representatives, or others having the requisite interest in the *res* will be entitled to appear as claimants thereof and assume the defense of the suit.²⁶

2. *The Libel.* — In suits for collision the libel should conform to admiralty rule 23. It may be filed against the ship and master together; or against the master or the owner alone; or against the ship alone.²⁷ The last course is the most usual and effective as the master's financial responsibility is not likely to be adequate and the liability of the owner will not ordinarily exceed the value of his ship as of the time of the disaster, by reason of the federal law of limited liability.²⁸ The libel should exhibit a plain statement of the movements of the vessels involved, the time and place of the collision, the conditions of the wind, weather, sea, and atmosphere, and, in particular, should specify the particular acts or omissions relied on as negligent. In this respect, the generality of common-law pleading is not permitted.²⁹

3. *The Answer.* — The answer must conform to admiralty rule 27, subject to the qualification of rule 48, in respect of suits not involving more than fifty dollars, and of rule 31, in regard to incriminating interrogatories. It must be full, explicit, and distinct, to each separate article and allegation of the libel, and vague or indefinite responses are not deemed sufficient to constitute a valid defense.³⁰

19. *La Bourgogne*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. ed. 973; *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. ed. 264.

20. *The Grand Republic*, 10 Fed. 398.

21. *The Minna*, L. R., 2 A. & E. 97.

22. *The New York*, 175 U. S. 187, 209, 20 Sup. Ct. 67, 44 L. ed. 126.

23. *Marsden's Collisions at Sea*, (fifth ed.) 96.

24. *Fairgrieve v. Ins. Co.*, 94 Fed. 686, 51 C. C. A. 686.

25. *The Trader*, 129 Fed. 462, 472.

26. Admiralty rule 26. And see the title "*Admiralty*," Vol. I, p. 502.

27. Admiralty rule 15.

28. See the title "*Shipping*."

29. *The Metamora*, 144 Fed. 936, 75 C. C. A. 576; *The Conde Winfredo*, 77 Fed. 324, 23 C. C. A. 187; *The Itasca*, 117 Fed. 885; *Jacobsen v. Company*, 93 Fed. 975; *The Vim*, 2 Fed. 374; *The Transport*, 1 Ben. 86, 20 Fed. Cas. No. 11,516; *The M. M. Chase*, 1 Hask. 489, 17 Fed. Cas. No. 9,685; *The Eri*, 3 Cliff. 456, 14 Fed. Cas. No. 7,765; *The H. P. Baldwin*, 2 Abb. 257, 12 Fed. Cas. No. 6,811; *The Havre*, 1 Ben. 295, 11 Fed. Cas. No. 6,232; *The Coleman & Foster*, Brown 456, 6 Fed. Cas. No. 2,981 (as to the necessity of presenting defects in the libel by exceptions).

30. *The Commander-in-Chief*, 1 Wall. 43, 48, 17 L. ed. 609; *Hamburg-American Packet Co. v. Rich*, 159 Fed. 667,

4. **Cross-Libel.** — A cross-libel must be filed by the respondent or claimant if affirmative relief against the libellant or his ship is desired.³¹ This will be in the form of an original libel by the respondent against the libellant or his ship, with such allegations as are appropriate from his standpoint, and praying relief independently of the claims asserted in the libel. Similar process should be issued and security obtained.³² If security be not furnished by the libellant, the court may stay all proceedings upon the original libel until such security shall be given.³³ The respondent may, of course, recoup his own damages against those of the libellant by apt allegations in his answer alone, the requirement of a cross-libel applying only to those cases where an affirmative decree against the libellant is desired.³⁴

5. **Petition Against Third Parties.** — Third parties, alleged by the claimant or respondent to have been guilty of fault or negligence contributing to the collision, may be brought in and proceeded against, under the provisions of admiralty rule 59, by process either *in rem* or *in personam*.³⁵

B. **HEARING.** — 1. **Practice.** — The hearing or trial is in accordance with the local rules of the court in which the cause is pending. There is no jury, except in rare cases by virtue of the provisions of section 566 of the Revised Statutes.³⁶

2. **Evidence in General.** — The rules of evidence are substantially the same as at common law,³⁷ but a court of admiralty has the authority, in its sound discretion, to relax or enlarge these rules, as justice may require.³⁸

3. **Presumptions.** — In cases of collision, the presumptions are mainly deduced from the statutory regulations for preventing collisions at sea,³⁹ and the settled usages of navigation.⁴⁰ Violation of

86 C. C. A. 535; *Virginia Home Ins. Co. v. Sundberg*, 54 Fed. 389.

31. "For all purposes of defence to the charges made by the libellant, his answer, if in due form, is sufficient; but if he intends to claim a decree for the damages suffered by his own vessel, then he should file a cross-libel. Damages for injuries to his own vessel cannot be decreed to him under an answer to the original libel, as the answer does not constitute a proper basis for such a decree in favor of the respondent. Consequently, whenever he desires to prefer such a claim, he should file an answer to the original libel, and institute a cross-action to recover the damage for the injuries sustained by his own vessel." *The Dove*, 91 U. S. 381, 383, 23 L. ed. 354. And see *Ebert v. The Reuben Doud*, 3 Fed. 520.

32. Admiralty rule 53. See the title "*Admiralty*," Vol. I, p. 484.

33. *Morse Iron Wks. & D. D. Co. v. Luckenbach*, 123 Fed. 332; *Old Do-*

minion S. S. Co. v. Kufahl, 100 Fed. 331; *The City of Hartford*, 11 Fed. 89; *The Toledo*, 1 Brown 443, 23 Fed. Cas. No. 14,077; *The Bristol*, 4 Ben. 55, 4 Fed. Cas. No. 1,889.

34. *The Reuben Doud*, 3 Fed. 520.

35. See the title "*Admiralty*," Vol. I, p. 524.

36. See the title "*Admiralty*," Vol. I, p. 538.

37. See, generally, 1 *Parsons' Sh. & Ad.* 537, 538; 2 *id.*, ch. xi; *Benedict's Admiralty*, (1910), ch. 28.

38. *The Gallego*, 30 Fed. 271; *The Boskenna Bay*, 22 Fed. 662; *The Vivid*, 4 Ben. 319, 28 Fed. Cas. No. 16,978.

39. "International Rules." Act of Aug. 19, 1890; 26 S. 320; U. S. Comp. Stat. (1901) 2863; Act of June 7, 1897; 30 S. 96. For harbors, rivers and inland waters: Rules for the Great Lakes, or the "White Law," U. S. Comp. Stat. 1901, 2886.

40. *The City of Washington*, 92 U. S. 31, 23 L. ed. 600. "Usages, called

either raises a strong presumption of negligence against the offending vessel and imposes upon her the burden of proving that the breach did not, and, in many cases, that it could not by any possibility, contribute to the disaster.⁴¹

The Regulations. — The rules of navigation promulgated by England in 1863 and by the United States in 1864, have been accepted as obligatory by all nations, and, as revised by subsequent international maritime conferences and enacted by statutes, now constitute an international code of which the courts of this country take judicial notice.⁴² These regulations, wherever the situation renders them applicable, furnish the primary and paramount test of negligence and a violation creates a presumption of fault. This presumption can only be rebutted by proof on the part of the infringing vessel that the infringement

sea laws, having the effect of obligatory regulations, to prevent collisions between ships engaged in navigation, existed long before there was any legislation upon the subject, either in this country or in the country from which our judicial system was largely borrowed. Plenary jurisdiction was conferred upon the courts in such controversies; and the judicial reports show, beyond peradventure, that the courts, both common-law and admiralty, were constantly in the habit of referring to the established usages of the sea as furnishing the rule of decision to determine whether any fault of navigation was committed in the particular case; and, if so, which of the parties, if either, was responsible for the consequences."

41. Marsden's *Collisions at Sea*, (fifth ed.) ch. 11.

In *The Lansdowne*, 105 Fed. 436, a case of failure to exhibit proper lights, it was said: "The fault of the *Lansdowne* in failing to comply with the requirements of the Canadian statute as to the position and character of the bright lights, is *prima facie* evidence, until conclusively refuted of the agency of that violation of the statute in the collision. Both the American and English courts hold that, where a vessel has disregarded a rule of navigation, it is incumbent upon her to show, in cases of collision or other disaster, that the violation of the statute not only did not, but could not have, contributed to the collision." And see *The Pennsylvania*, 19 Wall. 125, 22 L. ed. 148; *Wilders S. S. Co. v. Low*, 112 Fed. 161, 50 C. C. A. 473; *Merchants & Miners' Trans. Co. v. Hopkins*, 108 Fed. 890, 48 C. C. A. 128; *The Hercules*,

80 Fed. 998, 26 C. C. A. 301; *The Robert Graham Dun*, 70 Fed. 270, 17 C. C. A. 90; *The Kenilworth*, 64 Fed. 890; *The Oregon*, 27 Fed. 751; *The Alaska*, 22 Fed. 548; *The Jay Gould*, 19 Fed. 765; *The Leland*, 19 Fed. 771; *Desty Sh. & Ad.* §387; *The Fenham*, L. R. 3 C. P. 212.

"Those rules are the law of laws in cases of collision. They admit of no option or choice. No navigator is at liberty to set up his discretion against them. If these rules were subject to the caprice or election of masters and pilots, they would be not only useless but worse than useless. These rules are imperative. They yield to necessity, indeed, but only to actual and obvious necessity." *The Clara Davidson*, 24 Fed. 763.

42. *The Belgenland*, 114 U. S. 355, 370, 5 Sup. Ct. 860, 29 L. ed. 152; *The Scotia*, 14 Wall. 170, 20 L. ed. 22; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 26 Fed. 596.

The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. ed. 126, was heard on a writ of certiorari to the Circuit Court of Appeals for the sixth circuit (see 82 Fed. 819). The collision had occurred in Canadian waters and it had been held in the court of appeals that the regulations of Canada in regard to navigation could not be considered because they had not been proved as a foreign law. The supreme court, reversing the lower court, held, among other things, that a court of admiralty may properly take judicial notice of an act of the parliament of Canada regulating the navigation of Canadian waters, as a law of the sea and of general application.

could not have contributed to the collision.⁴³ Thus, infringement of the rules in regard to signal lights,⁴⁴ fog signals,⁴⁵ speed in thick weather,⁴⁶ the regulations for vessels meeting and passing one an-

43. *The Pennsylvania*, 19 Wall. 125, 136, 22 L. ed. 148. But when, as in this case, "a ship at the time of a collision is in actual violation of statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." Such a rule is necessary to enforce obedience to the mandate of the statute. See also *The Continental*, 14 Wall. 345, 20 L. ed. 801; *The Gray Eagle*, 9 Wall. 505, 19 L. ed. 741; *The Providence*, 98 Fed. 133, 38 C. C. A. 670; *The Bolivia*, 42 Fed. 169, 1 C. C. A. 221; *The Knight*, 45 Fed. 590; *The Whisper*, 37 Fed. 494.

"It is the settled rule in this court that when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. . . . Obedience to the rules is not a fault, even if a different course would have prevented the collision." *Belden v. Chase*, 150 U. S. 674, 699, 14 Sup. Ct. 264, 37 L. ed. 1218. See also *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. ed. 660.

44. "A wrong light or a light in a wrong position will almost certainly cause the ship carrying it to be held in fault, if it could by possibility have misled the other ship. It is an infringement of Art. I, and therefore it is not necessary for the latter to prove that she was in fact misled. It lies upon those admittedly in fault in respect of the light to make out beyond all doubt that the light was in such a position that it must have been seen." *Marsden's Collisions at Sea* (1904) 336. And see *The Scotia*, 14 Wall. 170, 22 L. ed. 822; *The La Champagne*, 60 Fed. 299, 8 C. C. A. 624; *The Nessmore*, 50 Fed. 616; *The Excelsior*, 39 Fed. 393; *The Haverton*, 31 Fed. 563; *The Scotia*, 7 Blatchf. 308; *The Benares*, 9 Pro. Div. (Eng.) 16;

The Talbot (1898), Pro. Div. (Eng.) 184; *The Rob Roy*, 3 W. Rob. (Eng.) 190; *The Gannet* (1900) L. R. App. Cas. (Eng.) 234; *The Lorne*, 2 Stuart (Can.) 177.

In *The Carvill*, L. R. 13 App. Cas. 455, it was said that if you can show that there is a defect in the lights, that vessel must be held to blame, unless she can show that the defect which exists in her lights could not by any possibility have contributed to the collision. And see *The Trave*, 55 Fed. 117; *The Catalonia*, 43 Fed. 396; *The Energy*, 42 Fed. 301; *The Wyanoke*, 40 Fed. 702; *The Love Bird*, 6 Pro. Div. (Eng.) 80; *The Hochung & Lapwing*, L. R. 7 App. Cas. (Eng.) 512.

45. *The Pennsylvania*, 19 Wall. 125, 22 L. ed. 148, where a sailing ship, hove to in a fog, was run down by a steamer which was held in fault for immoderate speed. The sailing ship was held also in fault for failure to sound her bell in accordance with the regulations by reason of her failure to demonstrate that such violation could not have contributed to the disaster.

The Martello, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. ed. 637, held that the requirement in article 12 of the International rules and regulations, that sailing vessels shall be provided with an efficient fog-horn, to be sounded by bellows or other mechanical means, is so far obligatory as to throw upon the sailing vessel in fault by such omission, the burden of proof, in case of collision, that the want of a mechanical fog-horn could not have contributed to it.

46. "A ship navigating at an improper rate of speed in thick weather would almost inevitably be held guilty of negligence contributing to the collision; and, under the existing law, without reference to the question whether the rate of speed was a cause of the collision." *Marsden's Collisions at Sea*, (1904), 373.

In *The Providence*, 98 Fed. 133, 38 C. C. A. 670, it was said: "At this locality, and with the fog then existing, this was clearly an unlawful rate of speed, in violation of the statutory regulations. . . . The rule has

other,⁴⁷ holding course and speed in particular situations,⁴⁸ stopping and reversing,⁴⁹ maintaining lookouts,⁵⁰ and failing to stand by after

been clearly laid down by the supreme court, to the effect that a vessel violating the statutory rules, in connection with which violation a collision arises, must show, not merely that such disregard was probably not one of the causes of the collision, but that it could not have been." See *The H. F. Dimock*, 77 Fed. 226, 23 C. C. A. 123.

47. **Passing Rules.**—*Belden v. Chase*, 150 U. S. 674, 37 L. ed. 1218, held that where a vessel, meeting or passing another vessel, departs from the rules laid down by the supervising inspectors and a collision results, the burden of proof is on it to show that the departure was made necessary by immediate and overwhelming danger; and where a vessel has committed a plain breach of the regulations, she must show, not only that it probably did not contribute to the collision, but that it could not have done so. See *The Zouave*, 90 Fed. 440; *The Mary Ida*, 20 Fed. 741; *The Edwin H. Webster*, 18 Fed. 724.

48. *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. ed. 771; *The Northfield*, 154 U. S. 629, 14 Sup. Ct. 1184, 24 L. ed. 680; *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. ed. 660; *The Highgate*, 6 Asp. Mar. Law Cas. 512.

49. "Nothing is better settled than that, if a steamer is approaching another vessel which has disregarded her signals, or whose position or movements are uncertain, she is bound to stop until her course be ascertained with certainty. . . . The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect." *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. ed. 126. And see *The Martello*, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. ed. 637; *The Teutonia*, 23 Wall. 77, 23 L. ed. 44; *The Stokes*, 22 How. 48, 16 L. ed. 228; *The Ogdensburg*, 21 How. 548, 16 L. ed. 162; *The Louisiana*, 21 How. 1, 16 L. ed. 29; *The Birkenhead*, 3 W. Rob. (Eng.) 75.

A person placed in a position of danger by the fault of another, is bound to stop and reverse. "The gentlemen by whom I have been assisted upon the argument (the nautical assessors) advise me that, in their opinion, the vessels were then too close together for any efficient action on the part of the tug. But to exonerate her for her departure from the rules I apprehend that it must be shown with reasonable certainty that such departure could not have contributed to the disaster which followed." *The Jay Gould*, 19 Fed. 765. And see *The Voorwards and Khedive*, L. R. 5 App. Cas. 876.

50. "It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant lookout besides the helmsman. . . . And whenever a collision happens with a sailing vessel, and it appears that there was no other lookout on board the steamboat but the helmsman, or that such lookout was not stationed in a proper place, or not actually and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault." *The Genesee Chief*, 12 How. 443, 463, 13 L. ed. 1058.

It was said in *The Ariadne*, 13 Wall. 475, 20 L. ed. 542: "The duty of the lookout is of the highest importance. . . . The rigor of the requirement rises according to the power and speed of the vessel in question. . . . It is the duty of all courts, charged with the administration of this branch of our jurisprudence, to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary." See *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. ed. 943; *The Colorado*, 91 U. S. 692, 23 L. ed. 379; *Chamberlain v. Ward*, 21 How. 549, 16 L. ed. 211; *The Louisiana*, 21 How. 1, 16 L. ed. 29; *The Dillaway*, 98 Fed. 138, 38 C. C. A. 675; *The City of Augusta*, 80 Fed. 297, 25 C. C. A.

disaster,⁵¹ all entail the most serious presumptions of fault against the infringing vessel.⁵²

The "Pilot Rules," prescribed by the United States Supervising Inspectors under the authority of congress, are subordinate to the regulations,⁵³ but where applicable, create a similar presumption of fault.⁵⁴ It has, however, been held that the courts cannot take judicial notice of these rules of the inspectors,⁵⁵ and it is therefore safer, where they are relied upon, to introduce them in evidence under appropriate pleading.⁵⁶ A court of admiralty may waive technical rules in this, as in other respects, and consider such rules where the record or briefs bring them to its attention without formal proof.⁵⁷

430; *Robinson v. Navigation Co.*, 73 Fed. 883, 20 C. C. A. 86.

51. "So we construe this statute to mean that, if a master of a vessel that has been in collision with another fails to stay by her, and shows no reasonable cause for such failure, the law will presume that the collision was caused by some negligent act or omission on his part, and, in the absence of proof to the contrary, will fasten upon him the responsibility for the collision. It puts upon him the burden of showing that he was free from fault." *The Hercules & Morgan*, 80 Fed. 998, 26 C. C. A. 301. See also *The Dun*, 70 Fed. 270, 17 C. C. A. 90; *The Luzerne*, 148 Fed. 133; *The Trader*, 129 Fed. 462; *The Kenilworth*, 64 Fed. 890; *The Onmst*, 2 Fed. 811.

52. "These rules are general rules, to be adopted by all persons having charge of the navigation of vessels with the exceptions which have been pointed out as to immediate danger. This rule (as to stopping and reversing) is not laid down merely for the sake of the vessel commanded by the man who breaks it, but for the sake of the vessel commanded by the man approaching at a distance, and who has no right or reason to suppose that he will break it. If the rule is observed, every person will know precisely what he is to do, and will say, I will carry out my directions entirely with that knowledge which I possess. On the other hand, if the Court allows these rules to be lightly departed from, the result will be the very evil which the Act was intended to prevent." It was the deliberate policy of the legislature to compel sea captains, where their vessels are in danger of collision, to obey the rule, and not to trust to their own

nerve and skill. *The Khedive*, L. B. 5 App. Cas. (Eng.) 87d.

53. *The John H. Starin*, 162 Fed. 146, 89 C. C. A. 170; *The Transfer* No. 15, 145 Fed. 503, 76 C. C. A. 263; *The John King*, 49 Fed. 469, 1 C. C. A. 319; *The Aurelia*, 183 Fed. 341; *The Van Houten*, 50 Fed. 590; *The Greenpoint*, 31 Fed. 231; *United States v. Miller*, 26 Fed. 95; *The Saunders*, 19 Fed. 118; *The Grand Republic*, 16 Fed. 424; *The Morning Star*, 4 Biss. 62, 17 Fed. Cas. No. 9,817; *The Atlas*, 4 Ben. 27, 2 Fed. Cas. No. 633.

54. *The Dentz*, 29 Fed. 525; *The B. B. Saunders*, 19 Fed. 118; *The Beaman*, 18 Fed. 334; *The Grand Republic*, 16 Fed. 424; *The Clifton*, 14 Fed. 586.

55. "It was suggested upon the argument that there was a rule of the supervising inspectors, making it obligatory upon a crossing steamer to avoid the one having the right of way by porting her helm in all cases. But no such rule is incorporated in the record or in the briefs, and it is not a regulation of which we can take judicial notice." *The E. A. Packer*, 140 U. S. 360, 11 Sup. Ct. 794, 55 L. ed. 453.

56. *The Clara*, 55 Fed. 1021, 5 C. C. A. 390.

57. "It is further contended that this fault cannot be considered, because the court does not take notice of the inspectors' rules and they were not offered in evidence. But in this case the rule is referred to in the record and exactly stated in the examination of a witness, and is fully considered in some of the briefs, so that we think we are authorized to consider it." *The H. B. Rawson*, 162 Fed. 312, 89 C. C. A. 20.

Usages of Navigation. — These may be general, as established by the practice of competent navigators,⁵⁸ the law in respect of lookouts being a prominent example,⁵⁹ and the failure to comply with such usages will be deemed a breach of a legal duty and entail the presumption of negligence.⁶⁰

Usages may also be merely local and where not repugnant to the regulations and laws, will be binding upon vessels navigating the locality.⁶¹ In some localities, like the St. Mary's River, local rules may have precedence of all others.⁶² Failure to observe such local usages or rules, when applicable, will create a presumption of fault against the offending ship.⁶³

As a corollary to the rule of a presumption of negligence arising from the violation of regulations or usages, it is also established that where it is plain that the breach did not contribute to the disaster, it will not be considered a fault for which the ship will be condemned. The rule in regard to lookouts, for example, is most rigidly insisted upon, but the cases are numerous where a colliding vessel, defective for want of a lookout, has escaped condemnation on this account because the court has been satisfied that the presence of a lookout would not have prevented the collision.⁶⁴ So, also, in regard to lights, while fault in this respect creates a presumption of negligence, proof that

58. *Marsden's Collisions at Sea*, (1904), 464.

59. The regulations recognize the duty to carry lookouts as preexisting legal duty and this obligation was constantly enforced by the courts long before the rules were enacted. *Chamberlain v. Ward*, 21 How. 548, 16 L. ed. 211; *The John Frazer*, 21 How. 184, 16 L. ed. 123; *St. John v. Paine*, 10 How. 565, 13 L. ed. 537; *The Ann, Marsden's Admiralty Cas.* (a collision case decided in 1691); 1 *Parson's Sh. & Ad.* 576.

60. *Taylor v. Harwood*, *Taney's Decisions*, 437.

61. *The W. H. Beaman*, 45 Fed. 125.

62. *The North Star*, 108 Fed. 436.

63. *The James Bowen*, 52 Fed. 510.

64. *The Clarion*, 27 Fed. 128, where the court said: "We do not wish to be understood as extenuating in any degree the obvious fault of the *Lansdowne* in sailing without a lookout. We have no doubt that, having regard to the number of vessels in the Detroit river, to the valuable lives that the *Lansdowne* had on board, to her great size and speed, and the tremendous energy with which she moved, it was grossly careless for her to navigate without a lookout, and we should

promptly condemn her in this case did we find that this contributed to the collision; but we think that in her management, in the course she took, in the signals she gave to her wheel, to her engineer, and to the approaching vessel, she was guilty of no fault. She appears, too, to have sighted the *Clarion* as soon as she left her slip. . . . We are unable to put our finger upon any fault committed by the *Lansdowne*, aside from the technical one of being insufficiently manned." The *Clarion* was held solely to blame.

The Fannie, 11 Wall. 238, 20 L. ed. 114, was a collision between a steamer and a sailing vessel which held her course but was without a lookout: "We do not think it worth while to discuss the question whether the lookout on the schooner was sufficient. If it was not, it can make no difference, for the want of a proper lookout did not contribute to the disaster. If the schooner held her course, it was all the steamer had a right to require, and, whether she had a proper lookout or not, it was her duty to do precisely what she did." *The Blue Jacket*, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. ed. 469; *The Lindsley*, 104 U. S. 185, 26 L. ed. 716; *The Farragut*, 10 Wall. 234, 19 L. ed. 946.

the disaster would have occurred in spite of the presence of the lights required by law, will prevent this fault barring recovery.⁶⁵

"*Res Ipsa Loquitur*." — A further group of presumptions appears in collision cases which may be classified under this maxim: as where there is a collision between a navigating vessel and one at a wharf;⁶⁶ or one colliding with another at rest and out of the usual channel.⁶⁷ This presumption, however, will not obtain when the anchored or stationary vessel is where she ought not to have been.⁶⁸

Miscellaneous Presumptions. — There are also a number of general propositions, derived from forensic experience and found to be of substantial value in the determination of these cases, which may be classed as presumptions in the law. Where one ship is shown to have been clearly in fault, to an extent sufficient to account for the collision, there is a presumption in favor of the other vessel which will resolve doubts in her favor.⁶⁹

65. *The Pennland*, 23 Fed. 551, was a collision between steam and sail; the latter had failed to exhibit the light required by R. S. 4234: "It is admitted that no lighted torch was exhibited. But though the statute requires a torch-light to be exhibited, it does not declare that the sailing vessel shall be answerable for a subsequent collision if she fail to exhibit it, without regard to the question whether her failure to exhibit it had anything to do with the collision or not. When it clearly appears, therefore, that the exhibition of such a torch could have done no good,—that is, could not have conveyed any additional information of any use to the steamer, and could have made no difference in the result, the omission of it is immaterial." See *The Oder*, 8 Fed. 172; *The John H. Starin*, 2 Fed. 100.

66. *The Granite State*, 3 Wall. 310, 18 L. ed. 179, a collision between steamer and a barge moored at a wharf. "The fact that in these circumstances the steamboat did collide with the barge is conclusive evidence that she was not properly managed, and that she should be condemned to pay the damages caused by the collision." See *The Newburgh*, 130 Fed. 321, 64 C. C. A. 567; *The City of Macon*, 121 Fed. 686, 58 C. C. A. 434.

67. *The Louisiana*, 3 Wall. 164, 18 L. ed. 85, where it was held that a vessel drifting from her moorings and striking against another around, out of the usual course of navigation will be presumed negligent and the burden is upon her to prove that her drifting

was the result of inevitable accident or of some cause which human skill and precaution could not have prevented.

"Whenever injuries are sustained by a vessel (moored) out of the track of other vessels, the presumption arises that the fault therefor rests with the navigating vessel, unless it is affirmatively shown that the accident could not have been avoided by the exercise of human skill and precaution." *Rebstock v. Trans. Co.*, 132 Fed. 174. *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. ed. 943; *The Virginia Ehrman*, 97 U. S. 309, 24 L. ed. 890; *The Dallman*, 70 Fed. 797, 17 C. C. A. 419.

"In admiralty the rule is settled: that a moving vessel must keep away from a vessel properly anchored and lighted, and a collision in such cases raises a presumption of fault against the vessel in motion, placing upon her the burden of exonerating herself from blame for the collision." *Graves v. Lake Michigan, etc. Trans. Co. (C. C. A.)*, 183 Fed. 378.

68. *Graves v. Lake Michigan, etc. Trans. Co. (C. C. A.)*, 183 Fed. 378, 380; *The Europe*, 175 Fed. 596, 607.

69. "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the

There is a presumption that a vessel, bound from one point to another, will take the usual and direct course between them, and testimony of a deviation without adequate cause must be established by a preponderance of evidence;⁷⁰ and a like presumption in the case of a sailing ship with a free wind.⁷¹

Courts of admiralty look with disfavor upon attempts to obtain testimony from the adverse vessel in collision cases and a practical presumption against the party indulging in the attempt may be observed in the opinions.⁷² There is a presumption that the testimony of the men on board a vessel as to what was actually done there is entitled to greater weight than that of those on other boats who judge merely from observation.⁷³ But, coupled with this rule, there should be observed the notice which the courts have taken of the disposition of both sailors and passengers to stand by their own ship and to attribute the collision to the faults of the other vessel.⁷⁴ The failure to produce some, or all, of the crew as witnesses will, nevertheless, be often treated as a suspicious circumstance and raise a presumption that, if called, their testimony would have been unfavorable to their employer.⁷⁵

conduct of such other vessel should be resolved in its favor." The City of New York, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. ed. 84. See also The Victory & Plymouthian, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. ed. 519; The Oregon, 158 U. S. 196, 15 Sup. Ct. 804, 39 L. ed. 943; The Ludvig v. Holberg, 157 U. S. 60, 15 Sup. Ct. 477, 39 L. ed. 620; The Ashbourne (C. C. A.), 181 Fed. 815; The William Chrisholm, 153 Fed. 704, 82 C. C. A. 562; The City of Augusta, 125 Fed. 712, 60 C. C. A. 480; The Georgetown, 135 Fed. 854.

70. The Alberta, 23 Fed. 807, 810.

71. The City of New York, 147 U. S. 72, 79, 13 Sup. Ct. 211, 37 L. ed. 84.

72. Palmer v. Trans. Co., 154 Fed. 683; The Twenty-One Friends, 33 Fed. 190; The Belgenland, 5 Fed. 86; The Monticello, 1 Low. 184, 17 Fed. Cas. No. 9,739; The Douglas, 1 Brown Adm. 105, 7 Fed. Cas. No. 4,031; The Commerce, 3 W. Rob. (Eng.) 286; The Great Eastern, Holt's Adm. Cas. (Eng.) 167.

73. 1 Parson's Sh. & Ad. 538; The Alexander Folsom, 52 Fed. 403, 3 C. C. A. 165; The Garlick, 88 Fed. 553; The Alberta, 23 Fed. 807; The Wiman, 20 Fed. 245; The Hope, 4 Fed. 89; The Forbes, 1 Cliff. 331, 19 Fed. Cas. No. 11,275; The Osceola, Olcott 450, 18 Fed. Cas. No. 10,602; The Governor, 1 Abb. Adm. 108, 10 Fed. Cas. No. 5,645;

The Empire State, 2 Ben. 178, 8 Fed. Cas. No. 4,473; and numerous cases in 1 Moore on Facts, §526.

74. The Juniata, 93 U. S. 338, 23 L. ed. 930; Walsh v. Rogers, 13 How. 283, 14 L. ed. 147; Waring v. Clarke, 5 How. 441, 12 L. ed. 226; The Acilia, 120 Fed. 455, 56 C. C. A. 605; The Armonia, 67 Fed. 362; The Grace, 42 Fed. 461; The Columbia, 27 Fed. 704; The Jay Gould, 19 Fed. 765; Vandewater v. Westervelt, 28 Fed. Cas. No. 16,846a; The Bella Donna, 4 Newb. 510, 19 Fed. Cas. No. 11,292; The Manitoba, 2 Flip. 241, 16 Fed. Cas. No. 9,029; The Armstrong, Brown 130, 1 Fed. Cas. No. 540; The Ceto, L. R. 14 App. Cas. (Eng.) 670, 683; "Admiralty Law," by Judge Coxe; Columbia Law Rev. Mar. (1908) 181.

75. In The Georgetown, 135 Fed. 854, 859, it is said: "The failure of the ship against which the weight of evidence exists to produce all of the persons, at least among its own officers and crew, likely to know of the circumstances of the collision, necessarily weakens its case. The failure to produce witnesses under such circumstances may be the result of mishap or misfortune, but these cannot suffice to take the place of absent witnesses who should have been produced."

"The force of this presumption of a defective lookout is greatly strengthened by the fact that the

4. Burden of Proof.—Where, as in collision cases, the rule is that all testimony offered should be received,⁷⁶ questions as to the burden of proof blend with the presumptions and become more a matter of argument to the court, upon the entire record, than a factor in determining which party shall proceed, as the burden shifts from time to time during the introduction of the proofs. The analogies of a jury trial are not present in these cases and testimony is seldom actually excluded; in practice, each party will usually put in all his case and reserve all questions as to the weight and effect of the evidence for the final discussion before the judge. This is the necessary course where local practice requires the proofs to be taken by deposition or before a commissioner; the result is practically the same where the witnesses are heard in open court, but no testimony can be excluded. With this general qualification, the general rules as to the burden of proof obtain in collision cases as in other forms of litigation.⁷⁷ The burden is upon the libellant to prove negligence and unless he does so he cannot recover;⁷⁸ but this may shift as soon as

claimant did not see fit to put upon the stand the officers and crew of the New York, who certainly would have been able to explain, if any explanation were possible, why the lights of the Conemaugh were not seen and distinguished or her signals heard." The New York, 175 U. S. 187, 20 Sup. Ct. 67; 44 L. ed. 126. See *Clifton v. United States*, 4 How. 242, 11 L. ed. 957; *The Bombay*, 46 Fed. 665; *The Alpin*, 23 Fed. 815; *The Laurence*, 15 Fed. 635; *The Porter*, 8 Fed. 170.

76. Rule Against Exclusion of Testimony.—The general practice had been for the trial judge to pass on the admissibility of testimony as in other trials where the witnesses were before him but in 1904 the Court of Appeals for the Sixth Circuit expressed its disapproval of the practice and it has since become largely obsolete. *Minnesota S. S. Co. v. Lehigh Valley Trans. Co.*, 129 Fed. 22, 63 C. C. A. 672, where it was said: "We observe that in a number of instances the district court, upon objection, excluded testimony tendered at the hearing (which was had in open court) upon various grounds which were assigned by the court. In several of these instances we think the testimony tendered and rejected was material and competent. But it happens in this case we are able to form definite conclusions without the aid of that which was rejected, and that which was rejected was in support of these conclusions. We think, however, we should call attention to

the error and inconvenience of this practice. If the court of first instance was empowered to make the ultimate judgment, there might be little or no objection to the course pursued. But as its determination is subject to appeal, and the appellate court might have a different opinion in regard to the competency and materiality of the rejected testimony, the difficulty becomes obvious. In such circumstances it might become necessary to undo all that had been done subsequent to the taking of the testimony and go over the ground again, and thus involve much cost and delay. The proper course is to receive the testimony tendered, subject to the objection, unless, indeed, it be so utterly irrelevant or immaterial that there could not possibly be any doubt about it. The power of the court to punish with the costs the bringing in of flagrantly indirect and useless testimony should ordinarily be a sufficient deterrent."

77. Marsden's Collisions at Sea, (fifth ed.), 29, 403, 223.

78. The George W. Peavey (C. C. A.), 183 Fed. 571, 572; *The Wioma*, 55 Fed. 338, 5 C. C. A. 122; *Five Canal Boats*, 24 Fed. 500; *The Wiman*, 20 Fed. 245; *The Jay Gould*, 19 Fed. 765; *The Saunders*, 19 Fed. 118; *The Webster*, 18 Fed. 724; *The City of Chester*, 18 Fed. 603; *The David Dows*, 16 Fed. 154; *The Amanda Powell*, 14 Fed. 486; *The Hall*, 14 Fed. 408; *The Joseph Stickney*, 1 Fed. 624.

he has made out a situation in which the obligation to avoid his ship rested upon the other vessel; the ship which was bound to keep out of the way of the other has the burden of proving by a preponderance of evidence that the collision was caused by the other's fault.⁷⁹

In cases of collision between steam and sail, the steamer is presumptively at fault,⁸⁰ and has the burden of proving that she was prevented from performing her duty by some fault on the part of the sailing vessel.⁸¹ The fault usually urged against the sailing vessel is that she made a sudden change of course and so caused the collision. The burden of proving this rests upon the steamer, and the courts have manifested some scepticism as to its general probability and truth.⁸² So, also, where a ship in motion collides with one

79. *The Gypsum Prince*, 67 Fed. 612, 14 C. C. A. 573.

80. *The Badger State*, 8 Fed. 526; *The Carroll*, 8 Wall. 302, 19 L. ed. 392, was a collision between a steamer and a schooner. "If the two vessels in this case were approaching each other in opposite directions, so as to involve risk of collision, the duty of each was plainly marked out by the law. The steamer was required to keep out of the way, slacken her speed, or if necessary, stop and reverse, while the schooner was required to maintain her course, and was not justified in changing it unless obliged to do so to avoid a danger that immediately threatened her. As the steamer did not keep out of the way, and as the collision did occur, the steamer is *prima facie* liable, and can only relieve herself by showing that the accident was inevitable, or was caused by the culpable negligence of the schooner."

81. *The Farnley*, 1 Fed. 631.

82. In *Haney v. Baltimore S. P. Co.*, 23 How. 287, 291, 16 L. ed. 562, it was said: "This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable and generally false." In *The Nessmore*, 41 Fed. 437, 441, in holding the steamer solely at fault, it was said: "That the pilot and master of the steamer honestly think that the schooner did change her course I have no doubt, but it is common experience that a sailing vessel, in the night-time, appears to change her course as her sails come more distinctly into view, and this impression on the senses in such cases, is stimulated by the strong bias to believe it is so affecting the persons who observe it

from the other one of two colliding vessels. It cannot be relied upon, therefore, without proof of corroborating facts."

"The burden is on the steamboat to prove very clearly that the luffing of the sloop would have saved the collision, especially as she herself had made it imminent. And certainly no duty devolved on the sloop to make any movement other than to keep her course until after it became evident to those in charge of her that the steamboat could herself do nothing to avoid the collision, for till that was evident the sloop must act on the supposition that the steamboat would perform her duty and keep out of the way, and any movement of the sloop other than keeping her course would only cause embarrassment to the steamboat in the performance of this duty. The blowing of a whistle by the steamboat to the sloop, if she did so before the collision, which is disputed, was an unmeaning signal. She had no right to call on the sloop to give way or change her course." *The Sylvan Glen*, 2 Fed. 905.

The Alaska, 22 Fed. 548, held that where there is risk of collision with a sailing vessel, the burden of proof rests upon the steamer to justify her failure to stop and back in ample season and she must be condemned if it is not met.

"It is well settled, in cases like this, that the burden of proof is on the steamer to show a sufficient reason for not keeping out of the way of the sailing vessel." *The Hercules*, 1 Fed. 925.

The City of Truro, 35 Fed. 317, held that, in cases of collision between steam and sail, if there is no clear

at rest, the burden rests upon the former to show that she was without fault.⁸³ The same rule obtains where an overtaking vessel col-

evidence of want of care on the part of the sailing vessel, the steamer must respond for the damages unless it can be shown that the disaster was inevitable.

The *Gate City*, 90 Fed. 314, laid down that the sailing vessel will not be held in fault for adhering to her course although the steamer appears to be navigating in a dangerous and uncertain manner and the burden rests upon the steamer to explain her failure to keep out of the way.

In *The George L. Garlick*, 88 Fed. 553, it was said: "The burden of proving herself free from fault is with the steam vessel. It does not seem to the court that she has discharged this burden. Courts view with some suspicion the exculpatory allegation of a steamer that a gust of wind came with such nice punctuality as to make an involuntary change of eight points in the steamer's course."

The court in *Squires v. Parker*, 101 Fed. 843, 42 C. C. A. 51, said: "Where, as here, a collision has occurred in the condition stated, between a sail vessel and a steam vessel, and the sail vessel is shown to have kept her course, a presumption at once arises that it resulted from the failure of the steamship to keep out of the way of the other. And this presumption must form the basis of the judgment, unless it shall be made clearly to appear that the accident was inevitable;" citing *The Scotia*, 14 Wall. 170, 20 L. ed. 822; *The Fannie*, 11 Wall. 238, 20 L. ed. 114; *The Carroll*, 8 Wall. 302, 19 L. ed. 392; *The Seneca*, 47 Fed. 87; *The Pennsylvania*, 23 Fed. 551; *The Badger State*, 8 Fed. 526; *The Hercules*, 1 Fed. 925. See also *LaBourgogne*, 139 Fed. 433, 71 C. C. A. 489; *The Pilot Boy*, 115 Fed. 873, 53 C. C. A. 329; *Merchants' & Miners' Trans. Co. v. Hopkins*, 108 Fed. 890, 48 C. C. A. 128; *The Trainer*, 152 Fed. 102; *Brigham v. Luckenbach*, 140 Fed. 322; *Donald v. Guy*, 135 Fed. 429; *The J. C. Ames*, 121 Fed. 918; *The Ardanrose*, 115 Fed. 1010; *The Richmond*, 114 Fed. 208.

The duties "are of a mutual character, and it is as much the duty of the sailing vessel to keep her course as of the steamer to keep out of the

way." *The Old Point Comfort*, 187 Fed. 765.

83. *The City of Augusta*, 30 Fed. 844, where it was said: "The sloop, however, was not wrongfully where she was, and, as she was struck by a vessel in motion, the burden of proof is on the latter to show herself without fault."

In *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. ed. 943, the supreme court said: "As we had occasion to remark in the *City of New York*, 147 U. S. 72, 85, where one vessel clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault. This principle is peculiarly applicable to the case of a vessel at anchor, since there is not only a presumption in her favor, by the fact of her being at anchor, but a presumption of fault on the part of the other vessel, which shifts the burden of proof upon the latter."

In *The City of Cleveland*, 93 Fed. 844, a sailing vessel was moored properly at a dock and was injured by a fire-tug on duty. It was held that the burden rested upon the latter to exonerate itself from the presumption of negligence thereby created and that not having sustained the burden of proof it would be condemned.

In *The Worthington and Davis*, 19 Fed. 836, it was said: "There can be no doubt of the proposition that, as the collision occurred with an anchored vessel, the burden of proof is on the *Worthington* to show herself guiltless of fault. She may do this by showing that she exercised all reasonable care upon her part, and that the collision was the result of an inevitable accident, or, as is done in this case, by showing that the fault is with the schooner in herself failing to observe the proper precautions."

"The libellant's charge of fault is sufficiently established by the fact that the ice boat, propelled by steam, ran into the schooner while moored. *The Granite State*, 3 Wall. 310, *The F. C. Latrobe*, 28 Fed. 377; *Engle v. Mayor*,

lides with one ahead; the duty of keeping out of the way of the leading ship is imposed by the regulations, as well as by the antecedent custom of the sea, upon the following ship, and, in case of collision between them, the burden of proof rests on the latter to show that her own conduct was faultless and that there was negligence on the part of the ship which she was overtaking," or where, in cases of crossing courses, the preferred ship is in collision with the vessel

40 Fed. 51, note." *Guthrie v. City of Philadelphia*, 73 Fed. 688.

The presumption of negligence which arises from the fact that a steamboat comes into collision with a moored vessel imposes on the former the burden of proving all exculpatory facts. *The Dean Richmond*, 107 Fed. 1001, 47 C. C. A. 138.

A moving vessel being clearly at fault for a collision with an anchored ship, the burden rests upon her to prove contributory fault on the part of the latter, and the latter will be given the benefit of every reasonable doubt. *The Northern Queen*, 117 Fed. 906.

"The rule is that, if the fact of a collision between a moored vessel and one moving be shown, the burden of proof is upon the one moving to show that it was free from fault, and it must repel the presumption of its negligence, or suffer the damages incurred." *The William M. Hoag*, 101 Fed. 846.

If a collision occurs between two vessels at anchor, one of which dragged from its moorings and caused damage to the one which remained fast, the presumption is that the latter was free from fault. *The Severn*, 113 Fed. 578.

84. *The Brandreth*, 3 Fed. 414; *The Governor*, Abb. Adm. 103, 10 Fed. Cas. No. 5,645.

In *Simpson v. Spreckles*, 13 Fed. 93, it was said: "The *Rosario* was therefore clearly within the rule which requires every vessel overtaking another vessel to keep out of the way of the last-mentioned vessel, and the burden of proof, in cases of accident, is on her to show diligence on her own part, and negligence on the part of the other vessel. It is not only her duty to take steps to avoid the collision, but she must do so in season. 'A ship going out of port,' says Emerigon, 'is to take care to avoid the vessel that has gone out before her.' Emerigon, c. 12, sec. 14,

p. 330. And Valin says (sec. 2, p. 578): 'Whether it be by night or day, the ship that leaves after another and follows her should take care to avoid a collision, without which she will have to answer in damages.'"

Where a tug and tow overtook and passed a schooner, the tow striking her directly astern, negligence will be inferred on the part of both tug and tow unless they prove that the schooner was solely in fault for the collision. *The Nathan Hale*, 113 Fed. 865, 51 C. C. A. 489.

In *The Atlantis*, 119 Fed. 568, 56 C. C. A. 134, *The Atlantis* was a much smaller boat than *The Owen* which attempted to pass her and by her "suction" diverted *The Atlantis* from her course in such a way as to cause her to impinge against *The Owen's* quarter and there acting as a sort of rudder, *The Owen* swung on the rocks. On libel by *The Owen* against *The Atlantis*, it was held that as she was the overtaken vessel, every reasonable doubt should be resolved in her favor and that as the burden of proof rested upon *The Owen* she would be held solely to blame.

The overtaking vessel is bound to take care that she does not come so close to the overtaken vessel as to cause danger of collision and where a steamer overtook and ran into a tug, without giving any signal of her approach, she was held liable for all the damages, in the absence of proof on her part showing beyond question that the accident was caused by some fault on the part of the tug. *The Fleetwing*, 114 Fed. 409.

See also *Spencer v. The Dalles*, P. & A. Nav. Co., 188 Fed. 865, *affirming* 178 Fed. 862; *The Kaiserin Maria Theresa*, 149 Fed. 97, 78 C. C. A. 681; *The Sicilian Prince*, 144 Fed. 951, 75 C. C. A. 677; *The Rebecca*, 122 Fed. 619, 60 C. C. A. 251; *The Hackensack*, 32 Fed. 800.

whose obligation was to keep out of her way.⁸⁵ Where sailing vessels are meeting or crossing, and collision ensues, the burden of proof rests upon the one sailing with the wind free.⁸⁶ Where a ship was run down while at anchor in a frequented channel, it was held that the burden rested upon her to show that her lights were properly set and burning.⁸⁷ If no fault can be proved against either vessel, the presumption obtains that they were both navigating in a lawful manner and no recovery can be had.⁸⁸ Where the defense is that of inevitable accident, the burden rests upon the defendant.⁸⁹

In general, in every instance of a violation of the regulations the

85. *Bigelow v. Nickerson*, 70 Fed. 113, 17 C. C. A. 1; *The Pocumoke* 150 Fed. 193; *The Charles A. Campbell*, 142 Fed. 996; *Watts v. United States*, 123 Fed. 105; *The George L. Garlick*, 88 Fed. 553; *The Friesland*, 76 Fed. 591; *The Cyclops*, 45 Fed. 122; *The Cement Rock*, 38 Fed. 764; *The Farragut*, 35 Fed. 617; *The City of Albany*, 34 Fed. 812; *The St. John*, 34 Fed. 763; *The Greenpoint*, 31 Fed. 231; *The Servia*, 30 Fed. 502; *The Baltic*, 2 Ben. 98, 2 Fed. Cas. No. 821.

86. *The Nacooche*, 137 U.S. 330, 338, 11 Sup. Ct. 122, 34 L. ed. 687; *The Carroll*, 8 Wall. 302, 304, 19 L. ed. 392; *The Robert Graham Dun*, 70 Fed. 270, 17 C. C. A. 90; *The Havilah*, 50 Fed. 331, 1 C. C. A. 519; *The Martha E. Wallace*, 148 Fed. 94; *The Mary Augusta*, 55 Fed. 343; *The David Dudley*, 11 Fed. 522; *The Badger State*, 8 Fed. 526; *The Clement*, 1 Curt. 363, 5 Fed. Cas. No. 2,879.

"But the undisputed and concurrent testimony of all the witnesses from both vessels is that the *Rabboni* was on the starboard tack, nearly if not quite closehauled, and the barkentine was sailing free on the port tack. It was then the duty of the barkentine to keep clear, and, failing to do so, the burden is on her to justify her failure and exonerate herself from fault." *The Rabboni*, 53 Fed. 948.

87. *Phil. & R. R. Co. v. River, etc. Imp. Co.*, 183 Fed. 109; *The Armonia*, 67 Fed. 362.

88. "In admiralty law, however, the phrase has a more comprehensive meaning. It is not necessary that the accident should be the result of a vis major. If no negligence can be imputed to either vessel, there is a presumption that they were navigating in a lawful manner and where no fault can be shown the accident may be

said to be inevitable." *The Jumna*, 149 Fed. 171, 79 C. C. A. 119.

See also *The Grace Girdler*, 7 Wall. 196, 19 L. ed. 113; *The Morning Light*, 2 Wall. 550, 17 L. ed. 862; *The Swan*, Newb. Adm. 158, 15 Fed. Cas. No. 8,588.

89. *The Moran* (C. C. A.), 180 Fed. 700.

In *The Olympia*, 61 Fed. 120, 9 C. C. A. 393, it was said: "The circumstances alleged in the libel are so far admitted in the answer as to make out a prima facie case of negligence on the part of *The Olympia*. Her sudden change of course was the immediate cause of the collision. Prima facie that change, of course, was a violation of very plain rules of navigation, and the burden is upon the claimants to explain. The defendants say, 'Our tiller rope broke, and the vessel became unmanageable, and the collision unavoidable.' That only shows that the breaking of the tiller rope was the cause of the collision. They must go further, and show that the cause which operated to break the tiller rope was unavoidable. The collision was but the result of the cause which produced a broken tiller rope. If that cause is not shown to be unavoidable, how can it be said that the collision was an inevitable accident? Unless the defendants can get rid of the negligence proved against them by showing the cause which broke this wheel rope, and that the result of that cause was inevitable; or by showing all the possible causes which might have produced such an effect, and then showing that the result of each one of these possible causes could not have been avoided by them, they have not met the burden of proof which rests upon them." And see *The Merchant Prince*, L. R. (1892) Prob. 179.

burden of proof rests heavily upon the party in fault to show that such violation could not have had any part in the collision which followed.⁹⁰

Cases of collision usually produce so violent a conflict of testimony that courts of admiralty rarely attempt to determine to which side to give credit, or to reconcile the different accounts, but attempt to govern themselves rather by such undeniable facts as are seldom absent in any case,⁹¹ and such presumptions and probabilities as the nature of the case affords.⁹²

5. Assessors.—The practice of calling assessors to sit with the judge is settled and approved,⁹³ and his findings in respect of questions of fact, on conflicting testimony, will be regarded as presumptively correct upon an appeal.⁹⁴

6. Interlocutory Decree.—The question of fault alone is generally first determined by the judge, and then, if necessary, the matter of damages is determined by a reference to a commissioner, under an interlocutory decree.⁹⁵

In pronouncing upon the question of fault, the court determines by whom and in what shares the damage shall be borne, and for this purpose collisions are classified into five groups; first, those caused

90. *The Iberia*, 123 Fed. 865, 59 C. C. A. 306; *The Australia*, 120 Fed. 220, 56 C. C. A. 568; *The Pilot Boy*, 115 Fed. 873, 53 C. C. A. 329; *The Livingstone*, 113 Fed. 879, 51 C. C. A. 560; *The Ohio*, 91 Fed. 547, 33 C. C. A. 667; *The Mexico*, 84 Fed. 504, 28 C. C. A. 472; *The Gypsum Prince*, 67 Fed. 612, 14 C. C. A. 573; *The Salisbury*, 135 Fed. 854; *The Eagle Wing*, 135 Fed. 826; *The Komuk*, 120 Fed. 841; *The Richmond*, 114 Fed. 208; *The Churchill*, 103 Fed. 690; *The Gate City*, 90 Fed. 314; *The LeLion*, 84 Fed. 1011; *The Alaska*, 22 Fed. 548; *The Wiman*, 20 Fed. 245; *The Leland*, 19 Fed. 771; *The Bessie Morris*, 13 Fed. 397; *The Porter*, 8 Fed. 170; *The Brandreth*, 3 Fed. 414; *The Franconia*, 3 Fed. 397.

91. *The Great Republic*, 23 Wall. 20, 23 L. ed. 55.

92. *The Nichols*, 7 Wall. 656, 19 L. ed. 157; *The William Chisholm*, 153 Fed. 704, 711, 83 C. C. A. 562; *The Iroquois*, 91 Fed. 173, 33 C. C. A. 435; *The Lepanto*, 50 Fed. 234, 238, 1 C. C. A. 503; *The Margaret B. Roper*, 103 Fed. 887; *The George L. Garlick*, 88 Fed. 553; *The North Star*, 43 Fed. 807; *The Bertie Calkins*, 2 Fed. 793; *The Manitoba*, 2 Flip. 241, 16 Fed. Cas. No. 9,029.

93. See the title "**Admiralty**," Vol. I, p. 539; the English practice is stated

in *Marsden's Collisions at Sea*, (1904) 291, with authorities. See also Lowndes' *Admiralty Law of Collisions at Sea*, (1867) 215.

In *The Fountain City*, 62 Fed. 87, 10 C. C. A. 278, error was assigned on account of the district judge having called in a nautical assessor and the court said: "It has been the practice in this circuit, and particularly in that court over which so experienced and able an admiralty judge as Mr. Justice Brown presided for nearly 20 years, for the district judge to call to his assistance navigators of experience as nautical assessors. It was based on the practice, followed by the English admiralty judges, of advising with the elder brethren of Trinity house as to practical questions of seamanship and navigation. It has been approved by the supreme court of the United States, and is of such long continuance that it is too late now to question its validity. . . . We think the practice an admirable one, and one well adapted to assist the trial judge in reaching the right conclusion in an admiralty case."

94. *The Captain Weber*, 89 Fed. 957, 32 C. C. A. 452.

95. *Benedict's Admiralty*, (1910) ch. xxx; *Holmes v. Dodge*, Abb. Adm. 60, 12 Fed. Cas. No. 6,637; *The City of Chester*, 9 P. D. 182.

by inevitable accident, a storm or other *vis major*; in such cases the loss rests where it fell, and the libel is usually dismissed without costs to either party;⁹⁶ second, those occurring through the fault or want of care of both, or all, parties concerned; here, the loss will be divided or apportioned between or among them so that it may be equally borne by all;⁹⁷ third, those happening by the negligence of

96. "Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances—such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view—the safety of life and property. Where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen." *The Grace Girdler*, 7 Wall. (U. S.) 196, 19 L. ed. 113.

See *The Olympia*, 52 Fed. 985, 9 C. A. 393, *s. c.* (on appeal) 61 Fed. 120; *Dunton v. Steamship Co.*, 115 Fed. 250; *The West Brooklyn*, 103 Fed. 691; *The Catherine of Dover*, 2 Haggard (Eng.) 154.

97. The American and English admiralty, in these cases, divide the damages, as well as the costs, equally between the vessels concerned. *The Catherine*, 17 How. 170, 15 L. ed. 233. Where but two ships are concerned, the court proceeds on the theory that each is liable for one-half of the damage done to both (*The North Star*, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. ed. 91), and, if one has suffered more than the other, the burden is equalized by a decree that the one which has suffered least shall pay to the one which has suffered most, one-half of the difference between the amounts of their respective losses (*The Manitoba*, 122 U. S. 97, 111, 7 Sup. Ct. 1158, 30 L. ed. 1095). The court in the case last cited thus illustrated the rule: "Applying this rule to the present case, the amount of the aggregate damage to both vessels, computed with interest to the date of the decree of the Circuit Court, was \$93,288.16; being for *The Comet*, \$85,818.16, and for *The Manitoba*, \$7,470. One-half of this was \$46,644.08. The loss of the owners of *The Comet* and of her cargo and pend-

ing freight was greater than that of the owners of *The Manitoba* by the sum of \$78,348.16. One-half of that difference was \$39,174.08. That was the amount of the liability of *The Manitoba* to *The Comet*."

The same rule is applied in England. *Stoomvaart Maatschappij Nederland v. P. & O. Nav. Co.*, L. R. 7 App. Cas. 795.

Where more than two vessels are involved in fault, the American rule is to apportion the loss in fractions among all concerned, treating each ship as a personality and without reference to the fact that the same person may be interested in more than one, and holding each vessel in fault to share the damages equally with every other vessel in fault. *The Eugene F. Moran*, 143 Fed. 187; 154 Fed. 41, 83 C. C. A. 153; 212 U. S. 466, 29 Sup. Ct. 339, 53 L. ed. 600. In this case two tugs and two scows in tow of one of the tugs were all in fault for a collision and the damages were apportioned so that each of the four was liable for an equal share of the loss. See *The Transfer* No. 18, 188 Fed. 210. In *The Pesthigo*, 25 Fed. 488, three ships were found in fault and the damages were divided into thirds. In *The Lyndhurst*, 92 Fed. 681, each boat recovered two-thirds of her damage from two tugs. In *The Maling*, 110 Fed. 227, the damages were assessed one-third upon *The Maling* and two-thirds upon a dredge. *The Nettie L. Tice*, 110 Fed. 461, was a collision for which the three boats participating were held mutually in fault and the libellant recovered a decree for two-thirds of his damages and costs, the two other boats being held responsible for one-third each.

The American and English rule does not take into account degrees of negligence in collision cases, or disparity of their faults (*The Continental*, 14 Wall. 345, 20 L. ed. 801; *The Sapphire*, 18 Wall. 51, 21 L. ed. 814), although a tendency in this direction may be observed (*The Victory*, 68 Fed. 395,

the injured party alone, and in these cases the court will dismiss his libel and leave him to bear his loss;⁹⁸ fourth, those caused by the sole fault of the ship which ran the other down, and here the court will decree full compensation to be made to the injured party;⁹⁹ and fifth, those where the fault is said to be inscrutable, or, impossible to be ascertained by the court although apparently existing; in such cases the practice of the English and American admiralty is to dismiss the libel and leave each party to bear his own damage.¹

15 C. C. A. 490), which has not yet been sanctioned by the supreme court (The Victory and The Plymouthian, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. ed. 519). See The Mary Ida, 20 Fed. 741.

As to the practice in Continental Europe, see Law Quarterly Review, Vol. 12, 260.

98. *Libellant Solely at Fault.*—The Clara, 102 U. S. 200, 26 L. ed. 145, "Where the fault is wholly on one side, the party in fault must bear his own loss, and compensate the other party, if such party have sustained any damage."¹

99. Here the innocent party will recover full compensation for his loss, subject to the protection which the law of limited liability of shipowners may afford his opponent. The Virginia Ehrman, 97 U. S. 309. The admiralty endeavors to give *restitutio in integrum* in the sense of a full and complete indemnity. The Clyde, Swabey (U. S.) 23. If the ship is a total loss, the measure is her value and net freight pending, with interest from the time of the disaster. The Umbria, 166 U. S. 404, 16 Sup. Ct. 610, 41 L. ed. 1053. The admiralty rate of interest in collision cases is six per cent. Hemmenway v. Fisher, 20 How. 258, 15 L. ed. 799; The Oregon, 89 Fed. 520, 526; The Aleppo, 7 Ben. 120, 1 Fed. Cas. No. 158. If the vessel is not a total loss the measure of damages is the reasonable cost of raising her and of the repairs necessary to restore her to her former condition, the burden of proof of these expenses being upon the owner (The Reno, 134 Fed. 555, 67 C. C. A. 479), with interest upon the disbursements (The Bulgaria, 83 Fed. 312), subject to the general discretion of the court (Dyer v. Nat. Steam Nav. Co., 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. ed. 153), and compensation for demurrage or loss of time and profits while out of commis-

sion (The Potomac, 105 U. S. 630, 26 L. ed. 1194). The fact that the repairs make the ship better than before cannot ordinarily be taken advantage of by those responsible for the injury (The John H. Starin, 116 Fed. 433) but the court may take the fact into consideration and reduce or deny the item of interest (The Alaska, 44 Fed. 498).

1. In The Worthington and Davis, 19 Fed. 836, Judge Henry B. Brown said: "Cases of inscrutable fault are those wherein the court can see that a fault has been committed, but is unable, from the conflict of testimony, or otherwise, to locate it. Since the introduction of colored lights and fog signals these cases are of rare occurrence, and the measure of liability is still an unsettled question. At common law the plaintiff is bound to make out his case by a preponderance of testimony, and if the question of fault is left in doubt the defendant is entitled to a verdict, and the loss rests where it falls. This is also the rule in the English admiralty and vice-admiralty courts. . . . The laws of Oleron, of Wisbuy, and the Marine Ordinance of Louis XVI, made no distinction between cases of mutual fault, inscrutable fault, and inevitable accident, but divided the damages in every case where the collision was not the fault of one party only. This rule was probably adopted on account of the difficulty of determining to which vessel the fault was imputable. It has received the sanction of Emerigon, Valin, Pothier, Grotius, and most, if not all, of the continental authorities on the subject." The court found that the district court decisions were about equally divided in opinion on the question and, on principle, pronounced for the English doctrine and dismissed the libel but without costs. The principle is referable to the rule of burden of proof. The L. P. Dayton, 120 U. S. 337, 7 Sup. Ct. 568, 30 L. ed.

7. Reference To Ascertain Damages.—After the question of fault has been determined and the rule for apportionment of the damage announced in an interlocutory decree, the usual procedure is for a reference to a commissioner to take the evidence in respect of the amounts and report his findings to the court. The functions of this officer are those of masters in chancery and his findings upon questions of fact, conflicting testimony, and the credibility of witnesses, are generally not the subject of revision by the court.²

669. See also *The Jumna*, 140 Fed. 743, 149 Fed. 171.

2. *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. ed. 289; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. ed. 664; *The North Star*, 151 Fed. 168, 80 C. C. A. 536; *La-Bourgogne*, 144 Fed. 781, 75 C. C. A. 647.

References To Ascertain Damages. General admiralty rule 44 provides all necessary authority. The commissioner has all the powers of a master in chancery (*The Elton*, 83 Fed. 519, 31 C. C. A. 496); and may sit outside the district in taking proofs (*The Bailey*, 103 Fed. 799). The burden of proof rests upon the party seeking compensation to prove his loss and to establish the facts necessary to the ascertainment of the definite sum awarded (*Cal. Nav. Imp. Co. v. Union Trans. Co.*, 176 Fed. 533, 100 C. C. A. 21); objections to testimony must be made before the commissioner (*The Bulgaria*, 83 Fed. 312). The testimony of the master or other representative of the vessel as to the amount paid for the repairs and the production of the receipted bills or vouchers establish, *prima facie*, the cost of the repairs without the necessity of calling the men who actually did the work. *The America*, 4 Fed. 337. In cases of total loss, the best evidence of value is that of competent persons having knowledge of what similar vessels are worth in the open market (*The North Star*, 15 Blatch. 532, 18 Fed. Cas. No. 10,332) unless the ship is of a type seldom bought or sold, or for which there is no established market, when evidence of the original cost and of reasonable allowances for depreciation by use will control (*La Normandie*, 58 Fed. 427, 7 C. C. A. 285). The charter or contract under which the ship was operating at the time is evidence of what her earning capacity was for the purpose of estimating demurrage during

repairs (*The Mayflower*, 1 Brown's Adm. 376, 16 Fed. Cas. No. 9,345); and the books of the libellant are admissible to show the daily earnings prior to the collision, for the same purpose (*The State of California*, 54 Fed. 404, 4 C. C. A. 393). The survey is evidence of the extent of damage and repairs required (*The Alaska*, 44 Fed. 498). The findings of the commissioner appointed to ascertain damages, when based upon conflicting testimony, have great weight and will seldom be disturbed upon exceptions or appeal (*Panama R. R. Co. v. Napier Shipping Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. ed. 1004); but, when clearly erroneous, will be reversed and the proper decree entered in the court of review (*The Cayuga*, 59 Fed. 483, 8 C. C. A. 188). In *The Anson M. Bangs*, 129 Fed. 103, 63 C. C. A. 605, the court held that the amount found by the commissioner could not be sustained except on hearsay testimony introduced before the commissioner without objection, and treated such testimony as of no probative force, remitting the cause to the district court for further proceedings.

In general, as to practice of such references, see *The Paquete Habana*, 189 U. S. 453, 23 Sup. Ct. 593, 47 L. ed. 900; *The Waiontha*, 122 Fed. 719; *The Goss*, 53 Fed. 826; *The Wavelet*, 25 Fed. 733; *The Transit*, 4 Ben. 138, 24 Fed. Cas. No. 14,138; *The Lively*, 1 Gall. 315, 15 Fed. Cas. No. 8,403; *Lee v. Thompson*, 3 Woods 167, 15 Fed. Cas. No. 8,202; *The Scranton*, 2 Ben. 81, 8 Fed. Cas. No. 4,271; *The Beaver*, 8 Ben. 594, 3 Fed. Cas. No. 1,200.

Prima facie proof of amount of damages may be made by the production by the libellant of the bills claimed to have been paid on account thereof and witnesses who say that they have paid them; the further testimony of those to whom payment was made is not necessary in making out his *prima*

Upon the filing of the report of the commissioner as to the amount of damages to be awarded, and its confirmation or modification by the court, a final decree will be entered against the ship in fault or the security which stands in her stead.³

C. PROCEDURE AT COMMON LAW. — The action for damages caused by collision is an action of tort, founded upon negligence,⁴ and may be pursued at common law in the same manner as in cases of other torts, the exclusive jurisdiction of the admiralty being confined to procedure *in rem*.⁵ The action is usually trespass on the case. Where the action is brought in a state court, a writ of error from the United States Supreme Court will generally lie, the jurisdiction of that court being clearly maintainable when the plaintiff in error has seasonably claimed the right of navigation under statutes of the United States.⁶ Such action will proceed entirely according to the rules of the common law and local practice, and in event of the plaintiff's failure to prove that the defendant's negligence was the sole cause of his injury, he cannot recover.⁷

facie case. *The Armonia*, 81 Fed. 227, 26 C. C. A. 338; *The America*, 4 Fed. 337.

3. See the title "Admiralty," Vol. I, 547.

4. *The B. B. Saunders*, 19 Fed. 118.

5. See the title "Admiralty," Vol. I, 374; and *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 450.

6. *Belden v. Chase*, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. ed. 1218, holding that the supreme court has jurisdiction to review the judgment of the highest court of a state in an action at common law to recover damages caused by collision upon inland waters over which the admiralty jurisdiction

extends, when that judgment denies rights claimed by the plaintiff in error under the rules established by the United States for preventing collisions or rights regarding the application of such rules; and that the appellate jurisdiction of the court over questions national and international in their character, arising out of an action for a maritime tort, cannot be restrained by the fact that the plaintiff elected to pursue his common-law remedy in a state court.

Form.—See *Chitty Pl.*

7. *Belden v. Chase*, 150 U. S. 674, 691, 14 Sup. Ct. 264, 37 L. ed. 1218; *Atlee v. Northwestern Union Packet Co.*, 21 Wall. 389, 22 L. ed. 619.

COLOR. — See **Confession and Avoidance.**

COMBINATIONS. — See **Conspiracy; Monopolies.**

COMMENCEMENT OF ACTION. — See **Limitation of Actions.**

COMMERCE. — See **Interstate Commerce.**

COMMERCE COURT

By EDGAR WATKINS,
Of the Atlanta Bar, Author of "*Watkins Shippers and Carriers of Interstate Freight.*"

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CROSS-REFERENCE:

Federal Courts.

I. THE COURT AND ITS JUDGES.—A. COURT CREATED. Congress, by the act of June 18, 1910, created a new court of the United States, to be known as the commerce court, provided for the appointment of judges and officers thereof, fixed its jurisdiction, provided that four judges should constitute a quorum and that at least three judges should concur in all decisions. Provision is made in the act whereby suits pending in the courts of the United States at the time of the organization of the commerce court of which the commerce court is given jurisdiction may be transferred to that court.¹

B. JUDGES.—The court is composed of five circuit judges, the first appointments being made by the president, and the appointees assigned to the commerce court for periods of one, two, three, four, and five years respectively. After the present assignments terminate, all future assignments are made by the chief justice of the United States, and any circuit judge, including the present judges of the commerce court, may be assigned to that court, provided that after the year nineteen hundred and fourteen no circuit judge shall be redesignated to serve in the commerce court until the expiration of at least one year after the termination of his previous designation. The judge first assigned to the five-year period shall be the presiding judge of the court, and thereafter, the judge senior in designation shall be the presiding judge.²

C. SESSIONS.—The commerce court shall always be open for the transaction of business, and its sessions shall be held in the city of Washington, District of Columbia, but the power of the court or any judge or officer thereof may be exercised anywhere in the United States.

II. JURISDICTION.—A. STATUTORY PROVISIONS.—The court is one of special and limited jurisdiction, a portion of the jurisdiction heretofore conferred upon the circuit courts of the United States and the judges thereof being conferred upon the commerce court. The jurisdiction conferred by the act creating the court is as follows:

First.—All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the interstate commerce commission other than for the payment of money.

Second.—Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the interstate commerce commission.

1. Act June 18, 1910, entitled: An Act To Create A Commerce Court, To Amend The Act Entitled "An Act to Regulate Commerce," Approved February Fourth, Eighteen Hundred and Eighty Seven, as Heretofore Amended, And For Other Purposes. 36 St. at L. p. 539. By act March 3, 1911, a new judicial code was enacted by congress, which repealed and reenacted the sections of the act of June 18, 1910, relating to the commerce court. The only change so far as the commerce court is involved made by the judicial code was to conform the sections relating to the commerce court to the fact that the judicial code abolishes circuit courts of the United States. Section 296 of the judicial code provides that it may be so designated. The sections relating to the commerce court are sections 200 to 214, inclusive, and section 297. The judicial code became effective January 1, 1912.

2. Note 1, *supra*; Judicial Code, §200; Note on Constitution of Court by Archbald, J., 188 Fed. 229.

Third.—Such cases as by section three of the act entitled “An Act to Further Regulate Commerce With Foreign Nations and Among the States,” approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth.—All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the act entitled “An Act To Regulate Commerce,” approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

In all cases within its jurisdiction the commerce court and each of the judges assigned thereto shall, respectively, have and may exercise any and all of the powers of a district court of the United States and of the judges of said court, respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred. The commerce court may issue all writs and process appropriate to the full exercise of its jurisdiction and powers, and may prescribe the form thereof.³

B. ENFORCEMENT OF ORDERS OF COMMISSION.—The first paragraph of the section conferring the jurisdiction upon the commerce court gives general jurisdiction to enforce any order of the interstate commerce commission; but this section specifically excludes from the jurisdiction of the court the right—(a) To enforce the order of the commission by adjudicating and collecting a forfeiture or a penalty; (b) To enforce the order of the commission for the payment of money; (c) The court cannot inflict criminal punishment. In one order the commission may determine a particular rate or a particular tariff of rates to be illegal and direct that the carriers cease and desist from collecting the rate for the future, fix a rate for the future, and find an amount as reparation for the collection of the illegal rate in the past.⁴ The order, so far as it directs the carriers to cease from collecting the old rate, and so far as it prescribes rates for the future, can be enforced by the commerce court, but the reparation must be collected by suit in any district or circuit court of the United States of competent jurisdiction, though the commerce court, and the commerce court alone, may enjoin an order of the commission granting reparation.⁵ Circuit courts have been abolished, however, by recent statute.

C. INJUNCTION AGAINST ORDERS OF COMMISSION.—The commerce court has jurisdiction to try the question as to whether or not an order of the commission should be enjoined, set aside, annulled or suspended, and, in a proper case, to grant such relief. An order of

3. Judicial Code, §§206, 207.

4. Act June 18, 1910, amending §15 Act to Regulate Commerce of 1887.

5. Section 9, Act Feb. 4, 1887, ch. 104; 24 St. at L. p. 379; U. S. Comp. St., 1901, p. 3154; 3 Fed. St. Ann. 809; Naylor & Co. v. Lehigh Valley R. Co., 188 Fed. 860.

In *Southern R. Co. v. United States*, (Com. Ct.), the court said: “We need

go no further now than to hold that since the approval of the act creating this court, a carrier which is ordered to pay damages, and which could have gone to the circuit court in equity to have such an order annulled or enjoined, has now the right to ask this court to enjoin or annul or suspend such an order, provided always it can show grounds for equitable relief.”

the commission refusing relief to a shipper is as much subject to the jurisdiction of the commerce court at the suit of the shipper as is an order against a carrier at its suit.⁶

D. INJUNCTION AGAINST ILLEGAL ACTS OF CARRIERS.—The third paragraph of the jurisdictional grant to the commerce court gives that court jurisdiction of such cases as are authorized to be maintained in a Circuit Court of the United States under Section 3 of the act of February 19, 1903, generally known as The Elkins Act. This section authorizes the filing of a petition to the Circuit Court of the United States sitting in equity whenever the interstate commerce commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight at less than the published rates on file or is committing any discriminations forbidden by law. Upon the filing of such petition it was the duty of the circuit court having jurisdiction, and is now the duty of the commerce court, summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct, and without the formal pleadings and proceedings applicable to ordinary suits in equity, making such other parties as the court may deem necessary, and, upon being satisfied of the truth of the allegations in the petition, the court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs and process.⁷

Carriers may be enjoined from granting rebates, under authority of this section.⁸

Passenger transportation given for advertising is illegal and may be enjoined.⁹

Mere discriminations not specifically prohibited by the act to regulate commerce, but the existence of which must appear from an ad-

See also *Russe & Burgess v. Interstate Commerce Com.* (C. C. A.) — Fed. —, holding that the commerce court has jurisdiction where the commission has refused to allow reparation for full time.

6. A corporate shipper brought complaint before the interstate commerce commission seeking to set aside the demurrage rules of the carriers alleged to injuriously affect the complainant. For report of the commission, see *Proctor & Gamble Co. v. Cincinnati, H. & D. R. Co.*, 19 I. C. C. Rep. 556. Relief was denied by the commission. Complainant then brought suit in the commerce court to set aside the order of the commission dismissing its complaint and refusing it relief. Motion to dismiss in the commerce court was made on the ground that that court had no jurisdiction. From the language of the act of June 18,

1910, and citing *Peavey & Co. v. Union Pac. R. Co.*, 176 Fed. 409, and other cases, jurisdiction was maintained. The *Proctor & Gamble Co. v. United States*, 188 Fed. 221. The commerce court has also sustained its jurisdiction to review the order of the commission at the suit of shippers claiming that they had not received from the commission the full relief to which they were entitled. *Hooker v. Interstate Commerce Com.*, 188 Fed. 242; *Eagle White Lead Co. v. Interstate Commerce Com.*, 188 Fed. 256.

7. Act Feb. 19, 1903, ch. 708, §3; 32 St. at L. p. 847; U. S. Comp. St., Supp. 1909, p. 1138; 10 Fed. St., Ann., 170.

8. *United States v. Milwaukee Refrigerator T. Co.*, 145 Fed. 1007.

9. *United States v. Chicago I. & L. R. Co.*, 163 Fed. 114, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. ed. 305.

ministrative ruling of the commission, are not within the jurisdiction of the court until there has been preliminary action by the commission.¹⁰

E. MANDAMUS. — 1. Under Section Twenty of Act To Regulate Commerce. — The circuit and district courts had, and the commerce court has, jurisdiction, upon application of the attorney-general, at the request of the commission, to issue the writ of mandamus commanding a carrier to comply with any of the provisions of the act to regulate commerce.¹¹

2. Under Section Twenty-Three. — Section twenty-three of the act to regulate commerce, as amended by act March 2, 1889,¹² gave circuit and district courts of the United States jurisdiction to issue writs of mandamus against common carriers engaged in interstate commerce, commanding such carriers to move and transport the traffic or to furnish cars or other facilities to the shipper, relator, upon terms or conditions as favorable as those given by such carriers for like traffic under similar conditions to any other shipper. This jurisdiction, by paragraph four of section one of the Act of June 18, 1910, has been transferred to the commerce court.

3. General Statement of Right To Grant. — As the jurisdiction of the commerce court to grant the writ of mandamus is the same as that heretofore existing in the United States circuit and district courts, it is necessary to consider the law as announced by the courts in cases brought under sections twenty and twenty-three of the act to regulate commerce as amended. Mandamus in a suit brought by the United States must be under authority of a statute, and could not, prior to the amendment of June 29, 1906, issue under this section to enforce a report from carriers.¹³ Construing section twenty-three with section fifteen as amended by the Act of June 29, 1906,¹⁴ jurisdiction to issue the writ of mandamus under section twenty-three is limited to compelling the performance of duties which are either so plain and so independent of previous administrative action of the commission as not to require a prerequisite exertion of power by that body or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission within the lawful scope of the authority of that body. So construed, the circuit courts of the United States had no jurisdiction and the commerce court has no jurisdiction to compel a particular

10. *Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 431, 496, 30 Sup. Ct. 164, 54 L. ed. 292; *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506.

11. Ninth paragraph, §20, as amended by act June 29, 1906; 34 St. at L. p. 584, ch. 3591; U. S. Comp. St., Supp. 1909, p. 1158; Fed. St., Ann., Supp. 1909, p. 254; *United States v. Union Stock Yard & Transit Co.*, — Fed. —.

12. 25 St. at L. 855; U. S. Comp. St. 1901, p. 3158; 3 Fed. St., Ann. 852.

13. *Covington & C. Bridge Co. v. Hager*, 203 U. S. 109, 27 Sup. Ct. 24, 51 L. ed. 111; *Knapp v. Lake S. & M. S. R. Co.*, 197 U. S. 536, 25 Sup. Ct. 538, 49 L. ed. 870.

14. 34 St. at L. p. 584, ch. 3591; U. S. Comp. St., Supp. 1909, p. 1158; Fed. St. Ann., Supp. 1909, p. 254, known as *The Hepburn Act*.

distribution of cars to a shipper prior to an order of the commission fixing such distribution.¹⁵

F. LIMITATION OF JURISDICTION. — The grant of jurisdiction to the commerce court shall not be construed as enlarging the jurisdiction heretofore possessed by the circuit courts of the United States or the judges thereof.¹⁶

G. OF EXISTING COURTS — HOW FAR AFFECTED. — The act does not affect the jurisdiction of the circuit or district courts of the United States over cases or proceedings of a kind not within the classes enumerated in the grant of jurisdiction to the commerce court.¹⁷

H. JURISDICTION GRANTED, EXCLUSIVE. — Such jurisdiction as is given to the commerce court is exclusive in that court.¹⁸

III. EFFECT GIVEN BY COMMERCE COURT TO ORDERS OF INTERSTATE COMMERCE COMMISSION. — A. POWERS OF THE COMMISSION. — The act of June 29, 1906, materially enlarged the powers of the interstate commerce commission, giving that commission power "When after full hearing . . . it shall be of the opinion that any of the rates or charges . . . regulations or practices . . . are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation" of the act to regulate commerce as amended "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is

15. *Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 497, 30 Sup. Ct. 164, 54 L. ed. 292, reversing same case in 165 Fed. 113, 91 C. C. A. 147, cited in *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 176 Fed. 748, affirmed, 183 Fed. 929, 106 C. C. A. 269, holding that a suit for damage for discrimination could not be maintained prior to an order from the commission determining that discrimination existed. See also *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 183 Fed. 908; *Columbus Iron & Steel Co. v. Kanawha & M. R. Co.*, 171 Fed. 713, 178 Fed. 261, 101 C. C. A. 621; *Wickwire Steel Co. v. New York Cent. & H. R. Co.*, 181 Fed. 316, 104 C. C. A. 504 (holding that a rate could not be enjoined prior to a finding by the commission that the rate was illegal); *Meeker v. Lehigh Valley R. Co.*, 183 Fed. 548, 106 C. C. A. 94 (holding that damages were not recoverable under an allegation that by a monopoly and combination in restraint of trade illegal rates were being charged, the commission not hav-

ing determined that such rates were illegal).

The dividing line between the cases where jurisdiction exists in the court and where there is no such jurisdiction is not clearly defined, but rebating would be obviously a case that would give jurisdiction to the court. *Langdon v. Pennsylvania R. Co.*, 186 Fed. 237.

A district court of the United States or a state court may compel a carrier to transport property tendered for shipment. *Louisville & N. R. Co. v. Cook Brewing Co.*, 172 Fed. 117, 96 C. C. A. 322, affirmed by supreme court Jan. 22, 1912; *Louisville & N. R. Co. v. Cook Brewing Co.*, 223 U. S. —; *Southern R. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S. E. 429, 125 Am. St. Rep. 514, 15 L. R. A. (N. S.), 109, 114.

16. Act June 18, 1910, §1; Judicial Code, §207.

17. Note 16, *supra*.

18. Note 16, *supra*.

just, fair, and reasonable."¹⁹ The commission also may prescribe through routes and joint rates.²⁰

B. REVIEW OF COMMISSION'S ORDERS. — Section 15 of the act regulating commerce giving the commission power to prescribe rates, rules and practices for the future, provides that such orders shall continue "for such period of time, not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the commission or *be suspended or set aside by a court of competent jurisdiction.*" Section 16 prescribed the "venue of suits brought in any of the circuit courts of the United States against the commission to enjoin, set aside, annul or suspend any order or requirement of the commission," and further provision is made that suits "may be brought at any time after such order is promulgated."²¹ These provisions recognized jurisdiction in

19. Act June 29, 1906, 34 St. at L. p. 584, ch. 3591, U. S. Comp. St., Supp. 1909, p. 1158; Fed. St. at L., Ann., 1909, p. 254. The rules heretofore applied by the supreme court of the United States to cases wherein it was sought to set aside an order of a state commission or an act of a state legislature prescribing the charges and regulating the methods of doing business of public service corporations, while not directly in point in determining the principles that the commerce court and the supreme court shall apply to orders of the interstate commerce commission, are of value to the practitioner.

In *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247, 4 I. C. R. 45, and in *Atlantic C. L. R. Co. v. North Car. Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. ed. 933, are found cited and discussed all the leading cases on the point up to the time those cases were decided.

Mr. Justice White, in *Atlantic C. L. R. Co. v. North Car. Corp. Com.*, *supra*, announced the principle established by the cases as follows: "As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guaranties, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exer-

tion of power is void because repugnant to the due process and equal protection clauses of the fourteenth amendment."

The cases of *Knoxville v. Knoxville Water Co.*, 212 U. S. 1-18, 29 Sup. Ct. 148, 53 L. ed. 371, and *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382, are both important. In the former case Mr. Justice Moody said: "The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated." See also cases cited by the commerce court, *Hooker v. Interstate Commerce Com.*, 188 Fed. 242, 252.

20. Act June 29, 1906, §15. Prior to this act it was held that the commission had no power to fix rates or prescribe rules for the future; it could only declare existing rates, rules and practices illegal. *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. ed. 243. This power was conferred by §15 of the act of June 29, 1906.

21. Act June 29, 1906, *supra*, §§15, 16.

the courts to review orders of the commission, and this jurisdiction, to the extent hereinbefore stated, is by the act of June 18, 1910, conferred upon the commerce court.

C. **ENFORCEMENT OF COMMISSION'S ORDERS.**—The first paragraph of the jurisdictional grant to the commerce court gives that court jurisdiction to enforce orders of the commission. Section 16 of the act to regulate commerce as amended by the act of June 29, 1906, provides that where there is a failure to obey an order of the commission application to enforce the order may be made to the courts—the commerce court by the act of June 18, 1910. After such application is made by petition as in other cases, and after due service and a hearing and investigation is had, if it appear that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other process, mandatory or otherwise.

D. **GROUND'S UPON WHICH ORDERS OF THE COMMISSION MAY BE SET ASIDE.**—The different principles upon which the courts having jurisdiction of the subject-matter may properly set aside the orders of the commission may be grouped into the following: (a) That the order is in violation of the constitution of the United States; (b) That the order is based upon an error in law; (c) That it is without the scope of the power delegated to the commission; (d) That the exercise of authority by the commission has been manifested in such an unreasonable manner as to cause it to be within the rule that substance, and not shadow, determines the validity of the exercise of power; (e) That a wrong conclusion has been drawn from admitted facts.

1. **Orders Violative of the Constitution.**—The fourth amendment to the constitution of the United States guarantees security of "persons, houses, papers and effects against unreasonable searches and seizures," and the fifth amendment provides that "no person shall be . . . deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."²² When an order of the commission violates either of these or other constitutional provisions it may be annulled by the commerce court.²³ However, the courts are limited to the question

22. What is due process of law? and What constitutes a taking of property? and What is just compensation? are questions the answers to which are not within the scope of this discussion. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819, and cases shown in tables of citations to that case, will give the substantive law in answer to these questions. The cases are cited and discussed in their application to rates fixed by governmental authority in *Watkins Shippers & Carriers of Interstate Freight*, §206.

23. *Interstate Commerce Com. v. Illinois Cent. R. Co.*, 215 U. S. 452,

30 Sup. Ct. 155, 54 L. ed. 280, reversing the circuit court in *Chicago & A. R. Co. v. Interstate Commerce Com.*, and *Illinois Cent. R. Co. v. Same*, 173 Fed. 930. In this case the commission had, after complaint and hearing, ordered that in the distribution of coal cars, carriers should take into account foreign railway fuel cars, private cars, and their own fuel cars. *Traer v. Chicago & A. R. Co.*, 13 I. C. C. Rep. 451. Contention was made that taking into account private cars and foreign fuel cars was "unjust, unreasonable, oppressive and unlawful" and that it deprived the owners of the private

of power of the commission to make the order and cannot consider the wisdom or expediency of the order itself.²⁴ "The primary jurisdiction is with the commission, the power of the courts being that of review, and is confined in that review to questions of constitutional power and all pertinent questions as to whether the action of the commission is within the scope of the delegated authority under which it purports to have been made."²⁵

2. Orders the Result of Error in Law.—The commission having found as a fact the cost of a particular switching or reconsignment service rendered at the request and for the benefit of shippers, and having held that it was the duty of the carrier, under the circum-

cars of the use of their own property. The court, speaking through the present chief justice, said: "Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, a, all relevant questions of constitutional power or right; b, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made, and c, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph-Cable Co. v. Adams*, 155 U. S. 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised." This case was followed in *Interstate Commerce Com. v. Chicago & A. R. Co.*, 215 U. S. 479, 30 Sup. Ct. 163, 54 L. ed. 291. The supreme court in *Interstate Commerce Com. v. Union Pac. R. Co.*, de-

cided Jan. 9, 1912, reiterates and emphasizes these limitations on the jurisdiction of the courts. In *Goodrich Transit Co. v. Interstate Commerce Com.*, 190 Fed. 943, the fourth amendment was relied on, but the decision of the commerce court was placed on other grounds. In *Baltimore & O. R. Co. v. Interstate Commerce Com.*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. ed. —, the fourth amendment was relied on, but the order of the commission sustained.

24. *Interstate Commerce Com. v. Illinois Cent. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. ed. 280; *Interstate Commerce Com. v. Chicago & A. R. Co.*, *supra*.

25. *Interstate Commerce Com. v. Chicago, R. I. & P. R.*, 218 U. S. 83, 110, 30 Sup. Ct. 651, 54 L. ed. 946. In the course of the opinion in this case Mr. Justice McKenna said: "One question remains for discussion, the finding of the Commission upon the character of the rate, whether it is unreasonable as decided. Such decision, we have said with tiresome repetition, is peculiarly the province of the Commission to make, and that its findings are fortified by presumptions of truth, 'due to the judgments of a tribunal appointed by law and informed by experience.' *Illinois Central Railroad Company v. Interstate Commerce Commission*, 206 U. S. 454, and cases cited. The testimony in this case does not shake the strength of such presumptions." As to conclusions of fact "the judgment of the Commission is not susceptible of review by the courts." *Interstate Commerce Com. v. Delaware, L. & W. R.*, 220 U. S. 235, 31 Sup. Ct. 392, 55 L. ed. 448, citing *Baltimore & O. R. Co. v. Pitcairn*, *supra*.

stances, to furnish such switching at actual cost, the supreme court on appeal from the circuit court reversed the order of the commission because of the error of law by which a profit was denied the carrier for the service performed. Mr. Justice Brewer²⁶ said: "We are unable to concur with the commission. If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that privilege. It is justified in receiving some compensation in addition thereto."

Where a terminal charge was found to be reasonable, the fact that such charge, taken in connection with prior charges, made the total charge unreasonable, did not, as a matter of law, justify an order reducing the terminal charge.²⁷ In these cases the court did not determine any question of fact, but accepted the conclusions of fact as found by the commission, basing the reversal of the order upon error of law. In the cases of *Goodrich Transit Co. v. Interstate Commerce Commission* and *White Star Line v. United States*²⁸ the court annulled in part the order of the commission, basing its action on a question of law.

3. Orders Without the Scope of the Commission's Authority. The powers of the commission are both granted and limited by the act to regulate commerce and the acts amendatory thereof and supplementary thereto; therefore, when the commission acts outside the scope of these powers, its orders are illegal and may be set aside by the commerce court. In giving the reasons which the courts may consider in determining whether or not an order of the commission shall be suspended or set aside, the supreme court in the leading case on the subject gave this one: "All pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made."²⁹

26. *Southern R. Co. v. St. Louis Hay Co.*, 214 U. S. 297, 301, 29 Sup. Ct. 678, 53 L. ed. 1004, *reversing* 149 Fed. 609, 153 Fed. 728, 82 C. C. A. 614.

27. *Interstate Commerce Com. v. Stickney*, 215 U. S. 98, 30 Sup. Ct. 66, 54 L. ed. 112, *affirming* 164 Fed. 638.

28. *Goodrich Transit Co. v. Interstate Commerce Com.*, 190 Fed. 943. There were two each of these cases, being Nos. 21, 22, 23 and 24 on the commerce court docket. The cases, involving the same order of the commission were heard together. The petitioners claimed that an order of the commission requiring of them reports was "void because of lack of power in the commission, and because to enforce the order would be a violation of the fourth amendment to the con-

stitution of the United States, prohibiting unreasonable searches or seizures, and because the information sought by the inquiries is a property right, and because to enforce the order of the commission would be to take the property of the transit company without compensation and without due process of law." The order of the commission was sustained by the commerce court in so far as the order related to business conducted under through bills of lading, but the commerce court said: "In so far as the reports called for and the accounting rules prescribed extend beyond such interstate business of the carriers, or include matters of intrastate traffic accounts and affairs exclusively, they become invasions of the rights of the carriers, and to the extent of such invasions are unlawful."

29. *Interstate Commerce Com. v.*

Section one of the act to regulate commerce as amended by the act of June 29, 1906, provides that "on application . . . in writing by any shipper" switch connections may under certain prescribed circumstances be ordered by the commission. A "lateral branch line of railroad" having obtained an order from the commission requiring the establishment of a switch connection, the supreme court, affirming the lower court, held the order void, saying:³⁰ "The remedy given by the section creating the right is given only on complaint by the shipper. We are of opinion that the remedy is exclusive, on familiar principles, and that the general powers given by other sections cannot be taken to authorize a complaint to the commission by a branch railroad company . . ."

The act of June 29, 1906, gave the commission power to establish "through routes and joint rates" when "no reasonable or satisfactory through route exists." It is clear that, if a reasonable and satisfactory through route exists, the commission has no jurisdiction to establish another. This limitation is not a mere rule of law guiding the commission, but must be taken in its natural sense as a limit to the power of the commission, and the courts may re-examine and review the finding of the commission. These rules were given by Mr. Justice Holmes, who stated the conclusion of the court in this language: "We are of opinion then that the commission had no power to make the order if a reasonable and satisfactory through route already existed, and that the existence of such a route may be inquired into by the courts. How far the courts should go in that inquiry we need not now decide. No doubt in complex and delicate cases great weight at least would be attached to the judgment of the commission."³¹ While this was the decision of the court, it was shown in the further course of the opinion that, under the facts found by the commission, a proper construction of the law deprived the commission of power to act. An order of the commission declaring a rate illegal and fixing a lower rate was, as construed by the supreme court, based not on the fact that the higher rate was unreasonable, but upon questions of estoppel by the carrier to charge the higher rate though it was reasonable. This order was held to have been in consequence of assumption of power not possessed by the commission, and was set aside in the supreme court at the suit of the carrier.³²

Illinois Cent. R. Co., 215 U. S. 452, 470, 30 Sup. Ct. 155, 54 L. ed. 280. See also Interstate Commerce Com. v. Union Pac. R., 222 U. S. 541.

30. Interstate Commerce Com. v. Delaware, L. & W. R. Co., 216 U. S. 531, 537, 30 Sup. Ct. 415, 54 L. ed. 605. See Delaware, etc. R. Co. v. Interstate Commerce Co., 166 Fed. 498, 14 I. C. C. Rep. 191. The words "or owner" are added to this section by Sec. 7 of the act of June 18th, 1910, thus widen-

ing the scope of the authority of the commission.

31. Interstate Commerce Com. v. No. Pac. R. Co., 216 U. S. 538, 30 Sup. Ct. 415, 54 L. ed. 608.

32. Southern Pac. T. Co. v. Interstate Commerce Com., 219 U. S. 433, 31 Sup. Ct. 288, 55 L. ed. 283, reversing same case in circuit court, Southern Pac. Co. v. Interstate Commerce Com., 177 Fed. 963. For order of commission see Western Ora. L. Mfg. Assn. v. Southern Pac. Co., 14 I. C. C. Rep. 61.

Whether or not a terminal company is subject to regulation by the interstate commerce commission is a question of law, and the determination of the question by the commission may be reviewed by the courts.³³ The commerce court has jurisdiction to determine whether or not a particular carrier is subject to the act, and to what extent.³⁴ When a rate on lemons was reduced from \$1.15 to \$1.00, the commission, in the opinion of the court, in form holding the higher rate unreasonable and prescribing the lower rate as reasonable, but where " . . . in substance the commission did not determine the intrinsic reasonableness of either rate, but reduced the rate prescribed by the railroads in order that, and to a point at which, in its judgment, the California growers might successfully compete with the Sicilian competitors in a broader market than would otherwise be possible; in other words, that the commission acted upon the erroneous assumption that it had the power and the right, if not the duty, so to adjust railroad rates as would give to the American industry protection against foreign competition," the commerce court held the order of the commission void, the conclusion of the court being stated: "As in our judgment the order is based primarily on the assumed authority to protect the industry against foreign competition, it must be held void as beyond the powers delegated to the commission."³⁵

4. Orders Legal in Form But in Substance Beyond the Scope of the Commission's Powers.— Prescribing rates for the future is a legislative act, and that power as to carriers engaged in interstate commerce is delegated within certain prescribed limits to the interstate commerce commission, the courts having no rate-making power.³⁶ The fact that the power delegated to the commission must be executed in form within the power delegated does not deprive the courts of jurisdiction to review the order of the commission, if that order be in substance a violation of the delegated authority, for "the substance, and not the shadow, determines the validity of the exercise of the power."³⁷ The mere form given by the commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power.³⁸

33. *Southern Pac. Term. Co. v. Interstate Commerce Com.*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed. 310, sustaining the order of the lower court and of the commission. *Southern P. T. Co. v. Interstate Commerce Com.*, 166 Fed. 134, 14 I. C. C. Rep. 250.

34. *Goodrich Transit Co. v. Interstate Commerce Com.*, 190 Fed. 943.

35. *Achison, T. & S. F. R. Co. v. Interstate Commerce Com.*, respondent *The United States*, and *Arlington Fruit Co.*, Interveners, 189 Fed. —. The order of the commission was held to be within the scope of its authority in *Omaha, etc. R. Co. v. Interstate Commerce Com.*, — Fed. (reported later), *Com.*

Ct. No. 25, and in *Interstate Commerce Com. v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 31 Sup. Ct. 392, 55 L. ed. 448.

36. *Hooker v. Interstate Commerce Com.*, 188 Fed. 242, and cases cited at p. 252.

37. *Interstate Commerce Com. v. Illinois Cent. R. Co.*, 215 U. S. 452, 470, 30 Sup. Ct. 155, 54 L. ed. 280, citing *Postal Cable-Tel. Co. v. Adams*, 155 U. S. 688, 698, 15 Sup. Ct. 268, 360, 39 L. ed. 311.

38. *Southern Pac. T. Co. v. Interstate Commerce Com.*, 219 U. S. 433, 443, 31 Sup. Ct. 288, 55 L. ed. 283. In *Peavey & Co. v. Union Pac. R.*

5. Courts May Draw Their Own Conclusions From Admitted Facts.—A conclusion of law by the commission is subject to review and reversal by the courts. Where the questions were whether or not an industrial track was a plant facility or a terminal facility and whether or not a charge for the use of such facility was the same service as that which is performed by a carrier in delivered freight at its own depot, and the facts relating to the facility and charge were admitted, the commerce court held that it was not bound by the conclusions of the commission.³⁹ Where the facts are found by the commission and there is no room for difference as to the facts and the commission takes a mistaken view of the law, the courts have jurisdiction to review and set aside the order of the commission.⁴⁰ This is but a statement that questions of law arising on contests of the validity of the commission's orders are within the jurisdiction of the courts.

IV. PARTIES.—A. PETITIONERS.—Neither the original act to regulate commerce nor any amendment thereto, including the amendment creating the commerce court, provides what parties may main-

Co., 176 Fed. 409, 418, the circuit judge stated the rule as follows: "The power is vested in and the duty is imposed upon the circuit courts (now the commerce court) to relieve from orders . . . which, though in form within its (the commission's) delegated power, evidence so unreasonable an exercise of it that they are in substance beyond it," citing *Com. v. Illinois Cent. R. Co.*, *supra*. Note 29, and other cases. The Peavey case was modified and affirmed on appeal by the supreme court, though this point was not discussed, 222 U. S. 42. See also *Goodrich Transit Co. v. Interstate Commerce Com.*, 190 Fed. 943; *Atchison, T. & S. F. R. Co. v. Interstate Commerce Com.*, —Fed. — Com. Ct. — (reported later).

39. *Atchison, T. & S. F. R. Co. v. Interstate Commerce Com. and United States*, 188 Fed. 229. In a dissenting opinion in this case, 188 Fed. 929, Judge Mack of the commerce court said: "I agree that this court should not be concluded by a finding of the Commission, based upon admitted facts which in no wise tend to sustain the conclusion reached." This case is now before the supreme court, and the principle adopted by the court and restated by Judge Mack should be considered in the light of the particular facts then before the court. The commission, by §15 of the act to regulate commerce as amended by the act of June 18, 1910, is empowered to act if

it "shall be of opinion" that a particular order is necessary to prevent a violation of the act. Act June 18, 1910, §12, 36 St. at L. p. 539, amending §15 of the act to regulate commerce.

Mr. Justice Lamar of the supreme court, in the cases of *Interstate Commerce Com. v. Union Pac. R. Co.*, *Northern Pac. R. Co.*, and *Great N. R. Co.*, 222 U. S. 541, discussing the force of orders of the commission and its findings of facts, points out that the commission must and does consider many facts, that "the reasonableness of rates cannot be proved by categorical answers," and after specifying certain facts considered by the commission says: "With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusions. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's findings on such facts conclusive."

40. *Interstate Commerce Com. v. Northern Pac. R. Co.*, 216 U. S. 538, 544, 30 Sup. Ct. 417, 54 L. ed. 608.

tain suits in that court. Prior to the act creating the commerce court there was no specific enactment giving the right of review by the courts over the acts and orders of the commission. Both the right of review and the parties necessary to suits seeking to obtain a review were left to the general rules and practice of courts of equity. The interstate commerce commission having made an order prohibiting railroad companies from paying to the owners and lessees of elevators compensation for elevating grain in transit, a company operating elevators, theretofore enjoying these payments, but not a party to the hearing before the commission, brought suit in a circuit court of the United States, prior to the creation of the commerce court, against the railroad making the payments and the interstate commerce commission to set aside this order. It was urged by demurrer that the complainants, not having been parties to the hearing before the commission, could not maintain the bill. The demurrer was overruled, the court saying: "A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul or suspend an order of the commission, to those who were parties to the proceedings before it, upon which the order was based. The proceeding in court is not an appeal; it is a plenary suit in equity. . . . The determination of the question what parties may maintain such suits is left by the . . . act to the general rules and practice in equity, and under them any party whose rights or property are in danger of irreparable injury from an unauthorized order of the commission may appeal to a federal court of equity for relief."⁴¹

Complainant, having been denied relief on its complaint to the interstate commerce commission, sought in the commerce court to set aside and annul the order of the commission dismissing the complaint. The United States made a motion to dismiss the petition in the commerce court on the ground "that the petitioner is a shipper, and the interstate commerce commission having merely dismissed the complaint" there was no basis for action in the commerce court. This contention was overruled and the shipper held to be a proper party petitioner, and the principle approved that the right to resort to the commerce court extends to every one injuriously affected by the order of the commission even though not a party to the proceedings in which the order was made, the act to regulate commerce not having taken away the shipper's common law right to re-

41. *Peavey & Co. v. Union Pac. R. Co.*, 176 Fed. 409, 417. This case was modified and affirmed in *Interstate Commerce Com. v. Peavey*, 222 U. S. 42, 31 Sup. Ct. —, 55 L. ed. —, but the question of proper parties was not discussed.

In *Atlantic C. L. R. Co. v. Interstate Commerce Com.*, respondent, *United States, Kiser, et al. intervenors*, Fed. Rep., Com. Ct., (reported later), it was held that all parties defendant before

the commission need not be parties complainant in a suit to set aside the order of the commission.

In *Nashville Grain Exchange v. United States, Fed., Com. Ct.*, (reported later), it was held that a corporation organized by grain dealers for their mutual interests was a proper party to a suit to set aside an order alleged to adversely affect such grain dealers.

dress in court against an unjust and unlawful charge or practice by a common carrier.⁴²

B. **RESPONDENTS.**—Suits to enjoin, set aside, annul or suspend any order of the commission shall be brought against the United States,⁴³ and all proceedings in the commerce court which but for the act creating that court would have been brought by or against the interstate commerce commission shall be brought by or against the United States.⁴⁴ In each case the government stands for the order of the commission, which it is, by the provisions making the United States the defendant, appointed to justify,⁴⁵ the attorney-general being given charge and control of the interest of the government in all cases and proceedings in the commerce court and on appeal therefrom.⁴⁶

C. **INTERVENORS.**—The United States may intervene in any case or proceeding in the commerce court whenever, though it has not been made a party, public interests are involved.⁴⁷ The interstate commerce commission and any party or parties at interest to the proceeding before the commission in which an order or requirement is made may appear as parties to a suit or proceedings in the commerce court of their own motion and as of right and be represented by their counsel. Committees, associations, corporations, firms and individuals who are interested in the controversy or question before the interstate commerce commission or any suit which may be brought by any one under the commerce acts relating to acts of the interstate commerce commission may intervene in said suit or proceedings at any time after the institution thereof, and said intervenor or intervenors may prosecute, defend or continue said suit or proceeding unaffected by any action or non-action of the attorney-general of the United States therein.

Complainants before the interstate commerce commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.⁴⁸ The practice of complainants before the commission becoming intervenors before the commerce court is very general in cases pending before the court.

D. **ATTORNEY-GENERAL REPRESENTS UNITED STATES.**—The attorney-general is given charge and control of the interest of the government in all cases before the commerce court or on appeal therefrom. He may employ under the limitations of the statute special attorneys. He can not dispose of or discontinue a suit to which an interested

42. *Proctor & Gamble Co. v. United States*, 188 Fed. 221. Petitions by shippers have been considered in *Hooker v. Interstate Commerce Com.*, 188 Fed. 242; *Eagle White Lead Co. v. Interstate Commerce Com.*, 188 Fed. 256. See *supra*, IV.

43. Act June 18, 1910, §3; Judicial Code, §208.

44. Act June 18, 1910, §4; Judicial Code, §211.

45. *Proctor & Gamble Co. v. United States*, 188 Fed. 221, 224.

46. Act June 18, 1910, §5; Judicial Code, §212.

47. Act June 18, 1910, §4; Judicial Code, §211.

48. Act June 18, 1910, §5; Judicial Code, §§212-213.

party or intervenor is a party over the objections of such party or intervenor.⁴⁹

V. PLEADINGS.—A. PETITION TO COMMERCE COURT.—The jurisdiction of the commerce court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action and specifying the relief sought.⁵⁰

B. PROCESS AND SERVICE.—Service of the petition shall be forthwith made by the marshal or deputy marshal of the commerce court or by the proper United States marshal serving a copy thereof on the defendants. Service on the United States shall be made by filing a copy of the petition with the secretary of the interstate commerce commission and in the department of justice.⁵¹

C. DEMURRER.—Objection to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed.⁵²

D. ANSWER.—Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer must be filed in the clerk's office and a copy mailed to petitioner's attorney. This answer shall briefly and categorically respond to the allegations of the petition. No replication is necessary, and defects in an answer may be taken on final hearing or by motion to dismiss as is provided for taking objections to a petition. Should no answer be filed as provided, petitioner may apply to the court, on notice, for such relief as may be proper upon the facts alleged in the petition.⁵³

E. AMENDMENTS.—The act creating the court makes no provision for amendments to pleading, but does prescribe that, except as may be otherwise provided in the act or by rule of the court, the practice and procedure shall conform as nearly as may be to that in like cases in a district court of the United States.⁵⁴ Under this provision amendments could in proper cases be allowed.

F. RULES.—1. Court May Prescribe Rules.—The commerce court may "from time to time establish such rules and regulations concerning pleading, practice or procedure in cases or matters within its jurisdiction as to the court shall seem wise and proper."⁵⁵ The court has adopted rules, which have been printed.⁵⁶

49. Act June 18, 1910, §5; Judicial Code, §212.

50. Act June 18, 1910, §1; Judicial Code, §209.

51. Act June 18, 1910, §1; Judicial Code, §209; Atchison, T. & S. F. R. Co. v. Interstate Commerce Com., 188 Fed. 229, 231.

52. See note 51, *supra*.

53. Act June 18, 1910, §1; Judicial Code, §209.

54. Act June 18, 1910, §1; Judicial Code, §209.

55. Act June 18, 1910, §1; Judicial Code, §206.

56. Mr. C. F. Snyder, the courteous clerk of the court, has printed on the title page of these rules the following:

2. Attorneys.—Parties shall be entitled to be represented by counsel, and by the rules of the court “Any person of good moral character, learned in the law, shall be admitted to practice as an attorney and counselor of this court who shall have been previously admitted to the supreme court or any other court of the United States, or to a court of last resort of any state or territory, and who shall be in full and regular standing therein, due proof of which shall be made by certificate from the record or from one of the judges of such court or by motion of an attorney of this court.”

3. Attorney's Oath.—Attorneys of the court shall sign the roll of attorneys and take an oath prescribed by the rules.

4. Arguments.—“Two hours on each side shall be allowed for argument, and no more without special leave of court, obtained before the beginning of the argument. The time so allowed may be apportioned among the counsel on the same side at their discretion.”

5. Briefs.—Briefs of counsel must be printed, and a sufficient number of copies, not less than twenty-five, furnished the clerk, who shall forward one copy to opposing counsel. The form of the record and brief shall be as prescribed by the rules of the supreme court.⁵⁷

6. Costs and Fees.—The act authorizes the court to establish a table of costs and fees, to be approved by the supreme court, and in no case to exceed those charged in the supreme court; and no fees shall be taxed against the United States or the interstate commerce commission.⁵⁸

7. Evidence—How Taken.—The statute provides that the court may, by rule, prescribe the method of taking evidence in cases pend-

“The within rules have been adopted by the United States Commerce Court. As it is probable the court will, during the next session, adopt additional rules, these are printed in temporary form for the guidance of counsel and others concerned.”

57. The rule is: “In size of book, style of type, and quality of paper the printing shall be as required by the rules of the Supreme Court: All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.”

58. Act June 18, 1910, §1; Judicial Code, §202.

The table established is as follows:
Clerk:

For docketing a case.....\$5.00

For entering any final decree or order or judgment..... 1.00

For certified copy of an entry, record, or paper on file, for each folio of 100 words (no such fee, however, to be less than 50 cents)..... .10

For admission to the bar, including certificate under seal.... 1.00

For a copy of any opinion of the court or judge, certified under seal..... 2.00

Marshal:

For service of any writ, subpoena, or order, for each party upon whom service is made.. 1.00

In case of the service of process by the marshal of a district outside of the city of Washington, in addition to the fees just prescribed, the marshal shall receive the same mileage as is by law allowed to marshals for serving process in the district where such service is performed.

No fees shall be taxed against the United States or the Interstate Commerce Commission.

ing in the court, and may prescribe that the evidence be taken before a single judge of the court with power to rule upon the admission of evidence. A rule of the court follows this provision and also provides for the appointment of examiners and for taking testimony by depositions in accordance with the practice prevailing in the district courts of the United States. No witness, except by leave of the court for cause shown, shall be examined in open court.⁵⁹

8. Interstate Commerce Commission.—The interstate commerce commission may cause its counsel to enter an appearance on its behalf in the office of the clerk of the court in any suit instituted in the court wherein is involved, in whole or in part, the validity of any order or requirement of the commission; and from and after such appearance the commission shall be a party to the suit and entitled to notice of any and all proceedings therein, and may participate in such suit in the same manner and to the same extent as though named as a party at the time of its institution.

9. Motions.—The rules provide: "All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion."

The court may, for good cause shown, shorten the time of notice of hearing any motion.

10. Motion To Dismiss.—This motion serves the same purpose as a demurrer, and by the rule it is provided that such motion may be set down for argument on two weeks' notice to petitioner or his counsel.

"Motions to dismiss the answer on the ground that no defense is set forth may also be similarly made at any time within 10 days after the answer has been filed, and shall be similarly disposed of. If the motion to dismiss in either case is overruled, and the party making the same elects to stand by it, it may be treated as a demurrer, and judgment thereon rendered accordingly."

11. Parties—How Designated.—"The party who invokes the jurisdiction of the court by petition duly filed shall be called the petitioner, and the party who answers or demurs or moves to dismiss shall be called the respondent, and the party who intervenes shall be called the intervenor."

12. Process.—The writ of subpoena shall issue in the name of the president of the United States, requiring answer in the prescribed time. Such subpoena shall be under the seal of the court, signed by

⁵⁹ The rule is as follows: "The evidence in any cases may be taken before one of the judges of the court specially designated to do so, who shall have power to rule upon the admission or rejection of the evidence offered; or it may be taken before an examiner duly appointed for the purpose, by standing or special order. Where neither of these methods is practicable, it may be taken by depositions, in accordance with the practice prevailing in the district courts of the United States in like cases. In all cases it shall be taken stenographically, in the form of question and answer, and reduced to typewriting and filed. No witnesses shall be examined in open court, except by leave of court for cause shown. The examiners shall be entitled to their expenses for each day actually engaged in the performance of their duties, and to such compensation as may be fixed by the court in such case."

the clerk, and shall bear teste of the presiding judge. A copy of the petition shall be served with the subpoena.⁶⁰

13. Printing Records.—The rules provide: "The record, including the pleadings and evidence, shall be printed prior to the argument, and a sufficient number of copies, not less than twenty-five, shall be filed with the clerk for the accommodation of the court and counsel. Each party in the first instance shall bear the expense of printing his or its part of the record, which shall be taxed as a part of the costs against the losing party, except that no such costs shall be taxable against the Government or the Interstate Commerce Commission." This rule, so far as it relates to printing the record, may be dispensed with by the court or any judge thereof for good cause shown on motion for preliminary injunction. One copy of the record must be furnished opposing counsel.

VI. JUDGMENT AND EXECUTION.—**A. INTERLOCUTORY ORDERS.**—The mere pendency of a suit in the commerce court shall not of itself stay or suspend the operation of the order of the commission; "but the commerce court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the interstate commerce commission shall be made by the commerce court otherwise than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof, may, on hearing, after not less than three days' notice to the interstate commerce commission and the attorney-general, allow a temporary stay or suspension in whole or in part of the operation of the order of the interstate commerce commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application."⁶¹

B. WRITS.—Authority is granted the court to issue all writs and process appropriate to the full exercise of its jurisdiction and powers. The court may provide the form of its writs. Its orders, writs and process may run, be served, and be returnable anywhere in the United States. Not only the marshal of the court but also the United States marshals of the several districts of the United States have the power and are under the duty to act for and in behalf of said court as United States marshals, and deputy marshals act for and serve the courts in the circuits of the United States.⁶²

60. See also *supra*, V, B.

61. Act June 18, 1910, §3; Judicial Code, §208.

62. Act June 18, 1910, §1; Judicial Code, §206.

VII. APPEALS. — **A. FROM INTERLOCUTORY ORDERS.** — An appeal may be taken, just as formerly appeals from a circuit court, to the supreme court of the United States from an interlocutory order or decree of the commerce court granting or continuing an injunction restraining the enforcement of an order of the interstate commerce commission, provided such appeal be taken within thirty days from the entry of such order or decree.⁶³ This provision is similar to that in the act of June 29, 1906, allowing appeals from circuit courts to the supreme court,⁶⁴ and to that of the act of 1891 allowing appeals from interlocutory orders from the circuit courts to the circuit courts of appeal.⁶⁵

B. FROM FINAL JUDGMENT OR DECREE. — A final judgment or decree of the commerce court may be reviewed by the supreme court of the United States if appeal to the supreme court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a circuit court of the United States to the supreme court, and the commerce court may direct the original record to be transmitted on appeal instead of a transcript thereof. The supreme court may affirm, reverse or modify the final judgment or decree of the commerce court, as the case may require.⁶⁶

C. SUPERSEDEAS. — An appeal to the supreme court, however, shall in no case supersede or stay the judgment or decree of the commerce court appealed from, unless the supreme court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the supreme court or the justice of that court allowing the stay may require.⁶⁷

D. PRIORITY IN HEARING. — Appeals to the supreme court from interlocutory or final decrees of the commerce court shall have priority in hearing and determination over all other causes except criminal causes.⁶⁸

63. Act June 18, 1910, §2; Judicial Code, §210.

64. Proviso to Par. 12, §16, of act June 29, 1906, 34 St. 584, ch. 3591; U. S. Comp. St. Sup. 1909, p. 1158; Fed. St. Ann. 1909, 254.

65. Act March 3, 1891, 26 St. 826, U. S. Comp. St. p. 552, 4 Fed. Ann. 422, Judicial Code, 130.

66. Note 63, *supra*.

67. Note 63, *supra*.

68. Note 63, *supra*.

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I. DEFINITION AND DISTINCTIONS.—A composition agreement between debtor and creditors is defined as an agreement between an insolvent or embarrassed debtor and his creditors, or a considerable proportion of them, whereby the latter for the sake of immediate or earlier payment, agree to accept a dividend less than the whole amount of their claims, to be distributed *pro rata* in discharge and satisfaction of the whole.¹ If the agreement does not provide for the discharge of the debtor upon payment of a smaller amount, it is not a composition with creditors.²

II. ACTION UPON THE AGREEMENT.—**A. AGREEMENT CONTAINING NO RELEASE.**—If the composition agreement contains a mere stipulation that the creditors will accept a certain sum or percentage of their respective debts, in full satisfaction thereof, but contains no

1. *Wilson v. Samuels*, 100 Cal. 514, 35 Pac. 148; *Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 66 N. W. 606, 613.

Other Definitions.—“A composition is an engagement in which several of the creditors (not necessarily all, but a number) agree with the debtor, and in effect with each other, that the debtor shall be released on making the partial payments he proffers.” *Shinkle v. Shearman*, 7 Ind. App. 399, 34 N. E. 838, citing 1 Abb. L. Dict. 257. See also *Bailey v. Boyd*, 75 Ind. 125; *Abe Block & Co. v. Largent* (Tex. Civ. App.), 135 S. W. 1073.

Composition as Agreement Between Creditors.—A composition agreement between the creditors themselves as well as between creditors and debtor, each acting on the faith of the promise of the others to relinquish a part of his claim. *Solinger v. Earle*, 82 N. Y. 393 (cited with approval in *Kullman v. Greenebaum*, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150); *Crawford v. Krueger*, 201 Pa. 348, 50 Atl. 931.

Composition—Exception to Rule Requiring Full Payment.—A composition agreement by a debtor with his creditors is an exception to the “general rule of law that the acceptance of a lesser sum, or an agreement to accept it, will not bar a demand for a greater sum.” *White v. Kuntz*, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 896.

2. A contract not purporting to transfer all the debtor's property to a trustee for all his creditors, nor purporting to be signed by all the creditors and not providing for any time within which payments might be made upon the claims, and providing that

the contract shall remain in force and effect until all claims are fully paid, but not providing for the discharge of creditor's claims upon payment of less than full amount of claims, nor debarring signing creditors from prosecuting actions upon their respective claims, is not a composition with creditors. *Reynolds v. Pennsylvania Oil Co.*, 150 Cal. 629, 89 Pac. 610.

Sale of Creditors' Claims.—But a transaction whereby a third person purchased all creditors' claims and took an assignment of them, there being no understanding that any creditor agreed to take a percentage in full settlement upon condition that all should do so, is not a composition with creditors, but is a sale of the accounts to such third person. *Harris v. Zier*, 43 Wash. 573, 86 Pac. 928.

Distinctions.—“Every composition, to be complete, must have in it the element of accord and satisfaction. An accord is the proper term for an agreement between a single creditor and the debtor for the discharge of the debt, by accepting something other than agreed upon, or by payment of a less sum. Accord and satisfaction is the proper term for such agreement consummated by actual payment and acceptance in full.” *Shinkle v. Shearman*, 7 Ind. App. 399, 34 N. E. 838, 840.

As to distinction between composition agreements and accord and satisfaction, see the title “**Accord and Satisfaction.**”

As to distinction between assignments for benefit of creditors and composition agreement, see the title “**Assignment for the Benefit of Creditors.**”

release, and the debtor performs his part of the agreement, no action will lie for the original debt, but the creditor must sue on the composition agreement.³ But if the debtor fails to perform all the conditions of the composition agreement,⁴ or fails to perform them within the time specified,⁵ or if the composition agreement is set aside, the creditor may sue on the original cause of action,⁶ or prove in bank-

3. **Ga.**—*Stewart v. Langston*, 103 Ga. 290, 30 S. E. 35. **Ind.**—*Bailey v. Boyd*, 75 Ind. 125; *Pontious v. Durlinger*, 59 Ind. 27. **Minn.**—*Brown v. Farnham*, 48 Minn. 317, 51 N. W. 377. **N. H.**—*Browne v. Stackpole*, 9 N. H. 478. **N. Y.**—*Fellows v. Stevens*, 24 Wend. 294; *Talcott v. Janasson*, 85 N. Y. Supp. 833. **Pa.**—*Crawford v. Krueger*, 201 Pa. 348, 50 Atl. 931. **Tenn.**—*Evans v. Bell*, 15 Lea 569. **Eng.**—*Butler v. Rhodes*, 1 Esp. 236; *Bradley v. Gregory*, 2 Campb. 383.

Still while a composition agreement is in force, and before any infraction thereof, on the part of the debtor, any action on the original debt is premature. *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189; *Cranley v. Hillary*, 2 Maule & Sel. 120, 105 Eng. Reprint 327.

Secured Creditors Signing as General Creditors.—But secured creditors by signing a composition agreement in which they designated themselves as "general creditors," and who only put into the composition a general debt, but not the secured debt, do not release the debt so secured, and may sue for such sum as they are secured for. *Noyes v. Chapman, etc. Co.*, 60 Minn. 88, 61 N. W. 901.

4. **U. S.**—*Clarke v. White*, 12 Pet. 178, 9 L. ed. 1046; *Ransom v. Geer*, 12 Fed. 607. **Ala.**—*Bank of Montgomery v. Ohio Buggy Co.*, 110 Ala. 360, 18 So. 273, creditor upon breach may accept payment in full without becoming trustee for other assenting creditors. **Ill.**—*National, etc. Bank v. Feypel*, 93 Ill. App. 170. **Ind.**—*Bailey v. Boyd*, 75 Ind. 125; *Kahn v. Gumberts*, 9 Ind. 430. **Ky.**—*Taylor v. Farmer*, 81 Kv. 458. **Me.**—*Chapman v. Dennison Mfg. Co.*, 77 Me. 205. **Md.**—*Flack v. Garland*, 8 Md. 188. **Mass.**—*National Bank v. Porter*, 122 Mass. 308; *Whitney v. Whitaker*, 2 Met. 268. **Mo.**—*Pupke v. Churchill*, 91 Mo. 81, 3 S. W. 829. **N. Y.**—*Zoebis v. Von Minden*, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499, reversing 47 Hun 213, 13 N. Y.

St. 349; *Vogt v. Fasola*, 41 App. Div. 467, 58 N. Y. Supp. 982. **Vt.**—*Cobleigh v. Pierce*, 32 Vt. 788. **Eng.**—*Cranley v. Hillary*, 2 Maule & Sel. 120, 105 Eng. Reprint 327; *Sewell v. Musson*, 1 Vern. 210, 23 Eng. Reprint 420; *Goldney v. Lording*, L. R. 8 Q. B. 182, 42 L. J. Q. B. 103; *Edwards v. Coombe*, L. R. 7 C. P. 519.

In *Chittenden v. Woodbury*, 52 Vt. 562, the debtor's covenant to pay provided all creditors "come into the arrangement" is so qualified that a creditor signing the composition cannot sue for the original debt, though the creditors of a solvent firm of which the debtor was a member did not sign the composition agreement.

Failure To Pay \$1.41.—But a slight mistake resulting in a failure to pay \$1.41 to a creditor is too trivial to vitiate the composition. *Clarke v. White*, 12 Pet. (U. S.) 178, 9 L. ed. 1046.

5. *Penniman v. Elliott*, 27 Barb. (N. Y.) 315; *Vogt v. Fasola*, 41 App. Div. 467, 58 N. Y. Supp. 982; *Ex parte Gilbey*, L. R. 8 Ch. Div. 248, 47 L. J. Q. B. 49, 38 L. T. N. S. 728 (failure to pay instalments in time).

In several states it has been held that the failure to comply with the agreement does not revive the debt and the remedy is by action on the agreement, unless time is made the essence of the agreement. *Mullin v. Martin*, 23 Mo. App. 537; *Lanes v. Squyres*, 45 Tex. 382.

Failure To Present Notes for Payment.—Though an agreement provides that only payment of the notes shall be deemed satisfaction, where the debtor gave the creditor notice that the notes would not be paid, but changed his mind and before maturity placed enough money in bank to pay all notes, and all notes presented for payment at maturity were paid, but one creditor did not present his notes, the original debt is not revived. *Green v. McArthur*, 34 Barb. (N. Y.) 450.

6. But if a composition deed of trust

ruptcy for the balance of the original debt.⁷ The creditor is not restricted to this remedy, however, but may at his option sue for the balance under the composition agreement,⁸ or may sue the debtor⁹ or any creditor¹⁰ for damages for breach of the agreement.

B. AGREEMENT CONTAINING ABSOLUTE RELEASE.—But when the composition agreement contains an absolute and immediate release of the debtor, with a covenant on his part to pay the composition money in instalments, without any proviso declaring it void unless paid, the non-payment does not remit the creditor to his original debt, and the creditor's remedy is upon the agreement.¹¹

III. PLEADING COMPOSITION AGREEMENT.—**A. PETITION OR COMPLAINT.**—The complaint upon a composition agreement containing conditions precedent, should allege the performance of such conditions precedent.¹²

B. PLEA OR ANSWER.—**1. Necessity for Special Plea.**—In as-

is given to creditors for a release, if this is set aside the remedy is on the original claim. *Citizens, etc. Co. v. Wallis*, 23 Md. 173.

7. *Ex parte Gilbey*, L. R. 8 Ch. Div. 248, 47 L. J. Q. B. 49, 38 L. T. N. S. 728.

8. *Bailey v. Boyd*, 75 Ind. 125.

Judgment will not be entered on composition notes before maturity of the notes where action is brought thereon. *White v. Kuntz*, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886.

9. *Bailey v. Boyd*, 75 Ind. 125, 127; *Brown v. Farnham*, 55 Minn. 27, 56 N. W. 352.

10. *Hill v. Wertheimer, etc. Co.*, 150 Mo. 483, 51 S. W. 702.

Pleading Fraud of Debtor.—In an action by one creditor against another for breach of the composition agreement by the creditor attaching the debtor's goods, it is error for the court to instruct the jury that if the debtor was guilty of fraud justifying the attachment of the property, a verdict should be brought in for defendant, where no such plea was set up by defendant. *Hill v. Wertheimer, etc. Co.*, 150 Mo. 483, 51 S. W. 702.

11. *Mass.*—*Lothrop v. King*, 8 Cush. 382; *Lyman v. Clark*, 9 Mass. 235. *Minn.* *Brown v. Farnham*, 55 Minn. 27, 56 N. W. 352. *Mo.*—*Mullin v. Martin*, 23 Mo. App. 537, non-payment of notes taken in full satisfaction. *N. H.* *Browne v. Stackpole*, 9 N. H. 478. *N. Y.* *Bates v. Rosenberg*, 121 N. Y. Supp. 335; *Swartz v. Brown*, 135 App. Div.

913, 119 N. Y. Supp. 1024; *Orr v. McEwen*, 1 City Ct. Rep. 141. *Vt.*—*Bowen v. Holly*, 38 Vt. 574. *Eng.*—*Lay v. Mottram*, 19 C. B. (N. S.) 479, 484, 115 E. C. L. 479.

When Payment of Notes Need Not Be Averred.—Where the composition agreement contains an absolute release, the defendant who gave notes for the amount of the composition need not aver that the notes delivered, with the indorsement as agreed, had actually been paid. *Swartz v. Brown*, 135 App. Div. 913, 119 N. Y. Supp. 1024.

12. *Falconbury v. Kendall*, 76 Ind. 260 (signature of all creditors required); where it was held that an allegation that the creditors had performed all the conditions of the contract was not equivalent to the allegation that all the creditors signed the contract.

Indiana—Copying Agreement Into Complaint.—It is not necessary to copy the composition agreement into the complaint, if filed as an exhibit it is properly regarded as part of the complaint, for though a written instrument, not the foundation of the action is not to be regarded as part of the complaint, although filed as an exhibit, where the debtor sues a third person for failure to perform an agreement whereby he was to pay the debtor's obligations provided all the creditors signed the contract, and thus relieve the debtor, the composition agreement is properly a part of the complaint as the debtor has founded his action upon it. *Falconbury v. Kendall*, *supra*.

sumpsit at common law a composition agreement was admissible in evidence under the general issue.¹³

2. Setting Forth Composition Agreement in Full.—In pleading a composition agreement the terms of the composition agreement must be set forth with sufficient certainty and fullness to put plaintiff upon notice of what is expected to be proved and relied on as a defense.¹⁴

3. Specific Allegations Required.—*a. In General.*—It has been held that as an agreement to accept a composition is not binding until accepted, a plea of an agreement to accept a composition is not sufficient.¹⁵ To avail one's self of a fraudulent preference the answer to a complaint setting up a composition should plead such fraud so as to enable the opposite party to prepare the case with that issue in view.¹⁶ But an answer setting up a composition agreement as a defense, where the debt is alleged to have been created by fraud,¹⁷ or an

13. *Bratleman v. Douglass*, 1 Cranch C. C. 450, 2 Fed. Cas. No. 1,073. See, however, *Smith v. Owens*, 21 Cal. 11, holding that the want of such plea cannot be cured by the admission of evidence as to such agreement, without objection on the part of opposing counsel.

14. *Smith v. Mechanics Nat. Bank*, 108 Ga. 211, 33 S. E. 857; *Taylor v. Farmer*, 81 Ky. 458, 5 Ky. L. Rep. 487.

Agreement Sufficiently Pled.—The composition agreement is sufficiently pleaded where it is alleged that there was a meeting of creditors, stating the purpose of the meeting, and then alleging the execution of the agreement, setting forth such agreement in full, and then alleging in execution of the agreement the payments as provided by the agreement. *Robinson, etc. Co. v. Meyers*, 32 Ky. L. Rep. 280, 105 S. W. 428.

The answer should allege the time and place of the composition agreement, "and the names of the agents or persons who made the same, the exact terms thereof, and the written parts of so much as is alleged to have been made by correspondence." It should allege the "particulars and not simply the defendant's conclusions from conferences and correspondence unrevealed." *Smith v. Mechanics' Nat. Bank*, 108 Ga. 211, 33 S. E. 857.

Striking Plea.—If specific objection is taken by demurrer to the plea on the ground that the plea is not sufficiently specific as to the composition agreement, and the court sustains the demurrer, and defendant offers no

amendment to cure such defect, the trial court's action in entering up judgment for plaintiff and striking the plea will not be reversed. *Smith v. Mechanics' Nat. Bank*, *supra*.

15. *Heathcote v. Crookshank*, 2 T. R. 24, 100 Eng. Reprint 14. But in *Foakes v. Beer*, L. R. 9 App. Cas. 605, 620, it is said such plea would be good.

16. *Robinson v. Myers*, 32 Ky. L. Rep. 280, 105 S. W. 428.

Instruction Submitting Issue Erroneous Where no Plea of Fraud.—An instruction submitting the issue of a fraudulent preference where no issue as to fraud was pleaded is erroneous; and because evidence as to such fraud was admitted did not authorize the submission of the issue. *Robinson v. Meyers*, 32 Ky. L. Rep. 280, 105 S. W. 428.

Fraud Need Not Be Pled Where Preferred Creditor Plaintiff.—It has been held, however, that where the preferred creditor enforces the composition, the answer need not set up the fraud of the preferred creditor as it is incumbent upon plaintiff to show that the conditions upon which the defendant's liability became fixed have transpired. *Brannantine v. Cantewell*, 27 Mo. App. 658.

17. Failure To Deny Fraud in Answer.—An answer setting up a composition agreement with creditors under the bankrupt act by their vote, in number and manner as required by the bankrupt act, should deny the allegations of fraud in the complaint or it will be insufficient, as under the bankrupt act such debts are not discharged

assignment of the debt to another with notice to the debtor prior to the attempt to the composition, must deny such allegations, or the answer will be insufficient.¹⁸ A denial of the execution of the composition agreement must be in the statutory form.¹⁹

b. *As to Performance of Conditions Precedent.*—If the composition agreement was to become binding only upon the performance of certain conditions precedent, it is absolutely essential that the performance of such conditions be alleged.²⁰

c. *As to Performance or Tender of Performance.*—(I) *Agreement Containing no Release.*—Where the agreement does not contain an absolute release of the debtor's obligation, the plea must allege that the terms of the composition were strictly complied with,²¹ as to all the creditors joining in the composition agreement and not only as to the party bringing suit.²² If there has been no performance, tender of performance according to the terms of the composition or something by way of excuse should be alleged in lieu of performance.²³

by such composition. *Taylor v. Farmer*, 81 Ky. 458.

Negating Inference of Fraud.—An answer should close the door against inferences that none of the creditors had been paid or secured, and that the composition was fraudulent by stating the facts which would show a *bona fide* and legally effected and existent composition. *Taylor v. Farmer*, *supra*.

18. Where plaintiff alleges an assignment and immediate notice thereof to defendant an affidavit of defense is sufficient which fails to deny that defendant received notice of assignment prior to his attempt to compromise with the legal plaintiff. *Kamber v. Becker*, 27 Pa. Super. 266.

19. *Reynolds v. Pennsylvania Oil Co.*, 150 Cal. 629, 89 Pac. 610.

If a statute requires that where any contract is set up and its execution is denied, such execution must be denied by affidavit within a specified time, the failure to do so will be considered by the court as admitting the execution of the composition agreement for all purposes of the trial. *Reynolds v. Pennsylvania Oil Co.*, *supra*.

20. *Ky.*—*Cutter v. Reynolds*, 8 B. Mon. 596, assent of "eastern" creditors required. *Pa.*—*Lower v. Clement*, 25 Pa. 63. *Tex.*—*Lanes v. Squires*, 45 Tex. 382, 386, assent of all creditors required. *Eng.*—*Rosling v. Muggersidge*, 4 D. & L. 298, 16 M. & W. 181.

Alleging Like Settlement With Other Creditors Insufficient.—If the composition agreement was accepted on con-

dition that all the other creditors accept it, the plea should allege that the composition agreement was accepted on condition that all the other creditors accept it. *Lanes v. Squires*, 45 Tex. 382, 386.

21. *Ind.*—*Evans v. Gallantine*, 57 Ind. 367. *Ky.*—*Taylor v. Farmer*, 81 Ky. 458, 5 Ky. L. Rep. 487. *Mich.*—*Whittemore v. Stephens*, 48 Mich. 573, 12 N. W. 858. *Pa.*—*Lower v. Clement*, 25 Pa. 63, 67; *Kamber v. Becker*, 27 Pa. Super. 266, payment or readiness to pay should be averred in affidavit of defense. *Eng.*—*Fessard v. Mugnier*, 18 C. B. (N. S.) 286, 114 E. C. L. 284.

22. *Evans v. Gallantine*, 57 Ind. 367.

A creditor who has received his percentage under the agreement cannot set up that other creditors did not receive theirs. *Murchie v. McIntire*, 40 Minn. 331, 42 N. W. 348.

23. *Ky.*—*Taylor v. Farmer*, 81 Ky. 458, 5 Ky. L. Rep. 487. *Mich.*—*Whittemore v. Stephens*, 48 Mich. 573, 12 N. W. 858. *N. Y.*—*Warburg v. Wilcox*, 7 Abb. Pr. 336. *Pa.*—*Kamber v. Becker*, 27 Pa. Super. 266. *Eng.*—*Fessard v. Mugnier*, 18 C. B. (N. S.) 286, 114 E. C. L. 284.

Tender and Readiness To Perform Must Be Alleged.—If notes were to be taken, tender of the notes must be alleged, and readiness at all times to perform, and the new notes thus tendered must be brought into court on the trial. *Warburg v. Wilcox*, 7 Abb. Pr. 336, 2 Hilt. (N. Y.) 118.

Alleging Readiness To Tender With-

(II.) **Agreement Containing Release.**—But performance or tender of performance need not be alleged where the agreement contains a release to be void only on failure to perform the agreement.²⁴

IV. FRAUD IN COMPOSITION.—A. **REMEDIES OF INNOCENT CREDITORS.**—1. **Action at Law for Original Debt.**—A secret agreement by which the debtor gives one creditor an undue advantage is a fraud upon the other creditors who may sue for and recover the full amount of their original indebtedness, less any amount which they have received under the composition.²⁵ It is not essential to the main-

out Tender.—The absence of an averment as to payment or tender within the specified time is not cured by an averment of readiness and willingness to perform according to the terms of the composition. *Fessard v. Mugnier*, 18 C. B. (N. S.) 286, 114 E. C. L. 284.

Solvency of sureties should be alleged in setting up a tender of notes under an agreement calling for notes with good and solvent sureties. An allegation that they were approved does not allege solvency. *Taylor v. Farmer*, 81 Ky. 458, 5 Ky. L. Rep. 487.

Absence of the creditor from the jurisdiction affords an excuse for the want of an averment of tender or payment by the debtor only where the creditor has gone abroad after the making of the composition agreement. *Fessard v. Mugnier*, 18 C. B. (N. S.) 286, 114 E. C. L. 284.

24. *Swartz v. Brown*, 135 App. Div. 913, 119 N. Y. Supp. 1024; *Hart v. Smith*, L. R. 4 Q. B. 61. See *supra*, II.

25. **U. S.**—*Batchelder*, *Lincoln & Co. v. Whitmore*, 122 Fed. 355, 58 C. C. A. 517; *In re Chaplin*, 115 Fed. 162; *Elfelt v. Snow*, 2 Sawy. 94, 8 Fed. Cas. No. 4,342. **Cal.**—*Kullman v. Greenebaum*, 92 Cal. 403, 28 Pac. 674. **Ga.**—*Burgess v. Simpson Groc. Co.*, 128 Ga. 423, 57 S. E. 717; *Saul v. Buck*, 72 Ga. 254. **Ill.**—*Hefter v. Cohn*, 73 Ill. 296, 301. But see *Bartlett v. Blaine*, 83 Ill. 25, 25 Am. Rep. 346, where the fraudulent preference had been declared void and was of no effect. **Ind.**—*Evans v. Gallantine*, 57 Ind. 367; *Saving v. Gale*, 28 Ind. 486; *Kahn v. Gumberts*, 9 Ind. 430. **Md.**—*Loney v. Bailey*, 43 Md. 10; *Jackson v. Hodges*, 24 Md. 468. **Mass.**—*Cobb v. Fogg*, 166 Mass. 466, 44 N. E. 534; *Cobb v. Tirrell*, 137 Mass. 143. **Minn.**—*Powers, etc. Co. v. Harlin*, 68 Minn. 193, 71 N. W. 16, 64 Am.

St. Rep. 460. **Mo.**—*Enneking v. Stahl*, 9 Mo. App. 390; *Bank of Commerce v. Hoeber*, 8 Mo. App. 171. **N. H.**—*Pierce v. Wood*, 23 N. H. 519; *Trumball v. Tilton*, 21 N. H. 128. **N. J.**—*Feldman v. Gamble*, 26 N. J. Eq. 494. **N. Y.**—*White v. Kuntz*, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886; *Durgin v. Ireland*, 14 N. Y. 322; *Gilmur v. Thompson*, 49 How. Pr. 198; *Smith v. Salomon*, 7 Daly 216; *Whiteside v. Hyman*, 10 Hun 218. **N. C.**—*Zell Guano Co. v. Emry*, 113 N. C. 85, 18 S. E. 89. **Ohio.**—*Brown v. Daugherty*, 8 Ohio Dec. Reprint 371, 7 Wkly. Law Bul. 239. **Pa.**—*Shenandoah, etc. Church v. Robbins*, 81 Pa. 361; *Greer v. Shriver*, 53 Pa. 259; *Stuart v. Blum*, 28 Pa. 225; *Mann v. Darlington*, 15 Pa. 310. **Vt.**—*Reynolds v. French*, 8 Vt. 85. **Wis.**—*Musgat v. Wybro*, 33 Wis. 515. **Eng.**—*Mallalien v. Hodgson*, 16 Ad. & El. N. S. 689, 715, 71 E. C. L. 689; *Howden v. Haigh*, 11 Ad. & El. 1033, 39 E. C. L. 315; *Turner v. Hoole*, D. & R. N. P. 27, 16 E. C. L. 418.

This rule is not applicable if each creditor acts for himself (*Clark v. White*, 12 Pet. (U. S.) 178, 9 L. ed. 1046; *Price v. Winnebago Nat. Bank*, 14 Okla. 268, 79 Pac. 105), or if the preference is made with the knowledge of the other creditors (*Ia.*—*Bower v. Metz*, 54 Iowa 394, 6 N. W. 551. **N. H.**—*Gage v. De Courcay*, 68 N. H. 579, 41 Atl. 183. **N. Y.**—*Martin v. Adams*, 81 Hun 9, 30 N. Y. Supp. 523, 62 N. Y. St. 404. **Wis.**—*Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 66 N. W. 606).

The creditor may declare on the original notes he voluntarily gave up to the debtor to be cancelled, where the composition is void and is set aside because of such secret preference though the notes are no longer in the creditor's possession. *Bank of Commerce v. Hoeber*, 8 Mo. App. 171; *Reynolds v. French*, 8 Vt. 85.

tenance of such action that the composition agreement should first be rescinded, and the money recovered under it returned or offered to be returned,²⁶ unless one of the creditors or a third person acts as guarantor.²⁷ Nor is it necessary that the creditor desiring to sue on the original debt should allege or prove any damages from the fraud.²⁸

2. Suit in Equity To Set Aside Composition.—But a creditor whose assent to a composition agreement has been obtained by fraud or misrepresentation on the part of the debtor is not restricted to his remedy at law, but may bring a suit in equity to set aside the agreement,²⁹ without restoring or offering to restore what was received thereunder.³⁰ In such suit, if adequate grounds exist, the court will

26. **U. S.**—*Elfelt v. Snow*, 2 Sawy. 94, 8 Fed. Cas. No. 4,342. **Ga.**—*Burgess v. Simpson Groc. Co.*, 128 Ga. 423, 57 S. E. 717. **Ill.**—*Heffer v. Cohn*, 73 Ill. 296. **Md.**—*Loney v. Bailey*, 43 Md. 10. **Mass.**—*Cobb v. Fogg*, 166 Mass. 466, 44 N. E. 534. **Mo.**—*Bank of Commerce v. Hoeber*, 8 Mo. App. 171. **N. H.**—*Pierce v. Wood*, 23 N. H. 519. **N. Y.**—*Martin v. Adams*, 81 Hun 9, 30 N. Y. Supp. 523; *Smith v. Salomon*, 7 Daly 216. **Ohio.**—*Brown v. Daugherty*, 8 Ohio Dec. (Reprint) 371, 7 Wkly. Law Bul. 239. **Pa.**—*Stuart v. Blum*, 28 Pa. 225. **Vt.**—*Reynolds v. French*, 8 Vt. 85.

Notes need not be returned before suing on the original cause of action. *Cobb v. Tirrell*, 137 Mass. 143.

Not Analogous to Rescission for Fraud.—"This is not the case of a party repudiating a contract for fraud, and bringing an action to recover damages for the injury sustained, to maintain which, he must, before the action is brought, restore, or offer to restore, what he has received under the contract." It is an action brought to enforce a contract, in which a composition agreement to receive a percentage of the debt in discharge thereof is set up by way of answer, "and is met by the objection that the creditor was induced by fraudulent representations on the part of the debtor to sign the deed of composition, and that consequently it is fraudulent and void as against him. It does not come, therefore, within the class of cases upon which respondent relies. The plaintiff has received nothing that he can be required to give up." *Smith v. Salomon*, 7 Daly (N. Y.) 216, 220.

27. *McNealey v. Baldrige*, 106 Mo. App. 11, 78 S. W. 1031; *Babcock v. Dill*, 43 Barb. (N. Y.) 577 (father as

guarantor; creditor rescinding for breach of agreement that all creditors should sign). See *infra*, IV, A, 2.

One Creditor Acting as Guarantor. Where the debtor's property has been turned over to one of the creditors who was to pay a certain percentage of the debts to the other creditors, such creditors could not have the agreement set aside without returning all moneys received under the agreement. *McNealey v. Baldrige*, *supra*.

28. *Enneking v. Stahl*, 9 Mo. App. 390, 395.

29. **U. S.**—*Pettipiece v. Sayles*, 4 Mason 312, 19 Fed. Cas. No. 11,083. **Ga.**—*Burgess v. Simpson Groc. Co.*, 128 Ga. 423, 57 S. E. 717. **La.**—*Blodgett v. Hogan*, 10 La. Ann. 18. **Md.**—*Jackson v. Hodges*, 24 Md. 468. **N. Y.**—*Martin v. Adams*, 81 Hun 9, 30 N. Y. Supp. 523, 62 N. Y. St. 404; *Baxter v. Hebbard*, 5 N. Y. 854. **Vt.**—*Richards v. Hunt*, 6 Vt. 251, 27 Am. Dec. 545.

Creditors May Unite in Equitable Petition.—"The creditors may certainly proceed in equity in those cases where the remedy at law is incomplete and inadequate. Those of the creditors who desire to take advantage of the fraud perpetrated upon them may unite in an equitable petition, having for its purpose the cancellation of the agreement and the subjection to their claims of the assets wrongfully withheld by the debtor." *Burgess v. Simpson Groc. Co.*, 128 Ga. 423, 57 S. E. 717.

30. In *Cobb v. Fogg*, 166 Mass. 466, 44 N. E. 534, notes of the debtor were turned over to a third person under an agreement whereby the latter indorsed the debtor's composition notes, and in a suit by the creditors for the return of the notes surrendered it was held that a return of the composition

not only cancel the agreement, but will subject to the creditor's claims any assets wrongfully withheld from the debtor,³¹ enter up judgment for the amounts due the complainant creditors,³² and order the return of notes or securities surrendered by the creditor upon entering into the agreement.³³ A court of equity, however, instead of vacating the composition agreement, may require the debtor to account for any property that he held beyond what he stated to his creditors.³⁴ And the composition agreement will not be set aside at the suit of a creditor who has received an illegal preference.³⁵

3. Action at Law for Damages From Fraud.—Any innocent creditor may bring an action at law against the debtor for any damages sustained through the fraud.³⁶

4. Action at Law on Composition.³⁷

B. REMEDIES OF PREFERRED CREDITORS. — UPON SECRET AGREEMENT. It is well settled that the creditor receiving a note or other evidence

notes need not be alleged where such third person has been paid for what he has done.

31. Ga.—*Burgess v. Simpson Groc. Co.*, 128 Ga. 423, 57 S. E. 717. **Md.** *Jackson v. Hodges*, 24 Md. 468. **N. Y.** *Baxter v. Hebbard*, 5 N. Y. St. 854, recovering property held by assignees with debtor's connivance.

In a suit brought by the creditors to cancel a composition agreement, the court may grant the relief prayed for, enter judgment in their favor for the amount due them, and require the assets brought in appropriated to the payment of their claim. *Burgess v. Simpson Groc. Co.*, 128 Ga. 423, 57 S. E. 717.

That a third party offered advantage to creditor without the consent or knowledge of the debtor is not ground for setting aside the composition. *Martin v. Adams*, 81 Hun 9, 30 N. Y. Supp. 523.

Representations as to future conduct do not authorize a rescission for fraud. So a plea setting up as ground for rescission of a composition agreement the debtor's statement that he would continue in business at the same place, is insufficient. *Landreth Co. v. Schevenel*, 102 Tenn. 480, 52 S. W. 148.

32. Burgess v. Simpson Groc. Co., 128 Ga. 423, 57 S. E. 717; *Cobb v. Fogg*, 166 Mass. 466, 44 N. E. 534.

33. Cobb v. Fogg, 166 Mass. 466, 44 N. E. 534.

34. Irving v. Humphrey, 1 Hopk. Ch. (N. Y.) 284.

35. Cal.—*O'Brien v. Greenebaum*, 92 Cal. 104, 28 Pac. 214, action to set

aside because other creditors were also preferred. **Mo.**—*Bank of Commerce v. Hoerber*, 88 Mo. 37, 57 Am. Rep. 359. **N. Y.**—*White v. Kuntz*, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886; *Russell v. Rogers*, 10 Wend. 474, 25 Am. Dec. 574; *Blair v. Wait*, 6 Hun 477, 69 N. Y. 113. **Eng.**—*Child v. Danbridge*, 2 Vern. 71, 23 Eng. Reprint 655.

Creditor Presenting Reduced Claim. Where a debtor was guilty of fraud toward all his creditors and the creditors received 25% of their claims a creditor gives his debt as \$25,000 when it was \$45,000, he does not commit such a fraud as precludes him from setting up the debtor's fraud in a suit to recover the balance of the claim beyond the 25% received. *Huntington v. Clark*, 39 Conn. 540.

36. Whiteside v. Hyman, 10 Hun (N. Y.) 218.

Alternative Prayer for Damages for Fraud.—Though the original petition is for the balance of the account and for general relief, a supplemental petition may pray alternatively for the amount thereof as damages for fraud in the procurement of the composition agreement. *Grabenheimer v. Blum*, 63 Tex. 369.

Not the Balance of the Debt.—The recovery is limited to such damages as the fraud occasioned. It is the value of the unpaid moiety of their debt which they lost by means of the fraud, if that in fact had been perpetrated, with interest. *Whiteside v. Hyman*, 10 Hun (N. Y.) 218, 221.

37. See supra, II.

of indebtedness as a secret preference cannot enforce the same, even as against the debtor himself,³⁸ and though the notes were given at a later date but in pursuance of a previous agreement.³⁹

38. U. S.—Clark v. White, 12 Pet. 178, 9 L. ed. 1046; McCormick v. Solinsky, 152 Fed. 984, 82 C. C. A. 134; Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 361, 58 C. C. A. 517; Bean v. Amsinck, 10 Blatchf. 361, 2 Fed. Cas. No. 1,167. Cal.—Smith v. Owens, 21 Cal. 11. Conn.—Clement's Appeal, 52 Conn. 464; Baldwin v. Rosenman, 49 Conn. 105. Ga.—Dicks v. Andrews, 132 Ga. 601, 64 S. E. 788 (dated later than composition agreement and deposited with another to be delivered after completion of agreement); Brown v. Everett, etc. Co., 111 Ga. 404, 33 S. E. 813. Ind.—McFarland v. Garber, 10 Ind. 151. Kan.—Rothschild v. Cozad, 10 Kan. App. 447, 62 Pac. 6. Ky. Goodwin v. Blake, 3 T. B. Mon. 106, 16 Am. Dec. 87. La.—Hardies Sons & Co. v. Scheen, 110 La. 612, 34 So. 707. Mass.—Huckins v. Hunt, 138 Mass. 366; Fay v. Fay, 121 Mass. 561; Harvey v. Hunt, 119 Mass. 279; Howe v. Litchfield, 3 Allen 443; Ramsdell v. Edgarton, 8 Met. 227, 41 Am. Dec. 503. Minn.—Newell v. Higgins, 55 Minn. 82, 56 N. W. 577. Mo.—Oshea v. Collier, etc. Co., 42 Mo. 397, 97 Am. Dec. 332; Bastian v. Dreyer, 7 Mo. App. 332. Neb.—Freiberg v. Treitschke, 36 Neb. 880, 55 N. W. 273. N. H.—Trumball v. Tilton, 21 N. H. 128. N. J.—Feldman v. Gamble, 26 N. J. Eq. 494. N. Y. White v. Kuntz, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886; Bliss v. Matteson, 45 N. Y. 22; Russell v. Rogers, 10 Wend. 474, 25 Am. Dec. 574; Bates v. Rosenberg, 121 N. Y. Supp. 335; Glens Falls Nat. Bank v. Van Nostrand, 41 Misc. 526, 85 N. Y. Supp. 50, affirmed, 103 App. Div. 598, 92 N. Y. Supp. 1125 (notes void though composition failed and stocks deposited as security will be required to be returned). Ohio.—Way v. Langley, 15 Ohio St. 392; Ray v. Brown, 7 Ohio Dec. (Reprint) 494, 3 Wkly. Law Bul. 545. Okla.—Wheeler v. Pettyjohn, 14 Okla. 71, 76 Pac. 117. Pa.—Lee v. Sellers, 81 Pa. 473; Patterson v. Boehm, 4 Pa. 507; Callahan v. Ackley, 9 Phila. 99. Tenn.—Evans v. Bell, 15 Lea 569. Tex.—Willis v. Morris, 63 Tex. 458, 51 Am. Rep. 655. Vt.—Wheeler v. Wheeler, 11 Vt. 60. Eng.—Jackson v. Davison, 4 Barn. & Ald. 691, 6 E. C. L. 567; Cockshott v. Bennett, 2 T. R. 763, 100 Eng. Reprint 411; Mawson v. Stock, 6 Ves. Jr 300, 31 Eng. Reprint 1062. Nor transferee not a bona fide holder. La.—Hardie's Sons & Co. v. Scheen, 110 La. 612, 34 So. 707. N. Y.—Lawrence v. Clark, 36 N. Y. 128 (notice for precedent debt); Gilmour v. Thompson, 6 Daly 95, 49 How. Pr. 198; Hogaman v. Burr, 9 Jones & S. 423 (indorsee after maturity). Ohio.—Ray v. Brown, 7 Ohio Dec. (Reprint) 494, 3 Wkly. Law Bul. 545, indorsee after maturity. Pa.—Gibbon v. Bellas, 2 Phila. 390, 14 Leg. Int. 327, non-negotiable judgment note. Can.—Bellemare v. Gray, 16 Quebec Super. 581.
- The reason why a debtor is allowed to set up such a fraud in which he has participated is sometimes said to be from public policy, and sometimes because the debtor is supposed to act under a moral duress. Huntington v. Clark, 39 Conn. 540. Not in *pari delicto*. Crossley v. Moore, 40 N. J. L. 27, 35.
- If the preference is executory it cannot be enforced, and if executed it may be rescinded by the non-consenting creditors. Glens Falls Nat. Bank v. Van Nostrand, 41 Misc. 526, 85 N. Y. Supp. 50.
- Recovery where other creditors knew of the preference. O'Shea v. Collier, etc. Co., 42 Mo. 397, 97 Am. Dec. 332; Jackman v. Mitchell, 13 Ves. 581, 33 Eng. Reprint 412.
- This principle has no application where each creditor acts for himself. White v. Clarke, 5 Cranch C. C. 102, 29 Fed. Cas. No. 17,540, affirmed, 12 Pet. 178, 9 L. ed. 1046; Price v. Winnebago Nat. Bank, 14 Okla. 268, 79 Pac. 105.
39. Cal.—Smith v. Owens, 12 Cal. 11. Ga.—Dicks v. Andrews, 132 Ga. 601, 64 S. E. 788. Ill.—Woodman v. Stow, 11 Ill. App. 613. Ky.—Goodwin v. Blake, 3 T. B. Mon. 106, 16 Am. Dec. 87. La.—Hardie's Sons & Co. v. Scheen, 110 La. 612, 34 So. 707. Mich.—Tinker v. Hurst, 70 Mich. 159, 38 N. W. 16, 14 Am. St. Rep. 482.
- Giving Security After Discharge. But a security given a creditor for

Setting Aside Composition Agreement.—This has been dealt with in a previous section.⁴⁰

Enforcement of Composition.—Because to allow a creditor illegally preferred to sue on the original debt and avoid the composition would allow him to profit by reason of his fraud, the creditor illegally preferred is restricted in several states to an action for what was stipulated for under the composition agreement, less any amounts received.⁴¹

balance of a debt, after discharge by a composition agreement, may be enforced at law. *Crossley v. Moore*, 40 N. J. L. 27.

Enforcing Indemnity.—Where, after having made a composition and settlement with his creditors a debtor gave indemnity to certain sureties on a debt to one of his creditors, such creditor could not avail himself of the indemnity. *Taylor v. Skiles*, 113 Tenn. 288, 81 S. W. 1258.

Dating in Advance and Delivery to Third Person.—A note given as a secret advantage by the debtor, but dated in advance and delivered to a third person for delivery to a creditor after the composition had been completed is equally unenforceable. *Dicks v. Andrews*, 132 Ga. 601, 64 S. E. 788.

40. See *supra*, IV, A, 2.

41. *Huckins v. Hunt*, 138 Mass. 366; *Hanover Nat. Bank v. Blake*, 142 N. Y. 404, 37 N. E. 519, 40 Am. St. Rep. 607, 27 L. R. A. 33 (annotated) *reversing* 66 Hun 33, 20 N. Y. Supp. 780, *reversing* 60 Hun 428, 14 N. Y. Supp. 913; *Meyer v. Blair*, 109 N. Y. 600, 17 N. E. 228, 4 Am. St. Rep. 500; *White v. Kuntz*, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886, *affirming* 13 Daly 286.

The creditor thus preferred cannot sue on the original claim. *Huckins v. Hunt*, 138 Mass. 366.

No Recovery on Composition—Preference Equal to Amount Due Thereunder.—Where the debtor gave his note for ten shillings, the amount of the composition, but not until his brother gave the creditor coal to the amount of ten shillings, the balance of the debt, the creditor could not recover the amount of the note. *Knight v. Hunt*, 5 Bing. 432, 15 E. C. L. 488.

Reason of Rule.—“In modern times the doctrine has been acted upon in courts of law, as it has long been in courts of equity, that such secret arrangements are utterly void, and ought not to be enforced, even against the

assenting debtor, or his sureties, or his friends. There is great wisdom and deep policy in the doctrine; and it is founded in the best of all protective policy—that which acts by way of prevention rather than by mere remedial justice—for it has a strong tendency to suppress all frauds upon the general creditors, by making the cunning contrivers the victims of their own illicit and clandestine agreements. The relief is granted, not for the sake of the debtor, for no deceit or oppression may have been practiced upon him, but for the sake of the honest and humane, unsuspecting creditor. And hence the relief is granted equally whether the debtor has been induced to agree to the secret bargain by the threats or oppression of the favored creditors, or whether he has been a mere volunteer, offering his services, and aiding in the intended deception. Such secret bargains are not only deemed incapable of being enforced or confirmed, but even money paid under them is recoverable back, as it has been obtained against the clear principles of public policy. And it is wholly immaterial whether such secret bargains give to the favored creditors a large sum, or an additional security or advantage, or only misrepresent some important fact, for the effect upon other creditors is precisely the same in each of those cases. They are misled into an act to which they might otherwise not have assented.” *Hardie’s Sons & Co. v. Scheen*, 110 La. 612, 34 So. 707.

Conditional Composition Not Signed by All Creditors.—Where a compromise agreement provides that it shall not be binding unless signed by all and all do not sign, and the debtor avoids the note to this plaintiff because a fraudulent preference, the plaintiff may recover on the original debt. *Walker v. Mayo*, 143 Mass. 42, 8 N. E. 873, *citing*, *Leonard v. Trustees of First Congregational Soc.*, 2 Cush. (Mass.)

Still other authorities hold that he cannot recover on the composition notes on the ground that the composition is avoided *in toto*.⁴² And he cannot maintain suit to set aside the composition agreement on the ground that other creditors obtained a secret advantage if he himself is in equal fault.⁴³ A creditor who has received a fraudulent and voidable preference upon one debt cannot prove another in bankruptcy until he has surrendered the preference.⁴⁴

C. RECOVERY OF ILLEGAL PREFERENCES.—1. **At Law.**—Money or notes given as an illegal preference to a creditor to obtain his assent to a composition agreement may be recovered in an action at law for money paid, had and received, either by the debtor himself,⁴⁵ by in-

462; *Turner v. Browne*, 3 C. B. (Eng.) 157, 54 E. C. L. 156.

42. Conn.—*Huntington v. Clark*, 39 Conn. 540; *Doughty v. Savage*, 28 Conn. 146. Del.—*Macalitioner v. Croasdale*, 3 Houst. 365, one note given for amount of composition and secret preference. Minn.—*Powers, etc. Co. v. Harlin*, 68 Minn. 193, 71 N. W. 16, exacting surety as preference. Sureties may avoid notes. Ohio.—*Moses v. Katzenberger*, 1 Handy 46. Eng.—*Mallalieu v. Hodgson*, 16 Ad. & El. (N. S.) 689, 71 E. C. L. 689; *Howden v. Haigh*, 11 Ad. & El. 1033, 39 E. C. L. 315, criticized in *Davidson v. McGregor*, 8 M. & W. 755, 763.

There are dicta in several other decisions to the effect that the fraudulent preference avoids the agreement and allows the creditor secretly preferred no recovery on either the composition or the original debt. *Mallalieu v. Hodgson*, 16 Ad. & El. (N. S.) 689, 71 E. C. L. 689; *Knight v. Hunt*, 5 Bing. 432, 15 E. C. L. 488.

Littledale, J., in *Howden v. Haigh*, 11 Ad. & El. 1033, 39 E. C. L. 315, while agreeing with the judgment remarked rather significantly, that the plaintiff might be entitled to sue for the original debt.

In *Indiana*.—"So careful are the courts to preserve the highest degree of good faith among the creditors that the debtor himself may, on the grounds of public policy, set up the preference to defeat his own agreement. *Kahn v. Gumberts*, 9 Ind. 430; *McFarland v. Garber*, 10 Ind. 151; *Evans v. Gallantine*, 57 Ind. 367, 371. We fail to see how these rules can have any controlling effect on the case in hearing. Even if it be conceded that the collateral contract is voidable by reason of a preference given by the appellees, yet

as it was voluntarily performed in part, and to the extent of the performance it is binding upon them, they are not entitled to have the moneys so voluntarily paid returned, or credited upon the notes in suit. The small notes which were given in lieu of the second note, and which are declared upon, have never been paid in full. The appellees will not be permitted to repudiate both the composition contract and the collateral contract. The part performance of one will not operate as a discharge of the others." *Shinkle v. Shearman*, 7 Ind. App. 399, 34 N. E. 838, 840.

43. *O'Brien v. Greenebaum*, 92 Cal. 104, 21 Pac. 204.

44. *In re Chaplin*, 115 Fed. 162, 169, *disapproving In re Steers Lumb. Co.*, 112 Fed. 406, 50 C. C. A. 310, and following *Dickson v. Wyman*, 111 Fed. 726, 49 C. C. A. 574.

If the composition was in notes and the preference in cash, the whole preference must be returned. *Bean v. Amisnck*, 10 Blatchf. 361, 2 Fed. Cas. No. 1,167.

45. U. S.—*In re Chaplin*, 115 Fed. 162; *Bean v. Brookmire*, 2 Dill. 108, 2 Fed. Cas. No. 1,170. Ga.—*Brown v. Everett, etc. Co.*, 111 Ga. 404, 36 S. E. 813. N. J.—*Crossley v. Moore*, 40 N. J. L. 27. Eng.—*Turner v. Hoole, Dowl. & R.* 1 N. P. 27, 16 E. C. L. 418; *Smith v. Cuff*, 6 Maule & Sel. 160, 105 Eng. Reprint 1203.

The reason of the rule says Brett, Master of the Rolls, in *Ex parte Milner*, L. R. 15 Q. B. Div. 605, is that "unless there is something in the composition agreement which is plainly to the contrary, the equality between the creditors becomes an implied condition of the agreement."

Otherwise If Payments Voluntary.

nocent creditors,⁴⁶ or by his assignee or trustee in bankruptcy.⁴⁷ If the debtor is compelled to pay a note given as an illegal preference because of its transfer to a *bona fide* holder in due course, he may recover the amount thus paid.⁴⁸

U. S.—Batchelder, Lincoln & Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517. Ind.—Shinkle v. Shearman, 7 Ind. App. 399, 34 N. E. 838. N. J.—Crossley v. Moore, 40 N. J. L. 27. N. Y.—Solinger v. Earle, 82 N. Y. 393.

A sister making a payment of part of her brother's debts to a creditor to secure his assent to the composition may recover the amount so paid as she is not *in pari delicto*. Smith v. Bromley, 2 Doug. 696, 99 Eng. Reprint 441; Jones v. Barkley, 2 Doug. 684, 99 Eng. Reprint 434.

"In respect to the claim of duress, upon which Smith v. Bromley (2 Doug. 696) was decided, we are of opinion that the doctrine of that and the subsequent cases referred to can only be asserted in behalf of the debtor himself, or of a wife or husband, or near relative of the blood of the debtor, who intervenes in his behalf, and that a person in the situation of the plaintiff, remotely related by marriage, with a debtor, who pays money to a creditor to induce him to sign a composition, cannot be deemed to have paid under duress, by reason simply of that relationship, or of the interest which he might naturally take in his relative's affairs." Solinger v. Earle, 82 N. Y. 393, 399.

"The question here is whether a payment agreed to before a composition is effected, but made afterwards, affords a basis of recovery by the debtor. There is nothing in this class of cases which takes such a transaction out of the ordinary rule already stated, by virtue of which the turning over of the Stevens note several months after the composition was completed was voluntary, and afforded no specific basis of action. This was decided in 1839 by the King's Bench in Wilson v. Ray, 10 A. & E. 82. As already said, this precise point has never come before the Supreme Court or the House of Lords, and Wilson v. Ray was decided long after the Revolution; but it has always been accepted by text-writers of authority." Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 362,

58 C. C. A. 517, *per* Putnam, Circuit Judge.

Though a contract is voidable by reason of a preference, if it is voluntarily performed in part, to the extent of the performance it is binding, and money so voluntarily paid cannot be recovered or credited upon composition notes. Shinkle v. Shearman, 7 Ind. App. 399, 34 N. E. 838.

46. Batchelder, Lincoln & Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517; Bean v. Brookmire, 1 Dill. 151, 2 Fed. Cas. No. 1,169.

Reason of Rule.—"If a creditor, appealed to by his debtor, makes it a condition of his uniting in a composition that he shall have any advantage not enjoyed or made known to the others, the transaction cannot stand either in law or in equity. It is a fraud upon creditors, and they can avoid it. It is treated as oppression or duress towards the debtor, and he may defend against any promise to pay made under such circumstances; or, if he has actually paid, he may recover back the amount, as the law does not consider the parties *in pari delicto*, nor regard the payments thus made as voluntary, and allows such recovery on grounds of public policy." Bean v. Brookmire, 2 Dill. 108, 2 Fed. Cas. No. 1,170.

But a payment made after the composition has been effected cannot be recovered, though made pursuant to a previous agreement. The creditors "have no lien or other right, in the proper sense of the terms, recognized by either the common law or chancery, with reference to any amount received by a creditor who obtained such an advantage." Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517.

47. *In re* Chaplin, 115 Fed. 162; Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 630; Bean v. Brookmire, 2 Dill. 108, 2 Fed. Cas. No. 1,170; 1 Dill. 151, 2 Fed. Cas. No. 1,169; Alsager v. Spalding, 4 Bing. N. C. 407, 33 E. C. L. 393.

48. Gilmour v. Thompson, 6 Daly (N. Y.) 95, 49 How. Pr. 198 (note

2. In Equity.—The creditors need not pursue their remedy at law but may proceed in equity, and on the suit of the creditors, or the debtor alone, the additional notes or securities received in violation of the principles of equality will be decreed to be delivered up and canceled,⁴⁹ or the holder thereof will be enjoined from enforcement thereof,⁵⁰ or if the illegal preference has been enforced through the court's instrumentality, the court will set it aside.⁵¹

V. SPECIFIC PERFORMANCE OF COMPOSITION.—Equity will specifically enforce a composition agreement,⁵² at the suit of the debtor's personal representative⁵³ or on application of his cred-

given after signing of composition); *Horton v. Riley*, 11 M. & W. 492; *Smith v. Cuff*, 6 Maule & Sel. 160, 105 Eng. Reprint 1203.

Composition Fraudulent as Defense. It is a good defense to an action to recover the amount of an illegal preference paid to a bona fide holder, however, that the composition was obtained by fraudulent concealment of a portion of debtor's assets. *Armstrong v. Mechanics' Nat. Bank*, 6 Biss. 520, 1 Fed. Cas. No. 545.

49. *U. S.*—*Bean v. Brookmire*, 1 Dill. 151, 2 Fed. Cas. No. 1,169. *Mass.* *Cobb v. Fogg*, 166 Mass. 466, 44 N. E. 534. *N. Y.*—*Glens Falls Nat. Bank v. Van Nostrand*, 41 Misc. 526, 85 N. Y. Supp. 50, affirmed in 103 App. Div. 598, 92 N. Y. Supp. 1125, where one had innocently given a guaranty with stock as collateral. *Eng.*—*Jackman v. Mitchell*, 13 Ves. Jr. 581, 33 Eng. Reprint 412; *Leicester v. Rose*, 4 East 372, 102 Eng. Reprint 874; *Middleton v. Onslow*, 1 P. Wms. 768, 24 Eng. Reprint 605.

Debtor as Being In Pari Delicto.—In *Small v. Brackley*, 2 Vern. Ch. 602, 23 Eng. Reprint 993, a court of equity refused to grant a debtor relief from a secret agreement by which he gave security for the balance of a debt to induce the creditor to sign the composition, on the ground that he was himself guilty of fraud, and dismissed the bill.

In *Moses v. Katzenberger*, 1 Handy (Ohio) 46, the court refused to compel a judgment creditor who secretly received a preference for securing the assent of the other creditors to the composition to cancel the judgment, though he received the whole amount of his judgment.

50. *Mo.*—*O'Shea v. Collier, etc. Co.*, 42 Mo. 397, 97 Am. Dec. 322, enjoining

trust deed. *N. Y.*—*Almon v. Hamilton*, 100 N. Y. 527, 3 N. E. 580. *Pa.* *Gibbon v. Bellas*, 2 Phila. 390. *Eng.* *Jackman v. Mitchell*, 13 Ves. Jr. 581, 33 Eng. Reprint 412; *Spurret v. Spiller*, 1 Atk. 105, 26 Eng. Reprint 69.

The relief is given not on account of the individual, but of the public. *Jackman v. Mitchell*, 13 Ves. Jr. 581, 33 Eng. Reprint 412.

A trust deed given to a creditor as a secret preference to induce the creditor's signature to the agreement will be enjoined at the creditor's instance. *O'Shea v. Collier, etc. Co.*, 42 Mo. 397, 97 Am. Dec. 322.

A judgment note given to one creditor to induce his assent to the composition will be restrained at the suit of the other creditors, though such note is in the hands of a bona fide assignee. *Gibbon v. Bellas*, 2 Phila. (Pa.) 390, 14 Leg. Int. 327.

51. *Blodget v. Hogan*, 10 La. Ann. 18.

Sale.—Debtor Confessing Judgment to One Creditor.—Where property had been conveyed to a creditor for sale and pro rata distribution but the debtor in order to give an unjust preference to a creditor confessed judgment to him and the creditor had the property sold by the sheriff, the sale will be set aside and payment of the debt decreed. *Blodget v. Hogan*, 10 La. Ann. 18.

52. *U. S.*—*Clarke v. White*, 12 Pet. 178, 9 L. ed. 1046. *Ill.*—*Lobdell v. State Bank of Nauvoo*, 180 Ill. 56, 54 N. E. 157. *N. Y.*—*Matter of Leslie*, 10 Daly 76. *Eng.*—*Only v. Walker*, 3 Atk. 407, 26 Eng. Reprint 1035; *Pollea v. Huband*, 1 P. Wms. 751, 24 Eng. Reprint 598.

53. *Matter of Leslie*, 10 Daly (N. Y.) 76; *Only v. Walker*, 3 Atk. 407, 26 Eng. Reprint 1035 (residuary devi-

itors,⁵⁴ by enforcing an indemnity⁵⁵ or guaranty,⁵⁶ or surrender of notes to be cancelled.⁵⁷ But equity will not enforce a guaranty of a composition at the suit of a creditor who failed to sign the composition within the time specified,⁵⁸ nor can the debtor enforce the same where he gave an illegal preference to some creditors to secure their assent to the composition.⁵⁹

VI. BURDEN OF PROOF.—While the burden of proof to show that the composition has been followed by performance of all the acts necessary to consummate it,⁶⁰ or of all the conditions precedent, where a conditional composition agreement is set up, is upon the debtor,⁶¹ the burden of proving that the assent of all creditors was required to make the composition valid,⁶² and of proving fraudulent preferences, is upon the creditor suing for the balance of his debt.⁶³ The burden of proving the omission of a provision in the agreement by mistake, where the signing of the agreement was admitted, is upon the party alleging the mistake.⁶⁴

VII. PROVINCE OF COURT AND JURY.—The question as to whether an agreement is one between the debtor and one creditor, or between the debtor and all his creditors, where the evidence is conflicting,⁶⁵ or whether composition notes were given within a reasonable time, no time being specified, is for the jury.⁶⁶

see); *Pollen v. Huband*, 1 P. Wms. 751, 24 Eng. Reprint 598 (executor and devisee).

54. *Lobdell v. State Bank of Nauvoo*, 180 Ill. 56, 54 N. E. 157 (non-assenting creditor as complainant); *Synnot v. Simpson*, 5 H. L. Cas. 121, 10 Eng. Reprint 844.

55. *Pollen v. Huband*, 1 P. Wms. 751, 24 Eng. Reprint 598.

Indemnifying Executor.—*Pollen v. Huband*, 1 P. Wms. 751, 24 Eng. Reprint 598.

56. *Lobdell v. State Bank of Nauvoo*, 180 Ill. 56, 54 N. E. 157, a guaranty given to one creditor who was held to be a trustee for all.

57. *Clarke v. White*, 12 Pet. (U. S.) 178, 9 L. ed. 1046.

58. *Emmett v. Dewhurst*, 3 Mac. & G. 587, 15 Jur. 1115, 42 Eng. Reprint 386.

59. *Child v. Danbridge*, 2 Vern. 71, 23 Eng. Reprint 655.

60. *N. Y.*—*Dolsen v. Arnold*, 10 How. Pr. 528, 530. *Pa.*—*Artman v. Truby*, 130 Pa. 619, 18 Atl. 1065 (consent of all creditors except certain named lien holders required); *Lower v. Clement*, 25 Pa. 63 ("assent of all creditors in given place required"). *Eng.*—*Daglish v. Tennent*, 36 L. J. Q. B. 10, L. R. 2 Q. B. 49, 8 B. & S. 1, 15 W. R. 196.

61. *Lower v. Clement*, 25 Pa. 63, assent of "all" creditors must be shown where composition void if assent of "all" creditors is not received.

62. *Tutt v. Price*, 7 Mo. App. 194.

63. *Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 310, 66 N. W. 606.

64. *Robinson, etc. Co. v. Meyers*, 32 Ky. L. Rep. 280, 105 S. W. 428, that sureties not released.

65. *First Nat. Bank v. Steele*, 58 Minn. 126, 59 N. W. 959.

66. *Hall v. Merrill*, 9 Abb. Pr. (N. Y.) 116.

COMPOUNDING CRIME

By ARTHUR E. DENNIS,
Of the Los Angeles Bar.

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II. THE INDICTMENT OR INFORMATION, 190

III. TIME OF TRIAL, 193

I. DEFINITION. — Compounding a felony is refraining, or agreeing to refrain, from prosecuting one guilty of a felony, for a valuable consideration.¹

Misdemeanors. — The crime of compounding is not limited to agreement concerning felonies, but may be committed with respect to a misdemeanor of a public nature.²

1. Burrill defines it as "the offense of taking a reward for forbearing to prosecute a felony. As where a party robbed takes his goods again, or other amends upon an agreement not to prosecute." Burrill Law Dict.

The gist of the offense "is the concealing of the crime, and abstaining from prosecution to the detriment of the public," says Parker, C. J., in *Com. v. Pease*, 16 Mass. 91.

2. 1 Chitty Cr. Law, p. 4, and the following cases: *Ala.*—*Robinson v. Crenshaw*, 2 Stew. & P. 276. *Mass.*—*Partridge v. Hood*, 120 Mass. 403, 21 Am. Rep. 524. *N. J.*—*Price v. Summers*, 5 N. J. L. 667. *Pa.*—*Maurer v. Mitchell*, 9 Watts & S. 69. *Tex.*—*Powell v. State*, 101 S. W. 1006. *Vt.*—*Holcomb v. Stimpson*, 8 Vt. 141. *Eng.*—*Keir v. Leeman*, 6 Ad. & El. (N. S.) 308, 51 E. C. L. 308.

Misdemeanors which are purely personal may be compromised. *Ala.*—*Moog v. Strang*, 69 Ala. 98. *Ark.*—*Breathwit v. Rogers*, 32 Ark. 758. *Conn.*—*McMahon v. Smith*, 47 Conn. 221, 36 Am. Rep. 67. *Ga.*—*Chandler v. Johnson*, 39 Ga. 85. *Me.*—*Soule v. Bonney*, 37 Me. 128. *Mass.*—*Com. v. Pease*, 16 Mass. 91. *N. H.*—*State v. Carver*, 69 N. H. 216, 39 Atl. 973. *Pa.*—*Pearce v. Wilson*, 111 Pa. 14, 2 Atl. 99, 56 Am. Rep. 243; *Geier v. Shade*, 109 Pa. 180; *Sharp*

v. Philadelphia W. Co., 14 Phila. 513. But this is not so as to those which affect the public and give rise to a public prosecution. *Ia.*—*Peed v. McKee*, 42 Iowa 689. *Ky.*—*Gardner v. Maxey*, 9 B. Mon. 90; *Kimbrough v. Lane*, 11 Bush 556. *Me.*—*Shaw v. Reed*, 30 Me. 105. *Mass.*—*Com. v. Johnson*, 3 Cush. 454. *Mich.*—*Buck v. First Nat. Bank*, 27 Mich. 293. *N. H.*—*Clark v. Ricker*, 14 N. H. 44. *S. C.*—*Corley v. Williams*, 1 Bailey 588. *Vt.*—*Bowen v. Buck*, 28 Vt. 308. *Wis.*—*Fay v. Oatley*, 6 Wis. 42.

In *State v. Carver*, 69 N. H. 216, 39 Atl. 973, it is said that taking money or other reward or promise of reward, to forbear or stifle a criminal prosecution for a misdemeanor, against public justice and dangerous to society, "was an indictable offense by the common law, the same as it unquestionably was for a felony (*Partridge v. Hood*, 120 Mass. 403, 405, 406, 407), and that it has always been so understood and received here, as well as in other jurisdictions." Citing *Conn.*—*State v. Dowd*, 7 Conn. 384, 386. *Mass.*—*Jones v. Rice*, 18 Pick. 440; *Com. v. Pease*, 16 Mass. 91. *N. H.*—*Severance v. Kimball*, 8 N. H. 386, 387; *Hinds v. Chamberlin*, 6 N. H. 229; *Plumer v. Smith*, 5 N. H. 553, 554. *Vt.*—*State v. Carpenter*, 20 Vt. 9; *Hinesburgh v. Sum-*

Illustrations.—The most common instance of compounding a felony is that of the owner of stolen property agreeing not to prosecute the thief in consideration of the return of the goods or payment of their value,³ or, in case of a crime against the person, payment of the damages occasioned thereby.⁴ But it is by no means limited to one who is thus directly affected by the crime, though there are *dicta* and definitions which would seem to indicate it.⁵ Any one, having knowledge of the commission of a crime, who suppresses the information or in any way assists the felon to escape prosecution for a reward is guilty of the offense.⁶

II. THE INDICTMENT OR INFORMATION.—The indictment or information should allege all the facts necessary to constitute the offense under the statute.⁷

Commission of Offense.—In order to refrain, or agree to refrain, from prosecuting one guilty of a felony, a crime must first have been committed.⁸ So the indictment should allege the commission of a

ner, 9 Vt. 23, 26; *State v. Keyes*, 8 Vt. 57, 67; *Badger v. Williams*, 1 D. Chip. 137, 138, 139.

3. *McMahon v. Smith*, 47 Conn. 221, 36 Am. Rep. 67.

4. *Chandler v. Johnson*, 39 Ga. 83.

5. The explanation of such expressions is clearly set out by Coleridge, C. J., in *Queen v. Burgess*, L. R. 16 Q. B. D. 141. "Then it is said that the offense alleged is the old offense of theft-bote and that no one can be guilty of that offense except the owner of the goods. I do not deny that by some writers, especially by Lord Coke, expressions have been used which may be read so as to afford some countenance to this contention. It seems to me, however, that, when the writers in question so expressed themselves, it was probably because the question whether the offense could be committed by persons other than the owner of the goods was not then present to their minds, and they were dealing with what would be the case on ninety-nine out of a hundred occasions, viz., the case where the person who was guilty of interfering with the course of justice for his own benefit was the owner of the goods. One can easily see, I think, how it has happened in this way that language has been used which seems to favor to some extent the contention for the defendant, but it must be observed that the writers of the passages to which I refer do not use any negative expressions to the effect that the offense can only be committed by the owner of the goods."

6. *Ia.*—*State v. Johnson*, 149 Iowa 462, 128 N. W. 837; *State v. Ruthven*, 58 Iowa 121, 12 N. W. 235. *N. Y.*—*In re Hart*, 131 App. Div. 661, 116 N. Y. Supp. 193. *N. C.*—*State v. Furr*, 121 N. C. 606, 28 S. E. 552. *Tex.*—*Williams v. State*, 100 S. W. 149.

7. *People v. Bryon*, 103 Cal. 675, 37 Pac. 754, where it is pointed out that the facts necessary to constitute an offense under Cal. Penal Code, §153, are: "Knowledge of the actual commission of a crime, and the taking of money or property of another upon an agreement or understanding to compound or conceal such crime."

In *Alabama* the form of indictment is given in the Code, 1907, §7161, form 35, which is as follows: "A. B., knowing that one C. D. had been guilty of the commission of burglary, took, or agreed to take, from the said C. D. money or other property, to compound or conceal such felony, or to abstain from any prosecution therefor."

An indictment substantially following the statutory form is good. *Watt v. State*, 97 Ala. 72, 11 So. 901.

8. 2 Whart. Pr. 895; Chit. Cr. Law, 221, and the following: *Cal.*—*People v. Bryon*, 103 Cal. 675, 37 Pac. 754. *Ia.*—*Smith v. Steely*, 80 Iowa 738, 45 N. W. 912. *N. J.*—*State v. Hanson*, 69 N. J. L. 42, 54 Atl. 841; *State v. Leeds*, 68 N. J. L. 210, 52 Atl. 288.

"How defendant could be guilty of compounding a felony by taking or receiving the property conveyed by the deed to compound or conceal such felony, or to abstain from any prosecution

crime and describe it with such accuracy that the defendant may know with certainty the exact facts on which the charge is based.⁹

Under some statutes it is only necessary to aver that the prosecution was for what appeared to be a crime.¹⁰ In some states the common law offense has been so extended as to make the agreement the gist of the offense so that the crime of compounding may be committed though the original felony be not proved.¹¹

tion therefor, if complainant's husband had committed no offense, we are unable to perceive. Had he been indicted for the compounding of a felony by receiving the deed from complainant, in consideration of his promise to conceal or to abstain from a prosecution of her husband, it would have been a perfect defense to have shown that complainant's husband was not guilty of obtaining the money by false pretenses—that the charge and prosecution was unfounded, and could not have been successfully maintained." *Treadwell v. Torbert*, 122 Ala. 297, 25 So. 216.

"It would seem that, in the light of the language uniformly used (in defining the offense), there could be no doubt that, before a conviction can be had, it must be made to appear that a felony has been committed by the person with whom the corrupt agreement was made." *Connor, J.*, in *State v. Hodge*, 142 N. C. 665, 55 S. E. 626.

This would also seem to follow from the fact that the position of one who compounds a felony is similar to that of an accessory, and to convict the latter there must be a guilty principal. After discussing taking a reward under pretense of helping the owner to his stolen goods and receiving stolen goods, knowing them to be such, *Blackstone* says (4 *Black. Com.* 133): "Of a nature somewhat similar to the two last is the offense of *theft bote*, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. This is frequently called compounding of felony, and formerly was held to make a man an accessory, but it is now punished only with fine and imprisonment."

9. *Ala.*—*Watt v. State*, 97 Ala. 72, 11 So. 901. *Cal.*—*People v. Bryon*, 103 Cal. 675, 37 Pac. 754. *Ind.*—*State v. Henning*, 33 Ind. 189. *Ia.*—*Deere v. Wolff*, 65 Iowa 32, 21 N. W. 168. *N. J.*

State v. Leeds, 68 N. J. L. 210, 52 Atl. 288. *N. C.*—*State v. Hodge*, 142 N. C. 665, 55 S. E. 626. *Tex.*—*Williams v. State*, 100 S. W. 149.

Indictment laying the offense of compounding at a date later than the original crime, held insufficient. *State v. Dandy*, 1 Brev. (S. C.) 395.

"A careful examination of every case at our command fails to discover any one in which an indictment is sustained which omits the averment that a crime had been committed." *State v. Hodge*, 142 N. C. 665, 55 S. E. 626.

In *People v. Bryon*, *supra*, an information was upheld which charged that the crime of grand larceny was committed by Hardy (the felon), and stated *when, where and how* it was committed.

In *Iowa* an indictment is insufficient which does not charge that the offense compounded was punishable by imprisonment in the penitentiary. *State v. Guthrie* (Iowa), 129 N. W. 804; Code, §§4889, 4890.

The fact of the previous conviction or acquittal of the party charged with crime would be only *prima facie* evidence of the guilt or innocence of the defendant. *State v. Duhamel*, 2 Har. (Del.) 532; *People v. Buckland*, 13 Wend. (N. Y.) 592.

10. *Fribly v. State*, 42 Ohio St. 205.

In *State v. Carver*, 69 N. H. 216, 39 Atl. 973, a motion to quash the indictment because it described the offense for which composition was made as a "*supposed offense*," was denied.

It is so held under 18 Eliz. ch. 5 (27 Eliz. ch. 10, amended by 56 Geo. III, ch. 138) denouncing a composition "upon colour or pretense of any matter of offence against any penal law." *Rex v. Best*, 9 Car. & P. 368, 38 E. C. L. 159.

11. *State v. Carver*, 69 N. H. 216, 39 Atl. 973.

"The agreement not to prosecute constitutes the offense. . . . The bar-

Knowledge.—The information should also charge the defendant with knowledge of the commission of the crime.¹²

Agreement.—The state must also charge and prove the agreement not to prosecute,¹³ the mere failure of the defendant to prosecute not

gain and acceptance of the reward makes the crime." *State v. Duhamel*, 2 Har. (Del.) 532.

The conviction in *Fibly v. State*, 42 Ohio St. 205, was based on §6901 of the Rev. St., which provided that: "Whoever either directly or indirectly demands or receives any money, or other thing of value, for compounding or abandoning, or agreeing to abandon any prosecution threatened or commenced for any crime or misdemeanor, shall be fined, etc." Commenting on this, the court said, "The plain purpose of the statute is not only to prevent the suppression of prosecutions for actual crimes by private barter, but to prevent or punish the prostitution of the criminal processes of the law to purposes of private gain by groundless prosecutions. It is necessary to aver and prove that the prosecution was for what appeared by the charge to be a crime, but it is not necessary that the actual commission of such crime be either averred or proved." The further objection is pointed out that such a rule "would impose upon the state a double burden, making conviction difficult if not impossible, and in most cases require the injured parties, and those most likely to be interested in prosecuting offenses against section 6901, to establish their own guilt of the crime charged in the prosecution compounded."

In *Reg. v. Best*, 9 Car. & P. 360, 38 E. C. L. 159, the conviction was under St. 18 Eliz., ch. 504, making it a crime to compound a penalty "upon color and pretense of any matter of offense," and it was said that "the party may be convicted, though no offense liable to a penalty has been committed by the person from whom the reward is taken." It is generally held, however, that the prosecution must make a reasonable showing of the commission of a crime though it need not be proved with the same conclusiveness as would be required to convict the felon. *Swope v. Jefferson Fire Ins. Co.*, 93 Pa. 251.

12. *Ala.*—*Watt v. State*, 97 Ala. 72,

11 So. 901. *Cal.*—*People v. Bryon*, 103 Cal. 675, 37 Pac. 754. *Ind.*—*State v. Henning*, 33 Ind. 189. *La.*—Code, §4890; *State v. Guthrie*, 129 N. W. 804. *N. J.*—*State v. Hanson*, 69 N. J. L. 42, 54 Atl. 841. *Vt.*—*State v. Wilson*, 80 Vt. 249, 67 Atl. 533.

It is sufficient to charge the defendant with "having knowledge," it not being necessary to charge him with knowledge of the "actual" commission of the crime, the omission of the word "actual" being immaterial, though the statute defining the offense uses that word. *People v. Bryon*, *supra*.

13. *People v. Bryon*, 103 Cal. 675, 37 Pac. 754; *State v. Hodge*, 142 N. C. 665, 55 S. E. 626, citing *Swope v. Jefferson Fire Ins. Co.*, 93 Pa. 251, where it is said that "the guilt of the party accused and the agreement not to prosecute are essential ingredients in the compounding of a felony."

It need not allege that he has not prosecuted. *Queen v. Burgess*, L. R. 16 Q. B. D. 141.

There must be an agreement not to prosecute or there is no compounding. The injured party may accept the return of his goods or compensation therefor, or payment for the injury inflicted upon him, without laying himself liable to prosecution, if he does not bind himself to refrain from prosecuting the offender. *Ala.*—*Bibb v. Hitchcock*, 49 Ala. 468, 20 Am. Rep. 288. *Colo.*—*Percheron Norman Horse Co. v. Downen*, 18 Colo. 71, 31 Pac. 501. *Conn.*—*Von Windisch v. Klaus*, 46 Conn. 433. *Ga.*—*Wheaton v. Ansley*, 71 Ga. 35; *Chandler v. Johnson*, 39 Ga. 85. *Ill.*—*Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588n; *Bothwell v. Brown*, 51 Ill. 234. *Ia.*—*Deere v. Wolff*, 65 Iowa 32, 21 N. W. 168. *La.*—*Morgan v. Knox*, 15 La. Ann. 176. *Md.*—*Schirm v. Wieman*, 103 Md. 541, 63 Atl. 1056. *Neb.*—*Cass Co. Bank v. Bricker*, 34 Neb. 516, 52 N. W. 575, 33 Am. St. Rep. 649. *N. H.*—*Souhegan Bank v. Wallace*, 61 N. H. 24. *N. J.*—*Brittin v. Chegary*, 20 N. J. L. 625. *N. Y.*—*City of Cohoes v. Cropsey*, 55 N. Y. 685. *Pa.*—*Portner v. Kirschner*, 169 Pa. 472, 32 Atl. 442, 17 Am. St. Rep. 925. *Tenn.*—*Prov-*

being enough unless in furtherance of an agreement to that effect.¹⁴

Subsequent Prosecution.—The crime is consummated when the agreement is made,¹⁵ and, therefore, is not purged by a subsequent prosecution.¹⁶

The Intent.—And the information should allege that the agreement was made with intent to hinder the course of justice and to cause the felon to escape punishment.¹⁷

Reward.—The indictment must allege that something has been received, by way of inducement to the commission of the offense, since it should appear to be for the sake of gain, and not merely from weakness or compassionate motives.¹⁸ The consideration need not be goods or money, but may be anything of value to the receiver. Even a promise to pay, evidenced by a note, has been held sufficient.¹⁹

III. TIME OF TRIAL.—In harmony with the rules allowing an accessory to be tried before the principal, the prosecution for compounding felony may now in some states precede that of the felon.²⁰

ident, etc. Soc. v. Edmonds, 95 Tenn. 53, 31 S. W. 168. Wis.—Catlin v. Henton, 9 Wis. 476.

"If A receives his goods again simply without any contract to favor him (the thief) in his prosecution, or to forbear prosecution, this is lawful; but if he receives them upon agreement not to prosecute, or to prosecute faintly, this is theft-bote." 1 Hale P. C. 619.

The agreement need not, however, be made in so many words but may be implied from the negotiations or from vague terms, since it is usually expressed in covert language. Mass. Clark v. Pomeroy, 4 Allen 534. Mo. Sumner v. Sumners, 54 Mo. 340. N. H. Forshner v. Whitcomb, 44 N. H. 14. N. Y.—Conderman v. Hicks, 3 Lans. 108. Pa.—Riddle v. Hall, 99 Pa. 116.

An information is deficient which does not allege an agreement between the defendant and a third party who carried on the negotiations with the guilty party, to extort the money from him. Williams v. State, 51 Tex. Crim. 1, 100 S. W. 149.

14. Stancel v. State, 50 Ga. 152.

15. Forshner v. Whitcomb, 44 N. H. 14; Edgecomb v. Rudd, 5 East 294, 102 Eng. Reprint 1082.

16. State v. Duhamel, 2 Har. (Del.) 532.

In Queen v. Burgess, L. R. 16 Q. B. D. 141, 15 Cox C. C. 779, 50 J. P. 520, 55 L. J. M. C. 97, 53 L. T. N. S. 918, 34 W. R. 306, where it was said that if this were not so it would be "difficult to see when such offense can be said to be complete," since "a man might conceivably make an illegal agreement not to prosecute and abstain from prosecuting for six years, and then might turn round and prosecute after all in breach of the agreement."

In Rex v. Stone, 4 Car. & P. 379, 19 E. C. L. 429, the defendant was discharged on the ground that the criminal had in fact been prosecuted and convicted, but in that case the indictment charged that he "desisted and from that time has desisted from all further prosecution, etc."; an allegation not now essential.

17. State v. Wilson, 80 Vt. 249, 67 Atl. 533.

This is to be determined from the natural consequences of the agreement and irrespective of the good faith of the parties. Windhill v. Vint, 45 Ch. Div. 351, 38 W. R. 738.

18. Com. v. Pease, 16 Mass. 91.

19. Com. v. Pease, 16 Mass. 91; Fribly v. State, 42 Ohio St. 205.

20. Watt v. State, 97 Ala. 72, 11 So. 901; State v. Guthrie (Iowa), 129 N. W. 804.

COMPROMISE AND SETTLEMENT

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I. STATUS OF THE AGREEMENT. — An adjustment by way of compromise of disputed matters between the parties themselves¹ is favored by the law which will sustain an agreement of settlement, in the absence of fraud or mistake.²

1. **Ky.**—*Western, etc. Ins. Co. v. Quinn*, 130 Ky. 397, 113 S. W. 456 (holding it immaterial to the validity of the compromise that it subsequently developed that one of the parties was right and the other wrong); *Gray v. United States, etc. Co.*, 116 Ky. 967, 77 S. W. 200; *American Mut. Aid Society v. Bronger*, 91 Ky. 406, 15 S. W. 1118; *Creutz v. Heil*, 89 Ky. 429, 12 S. W. 926. **Mich.**—*Morgan v. Hodges*, 89 Mich. 404, 50 N. W. 876, 15 L. R. A. 438. **N. J.**—*Worcester Loom Co. v. Heald*, 72 Atl. 421.

"The settlement of a controversy is valid and binding, not because it is the settlement of a valid claim, but because it is the settlement of a controversy." *Smith v. Farra*, 21 Ore. 395, 28 Pac. 241, 20 L. R. A. 115.

For definition see *Oglesby v. Attrill*, 105 U. S. 605, 26 L. ed. 1186, and *New*

Orleans v. Warner, 180 U. S. 199, 21 Sup. Ct. 353, 45 L. ed. 493.

2. **U. S.**—*Boffinger v. Tuyes*, 120 U. S. 193, 7 Sup. Ct. 529, 30 L. ed. 649; *Brown v. Spofford*, 95 U. S. 474, 24 L. ed. 508 (compromises will be upheld unless some rule of law be violated in the transaction); *French v. Shoemaker*, 14 Wall. 314, 20 L. ed. 852 (compromise is favored by equity); *May v. LeClaire*, 11 Wall. 217, 20 L. ed. 50; *Kelsey v. Hobby*, 16 Pet. 269, 10 L. ed. 961. **Ark.**—*Kahn v. Metz*, 88 Ark. 363, 114 S. W. 911; *Fletcher v. Whitlow*, 72 Ark. 234, 79 S. W. 773. **Cal.**—*Dickie v. Steiger*, 4 Cal. App. 622, 88 Pac. 814. **Colo.**—*Berdell v. Bissell*, 6 Colo. 162. **Ia.**—*Billau v. Kern*, 107 N. W. 307. **Ky.**—*Petry v. Petry*, 142 Ky. 564, 134 S. W. 922; *Judson v. Bowser*, 28 Ky. L. Rep. 1288, 91 S. W. 727; *Mitchell's Heirs*

Adequacy and inadequacy of consideration for a compromise fairly and deliberately made will not be inquired into.³

A claim without foundation furnishes no basis for a settlement upon

v. Long, 5 Litt. 71. **Me.**—*Doyle v. Donnelly*, 56 Me. 26; *Jordan v. Stevens*, 51 Me. 78. **Mich.**—*Averill v. Wood*, 78 Mich. 342, 44 N. W. 381; *Nash v. Manistee Lumb. Co.*, 75 Mich. 346, 42 N. W. 840; *Hart v. Gould*, 62 Mich. 262, 28 N. W. 831; *Pritchard v. Sharp*, 51 Mich. 432, 16 N. W. 798; *Craig v. Bradley*, 26 Mich. 353. **Mo.**—*Mateer v. Missouri Pac. R. Co.*, 105 Mo. 320, 16 S. W. 839; *Dalpine v. Lume*, 145 Mo. App. 549, 122 S. W. 776. **N. J.**—*Ackerman v. Ackerman*, 44 N. J. L. 173. **N. Y.**—*Shank v. Shoemaker*, 18 N. Y. 489; *Coon v. Knap*, 8 N. Y. 402; *Potter v. Smith*, 14 Johns. 444; *Steele v. White*, 2 Paige 478; *People v. New York, etc. R. Co.*, 133 App. Div. 476, 117 N. Y. Supp. 1048; *Wadsworth v. Board of Suprs.*, 115 N. Y. Supp. 8. **N. D.**—*McGlynn v. Scott*, 4 N. D. 18, 58 N. W. 460. **E. I.**—*Supreme Assembly Royal Society, etc. v. Campbell*, 17 R. I. 402, 22 Atl. 307, 13 L. R. A. 601, annotated case. **Tex.**—*Williams v. Nolan*, 58 Tex. 708. **Eng.**—*Thornton v. Fairlie*, 8 Taunt. 354, 4 E. C. L. 130; *Penn v. Baltimore*, 1 Ves. Sr. 144, 27 Eng. Reprint 1132.

"The mere fact that a man has made a poor bargain is no ground for setting it aside. Neither can a settlement of a controversy be avoided because of a mistaken conception of its effect by one of the parties, unless it be shown that he was induced to agree to it by some act of the other party which would amount to a fraud upon his rights; and where a party has, for a valuable consideration, executed a solemn instrument of release, there ought to be pretty strong and clear evidence impeaching it to warrant a court or jury in avoiding it." *Christianson v. Chicago, etc. R. Co.*, 67 Minn. 94, 69 N. W. 640.

Where a compromise of an action is effected by advice of counsel, it will be presumed that the plaintiff recovered more in that way than he would have done by going on with the litigation. *Comer v. Illinois Car & Equipment Co.*, 108 La. 179, 32 So. 380. And see *Williams v. Nolan*, 58 Tex. 708.

To a settlement by which money is paid by an insurance company to the

representatives of the insured who is supposed to be dead cannot be recovered back. *New York L. Ins. Co. v. Chittenden*, 134 Iowa 613, 112 N. W. 96, 11 L. R. A. (N. S.) 233. Here "there was a compromise on the question whether anything was payable; and for the purpose of avoiding litigation, the plaintiff elected to make payment." See also *Sears v. Grand Lodge*, 163 N. Y. 374, 57 N. E. 618, 50 L. E. A. 204. See, *infra*, this section.

Contrary to the policy of the law to disturb a settlement long acquiesced in. **U. S.**—*McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. 29, 35 L. ed. 804. **Ark.**—*Russell v. Stewart*, 78 Ark. 603, 94 S. W. 47, holding that an action to annul a compromise must be brought within a reasonable time. **Ill.**—*Groenendyke v. Coffeen*, 109 Ill. 325; *Bogne v. Franks*, 100 Ill. App. 434, *affirmed*, 199 Ill. 411, 65 N. E. 346 (three years). **Kan.**—*Yeaman v. James*, 29 Kan. 373. **Ky.**—*Nevian v. New Albany Ice Co.*, 24 Ky. L. Rep. 400, 68 S. W. 647, five years. **Mich.**—*Northrup v. Gray*, 122 Mich. 700, 81 N. W. 961, 6 Det. Leg. N. 971 (thirty years); *Rayl v. Hammond's Estate*, 100 Mich. 140, 58 N. W. 654 (ten years). **N. J.**—*Swayze v. Swayze*, 37 N. J. Eq. 180, five years. **Pa.**—*Johnston v. Furnier*, 69 Pa. 449; *Randel v. Ely*, 3 Brewst. 270 (six years). **S. C.**—*Fraser v. Hext*, 2 Strobb. Eq. 250. **Tenn.**—*Boyd v. Robinson*, 93 Tenn. 1, 23 S. W. 72. **Wash.**—*Burrows v. Williams*, 52 Wash. 278, 100 Pac. 340.

S. Ill.—*Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588. **Mich.**—*Sanford v. Huxford*, 32 Mich. 313, 20 Am. Rep. 647. **N. J.**—*Worcester Loom Co. v. Heald*, 78 N. J. L. 172, 72 Atl. 421; *Bowers Hydraulic Dredging Co. v. Hess*, 71 N. J. L. 327, 60 Atl. 362; *Grandin v. Grandin*, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642; *Clark v. Turnbull*, 47 N. J. L. 265, 54 Am. Rep. 157; *Trenton St. R. Co. v. Lawlor*, 74 N. J. Eq. 828, 71 Atl. 234, 74 Atl. 668. **Tex.**—*City of Longview v. Copps* (Tex. Civ. App.), 123 S. W. 160. **Va.**—*Southall v. Farish*, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641. **Wis.**—*Galusha v.*

which a recovery can be had.⁴ And whenever by a palpable mistake of law or fact, essentially bearing upon and affecting the contract, money has been paid without cause or consideration, which in law, honor or conscience was not due or payable, and which in honor or good conscience ought not to be retained, it may be recovered back.⁵ Much stronger is the reason for recovery where the plaintiff is induced to enter into the settlement by the actual false and fraudulent misrepresentations of the defendant, cunningly made.⁶

II. ACTION UPON ORIGINAL CLAIM.—A. PLEA OF SETTLEMENT.—A compromise or settlement must be specially pleaded, in order that any proof regarding it may be admitted,⁷ and the plea should set out the terms and conditions thereof,⁸ and the time of per-

Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

4. *Ind.*—Moon v. Martin, 122 Ind. 211, 23 N. E. 668. *Ia.*—Sullivan v. Collins, 18 Iowa 228. *Mich.*—Morgan v. Hodges, 89 Mich. 404, 50 N. W. 876, 15 L. R. A. 438, annotated case. *Mich.* Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 504. *N. H.*—Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615. *N. Y.* Crosby v. Wood, 6 N. Y. 369; Sherman v. Barnard, 19 Barb. 291. *D. I.* Anthony v. Boyd, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657. *Vt.*—Ormsbee v. Howe, 54 Vt. 182, 41 Am. Rep. 841.

5. Ray v. Bank of Kentucky, 3 B. Mon. (Ky.) 510, 39 Am. Dec. 479; Underwood v. Brockman, 4 Dana (Ky.) 309, 39 Am. Dec. 479. These cases were followed in Louisville & N. R. Co. v. Hopkins County, 87 Ky. 605, 9 S. W. 497.

6. Titus v. Rochester German Ins. Co., 97 Ky. 567, 31 S. W. 127, 28 L. R. A. 478. See also Heinlein v. Imperial Life Ins. Co., 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627; Springfield Fire & Marine Ins. Co. v. Hull, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37.

7. *Cal.*—Smith v. Owens, 21 Cal. 11, a note in settlement of other notes. *Neb.*—Gandy v. Wiltse, 79 Neb. 280, 112 N. W. 569, holding that giving a note in settlement must be specially pleaded. *N. Y.*—Auerback v. Curie, 119 App. Div. 175, 104 N. Y. Supp. 233. *N. D.*—Mitchell v. Knudtson Land Co., 124 N. W. 946. *Utah.*—Rutan v. Huck, 30 Utah 217, 83 Pac. 833. *Wis.*—Petersen v. Elholm, 130 Wis. 1, 109 N. W. 76; Barker v. Ring, 97 Wis. 53, 72 N. W. 222.

The fact that the answer is wanting

in form and completeness in its allegations of settlement will not deprive defendant of the right to admit proof of such issue. Forbes v. Petty, 37 Neb. 899, 56 N. W. 730.

Although the settlement is not pleaded specially, if evidence is admitted without objection, the question may be decided as if by consent. Petersen v. Elholm, 130 Wis. 1, 109 N. W. 1034. See also Kelly v. Hopkins, 105 Minn. 155, 117 N. W. 396.

Allegation of attempts to settle not sufficient. Bryan v. Moredick, 9 Ky. L. Rep. 403.

Where a compromise is set up as a defense but is declared invalid, the amount paid on the attempted compromise should be credited on the judgment, which was for the full amount. City of Middlesboro v. Coal & Iron Bank, 33 Ky. L. Rep. 961, 111 S. W. 335.

Answer, and Not Motion To Dismiss. George v. Chicago, etc. R. Co., 85 Iowa 590, 52 N. W. 512.

8. Parkinson v. Boddiker, 10 Colo. 503, 15 Pac. 806; Forbes v. Petty, 37 Neb. 899, 56 N. W. 730.

In Forbes v. Petty, 37 Neb. 899, 56 N. W. 730, the answer contained this defense: "That in the year 1881 this defendant had a full and complete settlement, and a full and complete arbitration and settlement, of all matters and things in dispute, which settlement and arbitration included all matters and things in controversy between plaintiff and defendant at the time, and more especially the matter referred to in the plaintiff's petition." Considering the effect of this plea the court said: "It is claimed by the plaintiff that the only question at issue is that

formance also should be averred with reasonable certainty.⁹

General Issue. — In some states a settlement may be shown under the general issue.¹⁰

Burden of Proof. — Since a plea of settlement is an affirmative defense, the burden of proof rests on the defendant,¹¹ and this defense must be supported by a preponderance of evidence.¹²

Settlement Pendente Lite.¹³ — Strictly speaking, a plea alleging settlement after the commencement of the action is not good as a bar to the action itself, because containing matter which arose after the

of the arbitration. On the other hand, it is contended by the defendant that he is not confined to the arbitration alleged, but that his answer presents as well the issue of settlement, as a distinct and separate defense in no way depending upon the question of arbitration. We agree with counsel that the proof of settlement was rightly admitted under the issues. When tested by an objection in the nature of a demurrer, it is clear that both defenses are sufficiently alleged in the answer. Had it been assailed by a motion for a more specific statement of the matters alleged therein, such objection would have been well taken."

9. In *Schwartz v. B. C. Evans Co.*, 75 Tex. 198, 12 S. W. 863, the following plea was held good as against a general demurrer, the time of performance not being of the essence of the contract: "That in November, 1885, plaintiff claimed to have and hold a balance of indebtedness against defendant by reason of the notes sued on, and for merchandise sold to defendant of about five hundred dollars; that defendant claimed that the amount he owed plaintiff on said matters was a sum much less than five hundred dollars; that for the purpose of settling said dispute and controversy, on the said date, it was mutually agreed by and between plaintiff and defendant, that defendant should pay plaintiff two hundred and fifty dollars, which sum should constitute and be a payment in full of all demands, including all claims by reason of any balance on the notes here sued on; and that afterwards, in pursuance of said agreement, and in part payment of said two hundred and fifty dollars, defendant paid and delivered to plaintiff a fine gold watch, at and for the agreed price of one hundred and twenty-five dollars, which was

by plaintiff taken and accepted in pursuance of said agreement; and that defendant afterwards tendered to plaintiff one hundred and twenty-five dollars and interest thereon from the date of said settlement, but plaintiff refused to receive the same."

10. *Schwartz v. Southerland*, 51 Ill. App. 175.

11. *Ind.*—*Indianapolis St. R. Co. v. Haverstick*, 35 Ind. App. 281, 74 N. E. 34, 111 Am. St. Rep. 163. *Ia.*—*Johnson v. Berdo*, 131 Iowa 524, 106 N. W. 609; *Barber v. Maden*, 126 Iowa 402, 102 N. W. 120. *Mass.*—*Walton v. Eldridge*, 1 Allen 203. *Mich.*—*Snyder v. Snyder*, 95 Mich. 51, 54 N. W. 721; *Baumier v. Antiau*, 79 Mich. 509, 44 N. W. 939. *Mo.*—*Wood v. Kansas City Home Telephone Co.*, 223 Mo. 537, 123 S. W. 6, defense of duress and failure of consideration. *Neb.*—*Home Fire Ins. Co. v. Bredehoft*, 49 Neb. 152, 68 N. W. 400.

See the title "**Compromise and Settlement**" in the *ENCYCLOPEDIA OF EVIDENCE*.

However, in an action to recover money paid under protest, where the answer admits the payment, but alleges that it was a payment on a settlement, the presumption is in favor of the settlement, and burden of proof on the plaintiff. *Sewell v. Mead*, 45 Iowa 343, 52 N. W. 227.

Evidence of a receipt in full is a *prima facie* defense, and the burden of proof shifts to the plaintiff to rebut it by proof of fraud or mistake. *McElhaney v. People*, 1 Ill. App. 550; *Curley v. Harris*, 11 Allen (Mass.) 112.

12. *Indianapolis St. R. Co. v. Haverstick*, 35 Ind. App. 281, 74 N. E. 34, 111 Am. St. Rep. 163; *Baumier v. Antiau*, 79 Mich. 509, 44 N. W. 939.

13. See the title "**Accord and Satisfaction**."

commencement of the action.¹⁴ Such a settlement cannot be considered unless presented by a supplemental answer in the nature of an accord and satisfaction,¹⁵ or interposed in some manner, as a bar to further proceedings, so that the court may treat it as a *bona fide* settlement of a pending controversy.¹⁶

B. REPLICATION OR REPLY.—When settlement is set up by the answer any matter of confession and avoidance,¹⁷ such as mistake, fraud, or duress,¹⁸ should be specially pleaded in the replication or reply.

III. ACTION ON AGREEMENT.—**A. DECLARATION, PETITION OR COMPLAINT.**—In an action on a compromise agreement, the petition need not contain an itemized statement of all claims alleged to have been released or settled,¹⁹ nor need it aver the validity of the claims,²⁰ for such agreement will be sustained regardless of the validity of the claims settled, if the dispute was *bona fide* and the parties acted in good faith.²¹ Where a correction is necessary to en-

14. *Jaques v. Denehie*, 7 Blackf. (Ind.) 40.

15. *Aiken v. Taylor* (Tenn.), 62 S. W. 200. See *Gregory v. Powers*, 3 Litt. (Ky.) 339.

16. *Wolcott v. Root*, 2 Allen (Mass.) 194; *Meurer's Appeal*, 119 Pa. 115, 12 Atl. 868.

May be pleaded in bar to further maintenance of action. *Jaques v. Denehie*, 7 Blackf. (Ind.) 40; *Le Bret v. Popillon*, 4 East 502, 102 Eng. Reprint 923.

An agreement of settlement involving the dismissal of an action which is pending deprives the plaintiff of his right to file an amended petition. *Petry v. Petry*, 142 Ky. 564, 134 S. W. 922.

Oral agreement *pendente lite* may be thus pleaded. *Boswell v. Gillen*, 131 Ga. 310, 62 S. E. 187.

17. *Christianson v. Chicago, etc., R. Co.*, 61 Minn. 249, 63 N. W. 639; *Daly v. Proetz*, 20 Minn. 411.

An answer alleging merely that the plaintiff has released the defendant, instead of alleging in detail that a written release was executed, is not sufficient to compel the plaintiff to plead specially in reply. *Christianson v. Chicago, etc., R. Co.*, 61 Minn. 249, 63 N. W. 639.

A reply denying that the alleged agreement of compromise covered the injuries complained of, or that the consideration therefor covered payment of the damages claimed, is a sufficient denial of the agreement to make an issue of it. *Sweeney v. Montana Cent. R. Co.*, 19 Mont. 163, 47 Pac. 791.

Burden of Proof on Plaintiff.—*Linton v. Cathers*, 70 Neb. 598, 97 N. W. 799.

18. *Home Fire Ins. Co. v. Bredehoft*, 49 Neb. 152, 68 N. W. 400.

Where an agreement of compromise is entered into through fraud or mistake, the injured party may ignore the release, bring his action on the released cause and when the answer sets up a settlement, he may reply that it was obtained by fraud, or is otherwise of no force and effect. *Nelson v. Nelson* (Minn.), 126 N. W. 731; *Christianson v. Chicago, etc., R. Co.*, 67 Minn. 94, 69 N. W. 640; *Christianson v. Chicago, etc., R. Co.*, 61 Minn. 249, 63 N. W. 639; *Peterson v. Chicago, etc., R. Co.*, 36 Minn. 399, 31 N. W. 515.

19. *Needham v. Bythewood* (Tex. Civ. App.), 61 S. W. 426.

20. A complaint alleging an agreement by which defendant was released from all claims arising out of seduction under promise of marriage, and from any other action which the plaintiff might have had, is not demurrable for failure to show consideration, even though a woman has no action for her own seduction. *Cowen v. Rouss*, 40 Misc. 105, 81 N. Y. Supp. 276, *affirmed*, 84 App. Div. 641, 82 N. Y. Supp. 1098.

21. *Colo.*—*Coffey v. Emigh*, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125. *Conn.* *Smith v. Richards*, 29 Conn. 232. *Idaho.*—*Heath v. Potlatch Lumb. Co.*, 18 Idaho 42, 108 Pac. 343. *Ill.*—*Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *Mulholland v. Bartlett*, 74 Ill. 58. *Ia.* *Everts v. Rose Grove Twp.*, 77 Iowa 37, 41 N. W. 478; *Keefe v. Vogle*, 36

able the plaintiff to recover the complaint should ask for reformation of the instrument.²²

B. PLEA OR ANSWER.—In an action on a compromise agreement, any matter impeaching its validity, must be specifically and distinctly alleged in the answer.²³ If there is no dispute of facts, the legal effect of an agreement is a question for the court.²⁴

C. WHEN PROCURED BY FRAUD.—When an agreement of settlement is fraudulently procured, the injured party may elect to rescind the agreement and sue on the original claim, or to prosecute the other party for damages for fraudulently inducing the settlement.²⁵ In the latter case the complaint must contain allegations by which the damages may be determined.²⁶

D. QUESTIONS OF FACT.—The question of a settlement should be presented to the jury only when properly put in issue by the pleadings and the evidence.²⁷ It is the province of the jury to determine whether

Iowa 87. **Md.**—*Alexander v. Maryland Trust Co.*, 106 Md. 170, 66 Atl. 836. **Mass.**—*Blount v. Wheeler*, 199 Mass. 330, 85 N. E. 477, 17 L. R. A. (N. S.) 1036; *Leach v. Forbes*, 11 Gray 506, 71 Am. Dec. 732. **Mich.**—*Sanford v. Huxford*, 32 Mich. 313; *Gates v. Shutts*, 7 Mich. 127. **Minn.**—*Kelly v. Hopkins*, 105 Minn. 153, 117 N. W. 396; *Hall v. Wheeler*, 37 Minn. 522, 35 N. W. 377; *Demars v. Musser, etc.*, Mfg. Co., 37 Minn. 418, 35 N. W. 1. **N. J.** *Grandin v. Grandin*, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642. **N. Y.** *Wahl v. Barnum*, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623; *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76; *White v. Hoyt*, 73 N. Y. 505; *Kidder v. Harrobin*, 72 N. Y. 159; *Wehrum v. Kuhn*, 61 N. Y. 623; *Minehan v. Hill*, 129 N. Y. Supp. 873; *Farmers' Bank v. Blair*, 44 Barb. 641; *Brooklyn Bank v. Waring*, 2 Sandf. Ch. 1, 5. **R. I.**—*Anthony v. Boyd*, 15 R. I. 495.

In *Cowen v. Rouss*, 40 Misc. 105, 81 N. Y. Supp. 276, *affirmed*, 84 App. Div. 641, 82 N. Y. Supp. 1098, the court says: "I entertain the opinion that the agreement to release an asserted claim, be it valid or not, would be a sufficient consideration. Were the law otherwise there would be no permanency to a settlement of any asserted claim."

It is not permissible to go back of a valid settlement to determine who was right in the original contention. *Kiler v. Wohletz*, 79 Kan. 716, 101 Pac. 474.

²² *Mason v. Mason*, 102 Ind. 38, 26 N. E. 124 (holding that a reply with-

out such averment could not avoid the defense raised by the answer); *King v. Enterprise Ins. Co.*, 45 Ind. 43 (holding a mere averment of mistake not sufficient without the request for correction).

²³ **Ia.**—*Johnson v. Berdo*, 131 Iowa 524, 106 N. W. 609; *Hunter v. Aldrich*, 52 Iowa 442, 3 N. W. 574 (holding that the particular errors must be alleged and proved). **Mo.**—*Kronenberg v. Binz*, 56 Mo. 121. **Tex.**—*Needham v. Blythewood* (Tex. Civ. App.), 61 S. W. 426.

An answer to a complaint in an action on a settlement which neither denies nor responds to the settlement, is bad. *Bernhamer v. Conard*, 45 Ind. 151.

Verification of Answer.—Where the complaint is based on a written instrument given as a settlement, and the statute requires the answer to be verified in order to deny execution, it is held that the defendant must verify his answer in order to set up any plea relating to the execution, such as duress. *Parkison v. Boddiker*, 10 Colo. 503, 15 Pac. 806.

²⁴ *Terry v. Shively*, 64 Ind. 106 (holding legal effect of a note to be a question for the court); *Vedder v. Vedder*, 1 Denio (N. Y.) 257.

²⁵ *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799.

²⁶ *Westerfeld v. New York Life Ins. Co.*, 157 Cal. 339, 107 Pac. 699.

²⁷ *Sweeney v. Montana Cent. R. Co.*, 19 Mont. 163, 47 Pac. 791.

or not a settlement was in fact made,²⁸ and if so whether it is to be given a binding effect,²⁹ and what matters were included therein;³⁰ and the verdict of the jury on these questions will not be disturbed unless plainly against the evidence.³¹

The jury must determine all questions of fact, such as fraud,³² or mistake,³³ or diligence.³⁴

IV. ALLEGATIONS IN ACTIONS TO SET ASIDE.—When one seeks relief in equity, complaining of fraud or mistake in a settlement, it is incumbent upon him to specifically allege the fraud or mistake relied upon.³⁵ And in an action to vacate and set aside a compromise

28. **Ky.**—*Louisville, etc. R. Co. v. Williams*, 33 Ky. L. Rep. 168, 109 S. W. 874. **Md.**—*Lister's Agricultural Works v. Pender*, 74 Md. 15, 21 Atl. 686. **Minn.** *Southwick v. Herring*, 82 Minn. 302, 84 N. W. 1013, holding it proper to submit to jury the question whether a note was settled by a settlement and dismissal of a former action. **Mo.** *Owen v. Brockensmidt*, 54 Mo. 285. **N. J.**—*Castelli v. Jereissate*, 78 Atl. 227, holding that it is for the jury to determine whether a check was intended as a full settlement or a part payment. **Pa.**—*Hobart v. McCoy*, 3 Pa. 419. **W. Va.**—*Varner v. Core*, 20 W. Va. 472.

29. **Ill.**—*Rosencrantz v. Mason*, 85 Ill. 262. **W. Va.**—*Meyer v. Marshall*, 34 W. Va. 42, 11 S. E. 730 (the conclusiveness of the agreement properly left to the jury where mistake and coercion was involved); *Varner v. Core*, 20 W. Va. 472; *Parkersburg Nat. Bank v. Als*, 5 W. Va. 50. **Eng.**—*Thomas v. Hawkes*, 8 M. & W. 140.

30. *Hicks v. Leaton*, 67 Mich. 371, 34 N. W. 880; *Jack v. McKee*, 9 Pa. 235.

31. *Baumier v. Antiau*, 79 Mich. 509, 44 N. W. 939; *Varner v. Core*, 20 W. Va. 472.

32. *Baumier v. Antiau*, 79 Mich. 509, 44 N. W. 939; *Williamson v. North Pacific Lumb. Co.*, 42 Ore. 153, 70 Pac. 387.

Burden of Proof.—*Billau v. Kern* (Iowa), 107 N. W. 307; *Bailey v. Wood*, 114 Ky. 27, 69 S. W. 1103 (holding that mistake of facts must be shown by a preponderance of evidence).

Jury should be instructed on fact that a receipt in full settlement is *prima facie* a defense, and plaintiff must show fraud or mistake. *Curley v. Harris*, 11 Allen (Mass.) 112.

But where fraud is relied upon to

avoid a settlement, the court should submit to the jury the question whether the specific acts relied upon as constituting the fraud were perpetrated by the defendant (*Pace v. Paducah R. & Light Co.*, 28 Ky. L. Rep. 278, 89 S. W. 105); and the jury should be informed what they can consider in determining it, and what constitutes such fraud as will authorize rescission (*Springfield Engine & Thresher Co. v. Van Brunt*, 77 Iowa 82, 41 N. W. 578; *Lewless v. Detroit G. H. & M. R. Co.*, 65 Mich. 292, 32 N. W. 790).

33. *Christner v. John*, 2 Pa. Super. 78, 27 Pitts. Leg. J. (N. S.) 117.

34. "It was also the duty of the court to explain to the jury what diligence was required of a party defrauded in making investigation where doubts were created, and in action when fraud was believed to exist." *Lewless v. Detroit G. H. & M. R. Co.*, 65 Mich. 292, 32 N. W. 790.

The statute of limitations begins to run from the date of the settlement and the promise to comply therewith. *Needham v. Bythewood* (Tex. Civ. App.), 61 S. W. 426.

35. **Ala.**—*Langdon v. Roane's Admr.*, 6 Ala. 518. **Tex.**—*Williams v. Nolan*, 58 Tex. 708 (where an action was brought to set aside a judgment entered by an agreement of counsel, and the court held that the averments should show what the agreement was, and the plaintiff's injury); *Williams v. Dean* (Tex. Civ. App.), 38 S. W. 1024. **W. Va.**—*Currey v. Lawler*, 29 W. Va. 111, 11 S. E. 897 (holding also that relief cannot be had on any grounds other than those alleged); *Caldwell v. Caperton*, 27 W. Va. 397.

Jurisdiction of Equity.—See *Hall v. Clagett*, 2 Md. Ch. 151; and the titles "Equity Jurisdiction and Procedure," "Reformation;" "Rescission."

the plaintiff must aver that he has paid or tendered back the amount received.³⁶ Some of the courts, however, do not require an offer, or tender of the return of that which was received, to be pleaded, but hold that it is sufficient if a party inserts a general prayer for relief, and proffers to do equity on his part; and the court will require him to put the other party in *statu quo* as the price of the decree.³⁷

Burden of Proof.—When an action is brought to open a settlement for correction,³⁸ or to invalidate it,³⁹ the burden is on the plaintiff to prove that the transaction was fraudulent or based on mistake.⁴⁰ But if a fiduciary relationship is shown to exist, the burden of proof shifts to the defendant to show that the transaction was fair.⁴¹

V. COSTS.—The right to costs is generally dependent upon the right of recovery.⁴² But in the agreement of settlement parties may provide for the distribution of costs.⁴³ Except in case of some express

As to sealed instruments, see Jackson v. Security Mut. Life Ins., 135 Ill. App. 86, affirmed in 233 Ill. 161, 84 N. E. 198; Robinson v. Sharp, 201 Ill. 86, 66 N. E. 299; Gage v. Lewis, 68 Ill. 604; Evans v. Edwards, 26 Ill. 279.

Proof Must Be Unequivocal.—Keaugh v. Foreman, 33 La. Ann. 1434; Hall v. Clagett, 2 Md. Ch. 151.

36. Westerfeld v. New York Life Ins. Co., 157 Cal. 339, 107 Pac. 699; Western, etc. Ins. Co. v. Quinn, 130 Ky. 397, 113 S. W. 456.

Return or Tender Necessary.—Ark. Harkey v. Mechanics, etc. Ins. Co., 62 Ark. 274, 35 S. W. 230. Cal.—Westerfeld v. New York Life Ins. Co., 157 Cal. 339, 107 Pac. 699; Campo v. Camarillo, 154 Cal. 647, 98 Pac. 1049. Ind. Home Ins. Co. v. Howard, 111 Ind. 544, 13 N. E. 103. Ky.—McGill v. Louisville, etc. R. Co., 114 Ky. 358, 70 S. W. 1048; Home Benefit Society v. Muehl, 109 Ky. 479, 59 S. W. 520; Louisville, etc. R. Co. v. McElroy, 100 Ky. 153, 37 S. W. 844; City of Louisville v. Louisville R. Co., 24 Ky. L. Rep. 538, 68 S. W. 840. Mass.—Moore v. Mass. Ben. Assn., 165 Mass. 517, 43 N. E. 298. Mo.—Althoff v. St. Louis Transit Co., 204 Mo. 166, 102 S. W. 642 (holding that the law regarding rescission on contracts generally is applicable); Dalpine v. Lume, 145 Mo. App. 549, 122 S. W. 776. Ore. Wells v. Neff, 14 Ore. 66, 12 Pac. 84. Vt.—Town's Admr. v. Waldo, 62 Vt. 118, 20 Atl. 325.

This payment or tender back is necessary because it is inequitable to allow a person to enter into a compro-

mise and receive money thereon, and then sue for the balance of a disputed claim. Western, etc. Ins. Co. v. Quinn, 130 Ky. 397, 113 S. W. 456.

37. Paquin v. Milliken, 163 Mo. 79, 63 S. W. 417, 1092; Whelan v. Reilly, 61 Mo. 565; Dalpine v. Lume, 145 Mo. App. 549, 122 S. W. 776; Haydon v. St. Louis & S. F. R. Co., 117 Mo. App. 76, 93 S. W. 833.

38. Chubbuck v. Vernam, 42 N. Y. 432.

39. U. S.—Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co., 159 U. S. 423, 16 Sup. Ct. 94, 40 L. ed. 205 (holding also that this burden is materially increased by the lapse of eight years). Ga.—Hale v. Owensby, 133 Ga. 631, 66 S. E. 781. La.—Long v. Robinson, 5 La. Ann. 627. N. Y.—Smith v. Ogilvie, 127 N. Y. 143, 27 N. E. 807, affirming 6 N. Y. Supp. 233; Chubbuck v. Vernam, 42 N. Y. 432. Tex.—Landa v. Obert, 5 Tex. Civ. App. 620, 25 S. W. 342. W. Va.—Mullen v. E. A. Searls Co. (W. Va.), 72 S. E. 1089; Calwell v. Carpenter, 27 W. Va. 397.

40. That the proof must be clear and strong, see the title "Compromise and Settlement" in the *ENCYCLOPEDIA OF EVIDENCE*.

41. Smith v. Ogilvie, 127 N. Y. 143, 27 N. E. 807, affirming 6 N. Y. Supp. 233.

42. See the title "Costs."

43. U. S.—Howler v. Chicago, etc. R. Co., 166 Fed. 828, holding also that a settlement is not a discontinuance such as to entitle defendant to a statutory discontinuance fee. Minn.—Dorr v. Steichen, 18 Minn. 10. Mo.—Murphy v. Smith, 86 Mo. 333.

statutory provision, an extinguishment of the entire cause of action by settlement pending the action, with no mention of costs, extinguishes the right to costs.⁴⁴ And a compromise agreement may be interposed to prevent a judgment for costs contrary to the terms agreed upon.⁴⁵

Costs in chancery depend upon the sound discretion of the chancellor, to be exercised upon a consideration of the facts and merits of the case.⁴⁶

"When a court assumes to carry out a compromise requiring a special judgment for costs, it should be in pursuance of a stipulation filed of record, or should be with the consent of the parties in open court." *Murphy v. Smith, supra.*

Legal costs only covered by such agreement. *Wallace v. Coates*, 1 Ashm. (Pa.) 110.

Beneficial Party.—Upon a settlement judgment for costs may by consent be entered for defendant against person for whose benefit the action was brought. *Pates v. St. Clair*, 11 Gratt. (Va.) 22.

If several defendants are joined, though they are represented by different attorneys, and by a settlement plaintiff is to have costs, he is entitled to only one bill of costs. *Latham v. Bliss*, 6 Duer (N. Y.) 661.

"In a suit on a joint and several bond against several defendants who defend separately, if the plaintiff settles the suit with one or more of the defendants without the concurrence of the others, he is liable to such others for the costs of the defence, and a rule will be granted that he pay such costs, unless he proceed to the trial of the issues, joined with such defendants or consent to judgment of discontinuance with costs." *Clark v. Wood*, 9 Wend. (N. Y.) 435.

44. *Dr. Sharp Family Medicine Co. v. Schowalter*, 120 Wis. 663, 98 N. W. 940, per Winslow, J. And see the following cases: **N. H.**—*Frazier v. Merrill*, 31 N. H. 496; *Carlton v. Choate*, 6 N. H. 138; *Kimball v. Wilson*, 3 N. H. 96, 14 Am. Dec. 342, where the court said by the chief justice that it must be presumed that the costs were adjusted. **N. J.**—*Den v. Pidcock*, 12 N. J. L. 363. **N. Y.**—*Pulver v. Harris*, 62 Barb. 500; *Johnston v. Brannan*, 5 Johns. 268; *Watson v. DePeyster & Co.*, 1 Caines 66.

In *Morgan v. Griffin*, 6 Ill. 565, the court says: "In contemplation of law,

the parties respectively advance such costs as they make during the progress of the cause. When they compromise the case without any understanding as to the payment of the costs already incurred, the suit ought simply to be discontinued on the record, without the rendition of any judgment for costs. The effect of such an entry is that each party bears his own costs."

In *The Victory*, Blatchf. & H. 443, 28 Fed. Cas. No. 16,937, the court says: "At law, where costs are incident to the success of the suitor's claim or defense, and accordingly depend upon the final event of the litigation, a settlement between the parties is ordinarily held to extinguish all claims for costs on the part of the attorney of either, as against the other."

Judgment For Costs.—**Del.**—*Catts v. Clements*, 6 Houst. 348. **Ky.**—*Martin v. While*, 1 Bibb 583, holding that if the complaint is well founded but settled *pendente lite*, the complainant should have his costs. **Ohio.**—*Standard Oil Co. v. Valley R. Co.*, 7 Ohio C. C. 442, holding the matter of costs in such case largely discretionary.

45. *Morancy v. Quarles*, 1 McLean 194, 17 Fed. Cas. No. 9,788; *Coburn v. Whitely*, 8 Metc. (Mass.) 272; *Moore v. Cutter*, 3 Allen (Mass.) 468.

Where plaintiff executed a release after a mistrial of the action and defendant set up the release in an amended answer which was denied by plaintiff, the defendant is entitled to his costs except such as had already been taxed against him prior to the date of final judgment. *Thompson v. Union Elevator Co.*, 77 Mo. 520.

46. *Walpole v. Griffin*, Wright (Ohio) 95, citing, 2 Ves. (Eng.) 223, where Lord Hardwick said that "one can never come into this court to pray a decree for costs only."

"The rule of the court is, that if a suit is compromised or settled, without any agreement as to costs, each

Admiralty courts will not allow a settlement out of court to deprive by collusion the proctor of his costs.⁴⁷

party must bear his own. And if the parties settle the cause between themselves, reserving the question of costs, the court will not hear the cause on a question of costs merely." *Stewart v. Ellice*, 2 Paige Ch. (N. Y.) 604, citing *Eastburn v. Downes*, 2 Johns. Ch. (N. Y.) 317; *Gibson v. Lord Cranley*, Mad. & Geld. 365; *Roberts v. Roberts*, 1 Sim. & Stu. 39. See also *Bruce v. Gale*, 13 N. J. Eq. 211; *Compton v. Griffith*, Wright (Ohio) 321; *Walpole v. Griffin*, *supra*.
47. *The Victory*, Blatch. & H. 443, 28 Fed. Cas. No. 16,937, per Betts, D. J.

Vol. V

CONCLUSIONS OF LAW

By the Editorial Staff.

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Vol. V

I. PROPRIETY OF PLEADING CONCLUSIONS.—A pleading is primarily and essentially a statement of facts; and it is the province of the court to draw therefrom such conclusions as may be proper. It follows therefore as an elementary rule of pleading, that allegations of conclusions of law are improper and generally are of no avail in stating a cause of action or defense.¹

Effect of Conclusions.—A conclusion of law may be regarded as surplusage;² it does not in any way aid a pleading,³ nor does it destroy a

1. **U. S.**—Alabama *v. Burr*, 115 U. S. 413, 6 Sup. Ct. 81, 29 L. ed. 435; *Cambers v. First Nat. Bank*, 144 Fed. 717; *McCloskey v. Barr*, 38 Fed. 165; *Muser v. Robertson*, 17 Fed. 500, 21 Blatchf. 368. **Ala.**—*McDonald v. Mobile Life Ins. Co.*, 56 Ala. 468. **Cal.**—*Moffatt v. Bulson*, 96 Cal. 106, 30 Pac. 1022, 31 Am. St. Rep. 192. **Colo.**—*Struby-Estabrook Merc. Co. v. Keyes*, 9 Colo. App. 190, 48 Pac. 663; *Winne v. Colorado Springs Co.*, 3 Colo. 155. **Conn.**—*Martin v. Sherwood*, 74 Conn. 475, 51 Atl. 526; *Bailey v. Bussing*, 29 Conn. 1. **Fla.**—*Harvey v. Morgan*, 58 Fla. 427, 51 So. 140. **Ga.**—*Furr v. Burns*, 124 Ga. 742, 53 S. E. 201; *James v. Kelley*, 107 Ga. 446, 33 S. E. 425, 73 Am. St. Rep. 135; *Tolbert v. Caledonian Ins. Co.*, 101 Ga. 741, 28 S. E. 991. **Ill.**—*Foss v. People's Gas Light, etc. Co.*, 241 Ill. 238, 89 N. E. 351; *Stanard v. Aurora, etc. R. Co.*, 220 Ill. 469, 77 N. E. 254; *Kilgore v. Ferguson*, 77 Ill. 213; *Woods v. Cox*, 149 Ill. App. 533. **Ind.**—*Farra v. Braman*, 171 Ind. 529, 86 N. E. 843; *Indianapolis & G. R. T. Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; *Davis v. Clements*, 148 Ind. 605, 47 N. E. 1056, 62 Am. St. Rep. 539; *Quick v. Taylor*, 113 Ind. 540, 16 N. E. 588; *Caskey v. City of Greensburgh*, 78 Ind. 233; *Singer Sewing Mach. Co. v. Phillips* (Ind. App.) 94 N. E. 793 (holding that a complaint under the code "must state facts and not conclusions"); *Connecticut Mut. Life Ins. Co. v. King* (Ind. App.), 93 N. E. 1046. **Ia.**—*Robinson & Co. v. Berkey*, 100 Iowa 136, 69 N. W. 434, 62 Am. St. Rep. 549; *County of Sac v. Hobbs*, 72 Iowa 69, 33 N. W. 368. **Minn.**—*Dennis v. Nelson*, 55 Minn. 144, 56 N. W. 589; *Griggs v. City of St. Paul*, 9 Minn. 246; *Holgate v. Broome*, 8 Minn. 243. **Mo.**—*National Hollow Brake Beam Co. v. Bakewell*, 224 Mo. 203, 123 S. W. 561; *Knapp, Stout & Co. v. City of St. Louis*, 156 Mo. 343, 56 S. W. 1102; *Butts v. Phelps*, 79 Mo. 302. **Neb.**—*State v. Osborn*, 60 Neb. 415, 83 N. W. 357; *Wabaska Elec. Co. v. City of Wymore*, 60 Neb. 199, 82 N. W. 626; *Woodward v. State*, 58 Neb. 598, 79 N. W. 164; *Bell v. Sherer*, 12 Neb. 409, 11 N. W. 861. **N. J.**—*Kennedy v. North Jersey St. R. Co.*, 72 N. J. L. 19, 60 Atl. 40. **N. Y.**—*Ludlow v. Woodward*, 117 App. Div. 525, 102 N. Y. Supp. 647; *Lesser v. Steindler*, 110 App. Div. 262, 97 N. Y. Supp. 255; *Sbarboro v. Health Dept.*, 26 App. Div. 177, 49 N. Y. Supp. 1033. **N. D.**—*Weber v. Lewis*, 126 N. W. 105. **Ohio.**—*Alter v. City of Cincinnati*, 7 Ohio Dec. 368, 4 Ohio N. P. 427. **Ore.**—*Long v. Dufur*, 113 Pac. 59 ("a standard rule of code pleading is to state facts from which the court can draw the legal conclusions desired by the pleader"); *Longshore Print. & Pub. Co. v. Howell*, 26 Ore. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464. **R. I.**—*McTwiggan v. Hunter*, 19 R. I. 68, 31 Atl. 693. **S. C.**—*Livingston v. Ruff*, 65 S. C. 284, 43 S. E. 678. **Tex.**—*Gray v. Osborne*, 24 Tex. 157, 76 Am. Dec. 99. **Wash.**—*Kemp v. Folsom*, 14 Wash. 16, 43 Pac. 1100. **W. Va.**—*Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217. **Wis.**—*Miles v. Mutual Reserve Fund Life Assn.*, 108 Wis. 421, 84 N. W. 159 (holding that under the code conclusions of law are not allowed to be pleaded any more freely than at commonlaw); *Pratt v. Lincoln County*, 61 Wis. 62, 20 N. W. 726.
2. *Mason v. Mason*, 219 Ill. 609, 76 N. E. 692; *Kolb v. Mortimer*, 135 App. Div. 542, 120 N. Y. Supp. 543.
3. **Cal.**—*Callahan v. Broderick*, 124 Cal. 80, 56 Pac. 782; *Aurrecoechea v. Sinclair*, 60 Cal. 532; *Levinson v. Schwartz*, 22 Cal. 229. **Ind.**—*Foland v. Town of Frankton*, 142 Ind. 546, 41 N. E. 1031; *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158,

pleading which contains a proper statement of facts.⁴ And in fact conclusions have been held not improper, when supported by sufficient facts antecedently pleaded.⁵ But being generally regarded as

39 N. E. 443, 30 L. R. A. 700; *Mitchell v. Stinson*, 80 Ind. 324 (cannot supply the place of traversable facts); *American Mut. Life Ins. Co. v. Mead*, 39 Ind. App. 215, 79 N. E. 526. **La.** *State v. Hackley*, 124 La. 854, 50 So. 772. **Mo.**—*Mallinckrodt Chem. Wks. v. Nemnich*, 169 Mo. 388, 69 S. W. 355. **Neb.**—*Western Travelers' Acc. Assn. v. Munson*, 73 Neb. 858, 103 N. W. 688, 1 L. R. A. (N. S.) 1068; *First Nat. Bank v. Myers*, 44 Neb. 306, 62 N. W. 459. **Ohio.**—*Fargo Gas Light & Coke Co. v. Greer*, 18 Ohio C. C. 589, 10 Ohio Cir. Dec. 164. **Wis.** *Quinney v. Town of Stockbridge*, 33 Wis. 505.

An allegation of a legal conclusion "is useless when the declaration is insufficient and superfluous where sufficient without it." *King v. Interstate Consol. R. Co.*, 23 R. I. 583, 51 Atl. 301, 70 L. R. A. 924.

"If the material facts are pleaded, the conclusion is harmless, but without the material facts it is fruitless" (*Indiana Bond Co. v. Jameson*, 24 Ind. App. 8, 56 N. E. 37), for no liability can be predicated upon it (*Tate v. American Woolen Co.*, 114 App. Div. 106, 99 N. Y. Supp. 678; *Alter v. City of Cincinnati*, 7 Ohio Dec. 368, 4 Ohio N. P. 427).

"If the rule by which the allegation of a conclusion of law is no allegation, but facts must be stated, is once departed from, it is not easy to see what rule is to be adapted in its place for the guidance of courts in judging of the sufficiency of pleadings. The pleader is allowed to dispense with the evidentiary or intermediate facts, and to content himself with alleging the ultimate facts; but further than this it is not possible to go, without losing sight of the principal object of pleading, which is to inform the adversary of what he must come prepared to meet with his evidence. It is not possible to go a step further and hold that even the ultimate facts may be dispensed with, provided a conclusion of law is alleged from which they may be deduced with a certain degree of cogency. The question in every case would then resolve itself into whether

the cogency in the particular case was sufficient to let the conclusion of law which was alleged to do service for the facts which were not alleged, but left to be ascertained by a deductive process." *State v. Hackley*, 124 La. 854, 50 So. 772.

4. Conn.—*Wiggin v. Federal Stock & Grain Co.*, 77 Conn. 507, 59 Atl. 607. **Ind.**—*Morgantown Mfg. Co. v. Hicks* (Ind. App.), 92 N. E. 199. **Ia.**—*Nourse v. Weitz*, 120 Iowa 708, 95 N. W. 251. **N. Y.**—*Williamson v. Wager*, 90 App. Div. 186, 86 N. Y. Supp. 684. **N. D.** *Weber v. Lewis*, 126 N. W. 105. **Tex.** *Texas, etc. R. Co. v. Kirk*, 62 Tex. 227.

5. Conn.—*Wiggin v. Federal Stock & Grain Co.*, 77 Conn. 507, 59 Atl. 607, where an allegation that it was defendant's duty under a contract to advance any money necessary to cover decline in the market value of certain stocks, was held a proper averment. **N. Y.**—*Williamson v. Wager*, 90 App. Div. 186, 86 N. Y. Supp. 684. **Tex.** *Texas, etc. R. Co. v. Kirk*, 62 Tex. 227.

In *Millville Gas Light Co. v. Sweeten*, 74 N. J. L. 24, 64 Atl. 959, the court says: "Where the facts are stated in a pleading, the pleader may and often should state that conclusion from such facts upon which he based his right; but when the facts upon which the pleader's conclusion is based are not stated, his conclusions from such undisclosed facts goes for nothing, and not being itself a relevant fact, is not admitted by a demurrer."

In *Pace v. Louisville & N. R. Co.*, 166 Ala. 519, 52 So. 52, the court says: "A statement, in form a conclusion, approaches occasionally so nearly the ultimate facts as to make the effort at further analysis futile for practical purposes of pleading. . . . Further, where from the facts as they are and as they must be alleged different minds might draw different conclusions, it is the office of the pleader to draw the conclusion necessary to the maintenance of his action or defense as the case may be."

A legal conclusion "to be justified, must be supported by sufficient proper

surplusage, it follows that they tender no issue and need not be denied.⁶

allegations antecedently pleaded, so that the court can see that the conclusion of the pleader is one which the facts already set forth will uphold." *Sprague v. Fletcher*, 67 Vt. 46, 30 Atl. 693.

6. **U. S.**—*McCloskey v. Barr*, 38 Fed. 165. **Cal.**—*Schoonover v. Birnbaum*, 148 Cal. 548, 83 Pac. 999; *Calahan v. Broderick*, 124 Cal. 80, 56 Pac. 782. **Conn.**—*McCune v. Norwich City Gas Co.*, 30 Conn. 521, 79 Am. Dec. 278. **Ky.**—*City of Lexington v. Board of Education*, 23 Ky. L. Rep. 1663, 65 S. W. 827. **Mo.**—*Nagel v. Lindell R. Co.*, 167 Mo. 89, 66 S. W. 1090; *Parks v. Heman*, 7 Mo. App. 14. **N. J.**—*Kennedy v. North Jersey St. R. Co.*, 72 N. J. L. 19, 60 Atl. 40. **N. Y.**—*Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377, 54 N. E. 1081; *Sbarboro v. Health Dept.*, 26 App. Div. 177, 49 N. Y. Supp. 1033. **S. C.**—*Livinston v. Ruff*, 65 S. C. 284, 43 S. E. 678.

In *Kittinger v. Traction Co.*, *supra*, the court says: "The allegation of a conclusion of law raises no issue, need not be denied, and its truth is not admitted by a demurrer to the complaint containing it."

See also—**U. S.**—*Pearcy v. Stranahan*, 205 U. S. 257, 27 Sup. Ct. 545, 51 L. ed. 793; *Chicot County v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. ed. 546; *Pennie v. Reis*, 132 U. S. 464, 10 Sup. Ct. 149, 33 L. ed. 426; *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. 132, 27 L. ed. 903; *United States v. Ames*, 99 U. S. 35, 25 L. ed. 295; *McCloskey v. Barr*, 38 Fed. 165. **Cal.**—*Johnson v. Kirby*, 65 Cal. 482, 4 Pac. 458; *Branham v. Mayor & Council of San Jose*, 24 Cal. 585. **Conn.**—*Molineux v. Hurlbut*, 79 Conn. 243, 64 Atl. 350; *Eliot's Appeal*, 74 Conn. 586, 51 Atl. 556. **Ill.**—*Stannard v. Aurora, etc. R. Co.*, 220 Ill. 469, 77 N. E. 254; *Mason v. Mason*, 219 Ill. 609, 76 N. E. 692; *Jocelyn v. White*, 201 Ill. 16, 66 N. E. 327; *Greig v. Russell*, 115 Ill. 489. **Ind.**—*Foland v. Town of Frankton*, 142 Ind. 546, 41 N. E. 1031. **Ia.**—*Bogaard v. Independent Dist. of Plain View*, 93 Iowa 269, 61 N. W. 859. **La.**—*Malbrough v. Roundtree*, 128 La. 54 So. 463. **Md.**—*Strauss v. Denny*, 95 Md. 690, 53 Atl. 571; *Ulman v. Charles St. Ave. Co.*,

83 Md. 130, 34 Atl. 366; *Reddington v. Lanahan*, 59 Md. 429. **Mass.**—*Lynch v. Forbes*, 161 Mass. 302, 37 N. E. 437. **Mich.**—*Dubois v. Hutchinson*, 40 Mich. 262. **Minn.**—*Griggs v. City of St. Paul*, 9 Minn. 246. **Mo.**—*Martin v. Castle*, 193 Mo. 183, 91 S. W. 930; *Barber Asphalt Pav. Co. v. Field*, 188 Mo. 182, 86 S. W. 860; *Mallinckrodt Chem. Wks. v. Nemnich*, 169 Mo. 388, 69 S. W. 355; *Nagel v. Lindell R. Co.*, 167 Mo. 89, 66 S. W. 1090; *Hand v. City of St. Louis*, 158 Mo. 204, 59 S. W. 92; *Knapp, Stout & Co. v. City of St. Louis*, 156 Mo. 343, 56 S. W. 1102; *Drovers' Live Stock Com. Co. v. Wilson County Bank*, 95 Mo. App. 251, 68 S. W. 967. **Neb.**—*Bellevue Imp. Co. v. Kayser*, 1 Neb. (Unof.) 63, 95 N. W. 499; *Markey v. School Dist.*, 58 Neb. 479, 78 N. W. 932. **N. J.**—*Millville Gas Light Co. v. Sweeter*, 74 N. J. L. 24, 64 Atl. 959. **N. M.**—*Dame v. Cochiti Reduction Imp. Co.*, 13 N. M. 10, 79 Pac. 296. **N. Y.**—*John D. Park & Sons Co. v. National Wholesale Druggists' Asso.*, 175 N. Y. 1, 67 N. E. 136; *Bonnell v. Griswold*, 68 N. Y. 294; *Ludlow v. Woodward*, 117 App. Div. 525, 102 N. Y. Supp. 647; *Petty v. Emery*, 96 App. Div. 35, 88 N. Y. Supp. 823; *Burdick v. Chesebrough*, 94 App. Div. 532, 88 N. Y. Supp. 13; *E. T. Burrowes Co. v. Rapid Safety Filter Co.*, 49 Misc. 539, 97 N. Y. Supp. 1048. **Ohio.**—*Pittsburgh, etc. R. Co. v. Moore*, 33 Ohio St. 384; *Peterson v. Roach*, 32 Ohio St. 374; *Mitchell v. Treasurer*, 25 Ohio St. 143; *Alter v. City of Cincinnati*, 7 Ohio Dec. 368, 4 Ohio N. P. 427. **Ore.**—*O'Hara v. Parker*, 27 Ore. 156, 39 Pac. 1004; *Longshore Print. & Pub. Co. v. Howell*, 26 Ore. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464. **S. C.**—*Tutt v. Port Royal, etc., R. Co.*, 28 S. C. 388, 5 S. E. 831. **Wis.**—*Brown v. Phillips*, 71 Wis. 239, 36 N. W. 242; *State v. Veeder*, 5 Wis. 339. **Wyo.**—*Ricketts v. Crewdson*, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

Denial of a conclusion puts no fact in issue. **Colo.**—*People v. Lothrop*, 3 Colo. 428. **Ky.**—*Roush v. Vanceburg, etc. Tpk. Co.*, 120 Ky. 165, 85 S. W. 735. **Minn.**—*Cathcart v. Peck*, 11 Minn. 45.

Distinguished From Ultimate Facts. — Ordinarily it is only necessary to plead the ultimate facts upon which the pleader relies;⁷ but it is difficult sometimes to distinguish conclusions of law from ultimate facts, and no rule has been formulated whereby the distinction is made.⁸ In fact averments may state ultimate facts or conclusions of

Objections to Denial of Conclusions.

"One who, in pleading, has stated a legal conclusion instead of a material fact, cannot object to a denial thereof in the same terms on the ground that it is a conclusion of law, and not an allegation of fact." *Baldwin v. Burt*, 43 Neb. 245, 61 N. W. 601.

7. See *Will's Gould Pl.*, 200 *et seq.* In *Western Travelers' Acc. Ins. Assn. v. Munson*, 73 Neb. 858, 103 N. W. 688, 1 L. R. A. (N. S.) 1068, the court says: "It is an elementary rule that a bare conclusion of law adds nothing to the value of a pleading, and should be disregarded when the sufficiency of the facts pleaded to constitute a cause of action or a defense is called in question. But this rule does not extend to conclusions of fact. Such conclusions do not render a pleading vulnerable to a demurrer. Ordinarily it is only necessary to plead the ultimate facts upon which the pleader relies. Such facts, of necessity, are conclusions drawn from intermediate and evidential facts. If the ultimate facts are not stated with sufficient certainty, the remedy is by motion. Whether the injuries were received through accidental means is purely a question of fact, and the allegation that they were thus received is a conclusion of fact, and does not fall within the rule invoked by the defendant."

Disregarded in Testing Pleading.—*Cal. Union Trust Co. v. State*, 154 Cal. 716, 99 Pac. 183, 24 L. R. A. (N. S.) 1111; *Callahan v. Broderick*, 124 Cal. 80, 56 Pac. 782; *Johnson v. Kirby*, 65 Cal. 482, 4 Pac. 458. **Ind.**—*Farra v. Brauman*, 171 Ind. 529, 86 N. E. 843; *Indianapolis & G. R. T. Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669. **Mo.**—*National Hollow Brake Beam Co. v. Bakewell*, 224 Mo. 203, 123 S. W. 561; *Mallinckrodt Chem. Wks. v. Nemnich*, 169 Mo. 388, 69 S. W. 355. **Neb.**—*Johnson v. American Smelt. & Ref. Co.*, 80 Neb. 255, 116 N. W. 517; *Western Travelers' Acc. Assn. v. Munson*, 73 Neb. 858, 103 N. W. 688, 1 L. R. A. (N. S.) 1068; *Woodward v. State*, 58

Neb. 598, 79 N. W. 164. **N. Y.**—*Burdick v. Chesebrough*, 94 App. Div. 532, 88 N. Y. Supp. 13; *Day v. Duckworth*, 40 N. Y. Supp. 378. **Wash.**—*Carlson v. County Comrs.*, 38 Wash. 616, 80 Pac. 795.

8. *Curtiss v. Livingston*, 36 Minn. 380, 31 N. W. 357; *Kemp v. Folsom*, 14 Wash. 16, 43 Pac. 1100.

In *Foss v. People's Gas Light, etc. Co.*, 241 Ill. 238, 89 N. E. 351, the court says: "The general rule that a pleading in equity as well as at law should state facts and not mere conclusions of law is plain enough, but it is not always an easy matter to determine whether a particular statement in a pleading is a statement of facts which ought to be pleaded or a conclusion of law which should be avoided. So far as we know, no one has attempted to formulate a rule which will enable one in all cases to determine whether a statement belongs to one class or the other. The books abound with cases where it became necessary to determine whether a particular statement was a statement of ultimate fact or an inference of law. But these cases, while useful as mere precedents, are of little value as authorities, except where the same statement occurs under like circumstances."

In *Travelers' Ins. Co. v. Hallauer*, 131 Wis. 371, 111 N. W. 527, the court says: "It is not easy to formulate a definition that will always describe what is a mere conclusion of law, so as to distinguish it from a pleadable ultimate fact, as that will define how great an infusion of conclusions of law will be held to enter into the composition of a pleadable fact. *Clark v. Ry. Co.*, 28 Minn. 69, 9 N. W. 75. But, where the conclusion describes a legal status or condition, or a legal offense, it would ordinarily be termed a conclusion of law. Where on the other hand, the conclusion describes a condition or status not represented or designated by some definite legal term or rule, it will ordinarily be a con-

law according to the context in which they are alleged.⁹

II. SPECIFIC INSTANCES OF CONCLUSIONS.—A. **AUTHORITY AND WANT THEREOF.**—General allegations of authority,¹⁰ or want of authority,¹¹ to do an act are legal conclusions. The facts must, as in other cases, be set out.

B. **CAPACITY AND RIGHT TO SUE.**—Averments that plaintiff has no legal right to sue,¹² or is not the real party in interest,¹³ or has no adequate remedy at law,¹⁴ or is not the legal assignee of another,¹⁵ are all conclusions of law and are insufficient.

C. **CONSEQUENCES.**—In pleading the consequences which have resulted or will follow from certain acts, the facts must be alleged, for general averments to that effect are conclusions.¹⁶ Instances of such

clusion of fact. Conclusions of fact are said to be inferences drawn from subordinate evidentiary facts."

9. *California Raisin Growers' Assn. v. Abbott* (Cal.), 117 Pac. 767.

In *Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219, the court says: "It is true that pleadings should state the ultimate facts, and not the probative facts or conclusions of law. But what are ultimate facts and what conclusions of law are often mixed and uncertain questions. *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161; *Turner v. White*, 73 Cal. 299, 14 Pac. 794. The same averment may be of a fact or a conclusion of law according to the context."

10. *Cal.*—*Branham v. Mayor & Council of San Jose*, 24 Cal. 585. *Ill.* *Hutches v. Adams*, 3 Ill. App. 42. *Ind.* *Old Wayne Mut. Life Assn. v. Flynn*, 31 Ind. App. 473, 68 N. E. 327. *Mass.* *Lynch v. Forbes*, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402, averment that a town had all the property which it was authorized to take, held a conclusion.

That plaintiff purchased certain property to be used by him in "a business at that time authorized by the laws of this state," is a conclusion. *M'Lane v. Leicht*, 69 Iowa 401, 29 N. W. 327.

Color of Office.—That acts were done by virtue of, or under color of, a certain office. *People v. Beach*, 49 Colo. 516, 113 Pac. 513.

11. *Cal.*—*People v. Otto*, 77 Cal. 45, 18 Pac. 869. *Colo.*—*People v. Lothrop*, 3 Colo. 423. *La.*—*Hintrager v. Richter*, 85 Iowa 222, 52 N. W. 188. *Pa.* *D. B. Martin Co. v. Williams*, 30 Pa. Super. 298. *Wyo.*—*Edwards v. City of*

Cheyenne, 114 Pac. 677, where averments that condemnation proceedings were unauthorized and *ultra vires*, were held conclusions.

That a corporation had "no power or authority" to do an act. *Vonnoh v. Sixty-seventh St. Atelier Bldg.*, 55 Misc. 222, 105 N. Y. Supp. 155.

That "the said board of directors has no jurisdiction of power to appropriate said money for said proposed highway." *Bogaard v. Independent Dist. of Plain View*, 93 Iowa 269, 61 N. W. 859.

That the purchase of goods by a receiver was not authorized by the court. *Hillsborough Groc. Co. v. Ingalls* (Fla.), 53 So. 930.

12. *Lott v. Porter* (Ark.), 133 S. W. 180.

13. *Ind.*—*Herth v. Smith*, 33 Ind. 514; *Raymond v. Pritchard*, 24 Ind. 318; *Garrison v. Clark*, 11 Ind. 369; *Swift v. Ellsworth*, 10 Ind. 205, 71 Am. Dec. 316; *Lamson v. Falls*, 6 Ind. 309. *Minn.*—*Esch v. White*, 82 Minn. 462, 85 N. W. 238, 718. *N. Y.*—*Russell v. Clapp*, 7 Barb. 482, 4 How. Pr. 347; *Van Dyke v. Gardner*, 21 Misc. 542, 47 N. Y. Supp. 710; *Voisin v. Mitchell*, 96 N. Y. Supp. 386.

14. *Mo.*—*Knapp, Stout & Co. v. St. Louis*, 156 Mo. 343, 56 S. W. 1102. *N. Y.*—*Silverman v. Doran*, 23 Misc. 96, 51 N. Y. Supp. 731. *Tex.*—*Sullivan v. Bitter*, 51 Tex. Civ. App. 604, 113 S. W. 193.

15. *Smith v. Kaufman*, 3 Okla. 568, 41 Pac. 722.

16. *Mont.*—*Bordeaux v. Greene*, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600, averment that a fence is liable to blow over on plaintiff's building and injure same, is a conclusion.

conclusions are: that plaintiff's injury was sustained while he was engaged in, and in consequence of, a criminal act;¹⁷ that the acceptance of an amendment to a corporate charter would change the character and purposes of the corporation;¹⁸ that others were deprived of the right to vote by reason of closing the polls before the time fixed by law;¹⁹ that a person was a member of an order and entitled to all the rights and privileges of such member;²⁰ that plaintiff was thrown from a bicycle by reason of a defective street;²¹ that a deed if executed would constitute a cloud on plaintiff's title.²²

Irreparable Injury.—An averment that certain threatened acts would cause irreparable injury, is a mere conclusion. The facts must be alleged so that the court can determine whether such injury will result.²³

D. CONSIDERATION.—As a general rule averments that a conveyance or contract was executed for a good or valuable consideration,²⁴ or was without any consideration,²⁵ or that there was a failure of con-

Ohio.—*Alter v. City of Cincinnati*, 7 Ohio Dec. 368, 4 Ohio N. P. 427. **Wash.** *Allend v. Spokane, etc.* R. Co., 21 Wash. 324, 58 Pac. 244, where an averment that if defendant had exercised ordinary care a certain explosion would not have occurred, was held a conclusion.

An allegation in a complaint for personal injuries that plaintiff "while in performance of his duties as such (employee) was thrown or fell against the door of a car," is not subject to demurrer as a conclusion of law. *Louisville & N. R. Co. v. Butler (Ala.)*, 55 So. 262.

An allegation that by reason of defendant's failure to deliver certain goods, the plaintiff was forced to go into the market and buy goods at an advanced price, was held not a conclusion. *Trigg Candy Co. v. Emmett Shaw Co. (Ga. App.)*, 71 S. E. 679.

17. *National Benev. Assn. v. Bowman*, 110 Ind. 355, 11 N. E. 316.

18. *Perkins v. Coffin (Conn.)*, 79 Atl. 1070.

19. *Murphy v. City of Spokane (Wash.)*, 117 Pac. 476.

20. *Grand Lodge A. O. U. W. v. Hall*, 31 Ind. App. 107, 67 N. E. 272.

21. *City of Logansport v. Kihm*, 159 Ind. 68, 64 N. E. 595.

22. *Schuyler v. Broughton*, 65 Cal. 252, 3 Pac. 870.

23. *Ala.*—*Montgomery Light, etc. Co. v. Citizens' Light, etc. Co.*, 147 Ala. 359, 40 So. 981. *Mo.*—*Knapp, Stout & Co. v. St. Louis*, 156 Mo. 343,

56 S. W. 1102. **Ohio.**—*Van Wert v. Webster*, 31 Ohio St. 420.

In *Bishop v. Owens*, 5 Cal. App. 83, 89 Pac. 844, the court says: "The court must be fully advised by the pleaded facts of what the acts of the alleged trespasser are, so that it can readily be determined whether the injury complained of meets the criterion of 'irreparable injury.' . . . And it is not sufficient simply to allege that fact, but it must be shown to the court how and why it will be so."

24. *Winne v. Colorado Springs Co.*, 3 Colo. 155; *Browning, King & Co. v. Terwilliger*, 129 N. Y. Supp. 431.

25. **D. C.**—*Bryan v. Harr*, 21 App. Cas. 190. **Ia.**—*County of Sac v. Hobbs*, 72 Iowa 69, 33 N. W. 368. **Ky.**—*Higgins v. Gose*, 144 Ky. 123, 137 S. W. 1038; *Roush v. Vanceburg, etc. Turnp. Co.*, 27 Ky. L. Rep. 542, 85 S. W. 735. **N. Y.**—*Hammond v. Earle*, 58 How. Pr. 426, 436. **Wash.**—*Griffith v. Wright*, 21 Wash. 494, 58 Pac. 582. *Contra*, *Evans v. Stone*, 80 Ky. 78.

If parties go to trial without objection such an averment will be construed as an ultimate fact. *Griffith v. Wright*, 21 Wash. 494, 58 Pac. 582.

Valuable Consideration.—"What is a valuable consideration is a pure question of law. Therefore an allegation that a transfer was made without a valuable consideration states merely the pleader's conclusion of law, and is bad on demurrer." *Roush v. Vanceburg, etc. Tpk. Co.*, 120 Ky. 165, 85 S. W. 735.

sideration,²⁶ are held to be mere conclusions of law; but some authorities hold a contrary view.²⁷

E. CONSTRUCTION OF WRITTEN INSTRUMENTS OR LAWS.—Averments as to the construction or rights resulting from a written instrument,²⁸ or that a liability was created under a certain law,²⁹ or that a written instrument is invalid,³⁰ are mere conclusions of the pleader and are insufficient.

F. CONVERSION.—The allegation that the defendant has converted certain property to his own use, is generally held to be a sufficient allegation of the fact of conversion.³¹

26. *Ala.*—*Meyer v. Bloch*, 139 *Ala.* 174, 35 *So.* 705; *Powell v. Crawford*, 110 *Ala.* 294, 18 *So.* 302. *Ark.*—*Abraham's Exr. v. Gray*, 14 *Ark.* 301. *Ill.* *Cairo, etc. R. Co. v. Dodge*, 72 *Ill.* 253. *Ind.*—*Mitchell v. Stinson*, 80 *Ind.* 324.

27. *First Nat. Bank v. Robinson*, 105 *App. Div.* 193, 94 *N. Y. Supp.* 767; *Leasure v. Forquer*, 27 *Ore.* 334, 41 *Pac.* 665.

28. *U. S.*—*Dillon v. Barnard*, 21 *Wall.* 430, 22 *L. ed.* 673. *Nev.*—*Wheeler v. Floral Mill & Min. Co.*, 9 *Nev.* 254. *Ohio.*—*Pennsylvania Co. v. Platt*, 47 *Ohio St.* 366, 25 *N. E.* 1028. *Wash.* *Harris v. Halverson*, 23 *Wash.* 779, 63 *Pac.* 549.

That plaintiff is entitled to certain things under a contract. *Summons v. Ling Oil Co.*, 71 *N. J. Eq.* 174, 63 *Atl.* 258.

That a draft of a contract and certain letters constituted a binding contract. *Nestor v. Diamond Match Co.*, 143 *Fed.* 72, 74 *C. C. A.* 266.

"That the contract, as intended to be made and entered into, is an absolute and unconditional promise to pay." *Toland v. Town of Franklin*, 142 *Ind.* 546, 41 *N. E.* 1031.

Where a claim was based on a breach of warranty of a mule, and a defense was averred that an agreement was entered into between the parties embodying all the terms of the sale, and that no warranty was contained therein; such answer is demurrable for failure to set out the contract at least in substance, the answer containing merely averments of conclusions of law. *Thomas v. Irvine (Ala.)*, 55 *So.* 109.

Mortgage.—That defendant executed a mortgage. *Cooper v. McKee*, 121 *Ky.* 287, 89 *S. W.* 203.

Attorney's Fee.—That no attorney's fee is due under the terms of an in-

strument. *Tidwell v. Wittmeier*, 150 *Ala.* 253, 43 *So.* 782.

Lease.—That by the terms of a lease the defendant's tenancy is an estate by sufferance. *Cook v. Howard (Ore.)*, 117 *Pac.* 320.

An averment that defendant "promised to perform the stipulations and covenants" contained in a certain lease, is an averment of a fact, the lease not being set forth. *Witherbee v. Meyer*, 168 *N. Y.* 641, 61 *N. E.* 554.

29. *Callahan v. Broderick*, 124 *Cal.* 80, 56 *Pac.* 782.

In an action to abate a nuisance consisting of a mill on the bank of a river, an answer alleging that the mill was established by law, without reference to an act of the legislature or a decree of a court establishing it, is insufficient as being a conclusion. *Blackman v. Mauldin*, 164 *Ala.* 337, 51 *So.* 23.

30. *Treat v. Richardson*, 47 *Conn.* 582; *Burrall v. Bowen*, 21 *How. Pr. (N. Y.)* 378.

31. *Cal.*—*Lowe v. Ozmun*, 137 *Cal.* 257, 70 *Pac.* 87; *Daggett v. Gray*, 110 *Cal.* 169, 42 *Pac.* 568 (holding such averment sufficient in the absence of a special demurrer). *Minn.*—*Cordill v. Minnesota Elev. Co.*, 89 *Minn.* 442, 95 *N. W.* 306. *Mont.*—*Stevens v. Curran*, 28 *Mont.* 366, 72 *Pac.* 753. *Neb.*—*Sanford v. Jensen*, 49 *Neb.* 766, 69 *N. W.* 108, where allegation that property was "unlawfully and wrongfully converted," was held proper. *Wash.*—*First Nat. Bank v. Gaddis*, 31 *Wash.* 596, 72 *Pac.* 460. See *McAllister v. Kuhn*, 96 *U. S.* 87, 24 *L. ed.* 615.

"The allegation that the defendant has converted the plaintiff's property to his own use is not an allegation of a conclusion of law, but of a fact which may be described as 'composite,' and

G. "DULY."—In many cases the word "duly" when used with a predicate as to the performance of an act or the statement of a happening is held to amount to a conclusion of law,³² and in others to be an allegation of ultimate fact.³³

it allows evidence to be introduced of all such unjustified dealings with the property named as may tend to show a wrongful taking and disposal of it to the prejudice of the plaintiff's rights." *Duggan v. Wright*, 157 Mass. 228, 32 N. E. 159. See the title "**Trover and Conversion.**"

32. U. S.—*Stephenson v. Supreme Council A. L. H.*, 127 Fed. 379, holding an averment that a person was duly notified, to be a conclusion. *Cal. Joyce v. McAvoy*, 31 Cal. 273. Ill. *Kenneally v. City of Chicago*, 220 Ill. 485, 77 N. E. 155, holding that an averment that a person was duly appointed as a patrolman, is a conclusion. Mo.—*Parks v. Heman*, 7 Mo. App. 14, that a call on a stockholder was "duly" made, held a conclusion. N. Y. *Meehan v. Flaherty*, 119 App. Div. 128, 103 N. Y. Supp. 1058, that a person was duly appointed to an office.

In a proceeding by mandamus to compel a court to declare the result of an election, an averment that the election was "duly" held is a conclusion. *State v. Malheur County Court*, 46 Ore. 519, 81 Pac. 368.

In Due Form.—In an action to determine validity of an application to purchase lands, averments that the application was "in due form," and that plaintiff's assignor "became the purchaser and entitled to the possession of said land and to receive a patent therefor in due course," are mere conclusions. *Moran v. Bonyng*, 157 Cal. 295, 107 Pac. 312.

In an action to determine right to purchase certain land, an averment that plaintiff filed his application and affidavit "in due form," was held a conclusion. *McEntee v. Cook*, 76 Cal. 187, 18 Pac. 258.

33. *Hoag v. Mendenhall*, 19 Minn. 335 (that a note was duly assigned); *Webb v. Bidwell*, 15 Minn. 479 (taxes "duly levied and assessed"); *Village of Prentice v. Nelson*, 134 Wis. 456, 114 N. W. 830 (that defendant was "the duly qualified treasurer of the plaintiff," and that his bond was "duly approved," and his successor "duly elected and qualified"); *Jones*

v. Davis, 22 Wis. 422 (that a stock assessment was duly made).

"The allegation that an assessment was duly made, by reasonable inference, states that the conditions existed and were properly so found, upon which the right to make the assessment depended, and that the assessment was made by proper authority within the meaning of the insurance contract." *Miles v. Mutual Reserve Fund Life Assn.*, 108 Wis. 421, 84 N. W. 159.

In *Moore v. Fowler* (Ore.), 114 Pac. 472, the court says: "It is permissible in pleading a judgment of a court to say that it was duly given or made, or, in pleading the performance of conditions precedent in a contract, it may be stated generally that the party duly performed all the conditions on his part, but it is not sufficient to say that a street was duly laid out and dedicated to the public. The pleader should state facts from which the court could determine for itself on a construction of the pleading whether or not the street was duly dedicated."

Action on a Note.—It may be alleged "that a note was duly presented for payment and duly protested for non-payment, and that notice thereof was duly given." *Miles v. Mutual Reserve Fund Life Assn.*, 108 Wis. 421, 84 N. W. 159. See also *Ducros v. Jacobs*, 10 Rob. (La.) 453.

That plaintiff duly demanded certain estimates and payments in accordance with a contract, is sufficient. *Newton v. Highland Imp. Co.*, 62 Minn. 436, 64 N. W. 1146.

Waiver of Objection.—In *Pacific Pav. Co. v. Diggins*, 4 Cal. App. 240, 87 Pac. 415, the court says: "While the averment that an act has been 'duly' performed is ordinarily but a legal conclusion, yet in the absence of a special demurrer or objection on that ground, it will be held sufficient to authorize the court to receive evidence upon the issue; and if the parties proceed to trial without such objection, and introduce evidence upon the issue, they will not be permitted, after a decision thereon, to contend that it was

"Where the matter is collateral to the essential fact, it is sufficient to allege generally that an election was duly held, or that an officer was duly elected and qualified, . . . but where the fact itself must appear, it is not sufficient to say that it has been duly performed, without stating how."³⁴

H. DUTY.—The direct statement that it was the duty of the defendant to do or not to do a certain act is a mere conclusion of law. The rule is that facts must be alleged from which the law will imply the existence of the underlying duty.³⁵

A positive averment of the existence of the duty is superfluous,

not before the court for such decision."

34. *State v. Malheur County Court*, 46 Ore. 519, 81 Pac. 368.

By New York Code Civ. Proc., §533, it is sufficient to allege generally that a plaintiff has duly performed all conditions precedent. *Rochester R. Co. v. Robinson*, 133 N. Y. 242, 30 N. E. 1008; *Clemens v. American Fire Ins. Co.*, 70 App. Div. 435, 75 N. Y. Supp. 484.

35. *Cal.*—*Mulcahy v. Hibernia Sav. & L. Soc.*, 144 Cal. 219, 77 Pac. 910. *Conn.*—*Atwood v. Walton*, 57 Conn. 514; *Nickerson v. Bridgeport, Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1; *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718; *McCune v. Norwich City Gas Co.*, 30 Conn. 521, 79 Am. Dec. 278. *Fla.*—*Milligan v. Keyser*, 52 Fla. 331, 42 So. 367. *Ill.*—*Schueler v. Mueller*, 193 Ill. 402, 61 N. E. 1044; *Ward v. Danzeizen*, 111 Ill. App. 163; *Wilson v. Baillargeon, etc. Co.*, 54 Ill. App. 250. *Ind.*—*Chicago, etc. R. Co. v. Baker*, 169 Ind. 670, 83 N. E. 369, 17 L. R. A. (N. S.) 542; *Pittsburgh, etc. R. Co. v. Peck*, 165 Ind. 537, 76 N. E. 163; *Pittsburgh, etc. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, 660; *City of Ft. Wayne v. Christie*, 156 Ind. 172, 59 N. E. 385. *Me.*—*Hone v. Presque Isle Water Co.*, 104 Me. 217, 71 Atl. 769, 21 L. R. A. (N. S.) 1021. *Minn.*—*Compare Berry v. Dole*, 87 Minn. 471, 92 N. W. 334. *Mo.*—*Nivert v. Wabash R. Co.*, 232 Mo. 626, 135 S. W. 33, where an allegation that it was defendant's duty to watch out for the plaintiff's safety was held a conclusion. *N. J.*—*Millville Gas Light Co. v. Sweeten*, 74 N. J. L. 24, 64 Atl. 959; *Long v. John Stephenson Co.*, 73 N. J. L. 186, 63 Atl. 910; *Neinaber v. Twp. of Weehawken*, 70 N. J. L. 630, 57 Atl. 267; *State v. Pennsylvania R. Co.*, 45 N. J. L. 82. *N. Y.*—*Buffalo*

v. Holloway, 7 N. Y. 493. *R. I.*—*King v. Interstate Consol. R. Co.*, 23 R. I. 583, 51 Atl. 301, 70 L. R. A. 924. *Tenn.* *Baker v. Louisville & N. Term. Co.*, 106 Tenn. 490, 61 S. W. 1029, 53 L. R. A. 474. *W. Va.*—*Thomas v. Electrical Co.*, 54 W. Va. 395, 46 S. E. 217. *Eng.*—*Dutton v. Powles*, 2 Best & S. 174, 7 Jur. N. S. 725, 30 L. J. Q. B. 169, 110 E. C. L. 172, *affirmed*, 2 B. & S. 191, 8 Jur. N. S. 970, 31 L. J. Q. B. 191, 6 L. T. N. S. 224, 10 W. R. 408, 110 E. C. L. 191; *Brown v. Mallett*, 5 C. B. 599, 12 Jur. 204, 17 L. J. C. P. 227, 57 E. C. L. 598.

That it was the duty of a state auditor to exhibit certain vouchers. *Clement v. Graham*, 78 Vt. 290, 63 Atl. 146.

Exception.—"There are instances where the word 'duty' may be used in a pleading, although perhaps not with the utmost propriety in characterizing the nature of the plaintiff's employment, as where the word is used as descriptive of an ultimate fact as to the character of the word which he was required to do, as that one of the duties which plaintiff was employed to perform was to inspect his locomotive. In such an instance the allegation is one of ultimate fact and is partially descriptive of what his contract was." *Pittsburgh, etc. R. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, 660.

"Ought."—An allegation that defendant "knew or ought to have known" of a matter, states a conclusion of the pleader. But such an allegation is proper when the petition sets out specific facts showing a duty on the part of the defendant to anticipate or know of the thing in question. *Pacetti v. Central of Georgia R. Co.*, 6 Ga. App. 97, 64 S. E. 302.

for it is of no avail without facts to support it, and unnecessary when facts are alleged which raise the duty.³⁶

I. FRAUD, DURESS, UNDUE INFLUENCE AND MISTAKE.—Fraud is the judgment of law on facts and intents, and is in itself a conclusion. Mere general allegations charging it are therefore ineffective in stating a cause of action; the pleader must state the specific acts or language constituting the fraud, so that the court may draw its conclusion therefrom.³⁷

36. Ala.—Wells v. Gallagher, 144 Ala. 363, 39 So. 747, 113 Am. St. Rep. 40, 3 L. R. A. (N. S.) 759, where an averment of duty was held unnecessary, as facts were averred from which the law implied the duty. **W. Va.** Thomas v. Electrical Co., 54 W. Va. 395, 46 S. E. 217. **Eng.**—Brown v. Mallett, 5 C. B. 599, 12 Jur. 204, 17 L. J. C. P. 227, 57 E. C. L. 599.

In Seymour v. Maddox, 16 Q. B. 326, 71 E. C. L. 326, Lord Campbell says: "The allegation of duty is in all cases immaterial, and ought never to be introduced, for if the particular facts raise the duty, the allegation is unnecessary, and if they do not, it will be unavailing."

Statutory Duties.—Where the duties are created and defined by statute, allegations setting out those duties are conclusions of law. McGuinness v. Alison Realty Co., 46 Misc. 2, 93 N. Y. Supp. 267, affirmed, 111 App. Div. 927, 97 N. Y. Supp. 1141.

37. U. S.—Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. ed. 404; Schell v. Alston Mfg. Co., 149 Fed. 439; Williamson v. Beardsley, 137 Fed. 407. **Ala.**—Bell v. Southern, etc. Assn., 140 Ala. 371, 37 So. 237, 103 Am. St. Rep. 41; McDonald v. Pearson, 114 Ala. 630, 21 So. 534; Ft. Payne Furnace Co. v. Ft. Payne Coal & Iron Co., 96 Ala. 472, 11 So. 439, 38 Am. St. Rep. 109. **Ariz.**—County of Cochise v. Copper Queen Consol. Min. Co., 8 Ariz. 221, 71 Pac. 946. **Ark.**—Abraham v. Gray, 14 Ark. 301. **Cal.**—People v. County of Glenn, 100 Cal. 419, 35 Pac. 302, 38 Am. St. Rep. 305; Sukeforth v. Lord, 23 Pac. 296; Albersoli v. Branham, 80 Cal. 631, 22 Pac. 404. **Conn.**—Bradley v. Reynolds, 61 Conn. 271. **D. C.**—Peck v. Haley, 21 App. Cas. 224. **Fla.**—Mickler v. Reddick, 38 Fla. 341, 21 So. 286; Sammis v. Wightman, 31 Fla. 10. **Ga.**—James v. Kelley, 107 Ga. 446, 33 S. E. 425, 73 Am. St. Rep. 135; Tolbert v. Caledonian Ins. Co., 101 Ga.

741, 28 S. E. 991; Carroll v. Hutchinson, 2 Ga. App. 60, 58 S. E. 309. **Idaho.** Picotte v. Watt, 3 Idaho 447, 31 Pac. 805. **Ill.**—Zimmerman v. Willard, 114 Ill. 364, 2 N. E. 70; Hovey v. Holcomb, 11 Ill. 660; Weigand v. Cannon, 118 Ill. App. 635; Ward v. Luneer, 25 Ill. App. 160. **Ind.**—Stroup v. Stroup, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523; Norris v. Scott, 6 Ind. App. 18, 32 N. E. 103, 865. **Ia.**—Stephens v. City Council, 132 Iowa 490, 107 N. W. 614; Ockendon v. Barnes, 43 Iowa 615. **Kan.**—Knox v. Pearson, 64 Kan. 711, 68 Pac. 613; Ladd v. Nystol, 63 Kan. 23, 64 Pac. 985; Leavenworth, etc. Co. v. Commissioners, 18 Kan. 169. **Ky.** Cary v. Mire, 143 Ky. 63, 135 S. W. 403 (in this case an allegation that writ of restitution was obtained by fraud, was held a conclusion); Kuhling v. Beidenhorn, 30 Ky. L. Rep. 811, 99 S. W. 646. **Md.**—Pearce v. Watkins, 68 Md. 534, 13 Atl. 376. **Mich.**—McMahon v. Rooney, 93 Mich. 390, 53 N. W. 539. **Minn.**—Kelley v. Wallace, 14 Minn. 236. **Mo.**—Newman v. Mercantile Trust Co., 189 Mo. 423, 88 S. W. 6; Barber Asphalt Pav. Co. v. Field, 188 Mo. 182, 85 S. W. 860; Burnham v. Boyd, 167 Mo. 185, 66 S. W. 1088; Nagel v. Lindell R. Co., 167 Mo. 89, 66 S. W. 1090; Nichols v. Stevens, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514; Dorman v. Hall, 124 Mo. App. 5, 101 S. W. 161. **Neb.**—First Nat. Bank v. Grosshaus, 61 Neb. 575, 85 N. W. 542; Kemper, etc. Dry-Goods Co. v. Renshaw, 58 Neb. 513, 78 N. W. 1071; Johnston v. Spencer, 51 Neb. 198, 70 N. W. 982; Crosby v. Ritchey, 47 Neb. 924, 66 N. W. 1005; Rockford Watch Co. v. Manifold, 36 Neb. 801, 55 N. W. 236. **N. H.**—Blood v. Manchester Electric Light Co., 68 N. H. 340, 39 Atl. 335; Bell v. Lamprey, 52 N. H. 41; Weld v. Locke, 18 N. H. 141. **N. J.**—Connor v. Dundee Chem. Wks., 50 N. J. L. 257, 12 Atl. 713. **N. Y.**—Knowles v. New

The same rule is applicable to averments of threats,³⁸ or duress,³⁹ or undue influence,⁴⁰ or mistake.⁴¹

The use of words such as falsely and fraudulently in characterizing an act is of no avail in a pleading in the absence of facts from which such conclusion follows.⁴²

J. GOOD FAITH.—Averments that a person is or is not *a bona fide*

York, 176 N. Y. 430, 68 N. E. 860; *Riddle v. Bank of Montreal*, 130 N. Y. Supp. 15; *Eppley v. Kennedy*, 45 Misc. 262, 92 N. Y. Supp. 170; *Smith v. Irwin*, 45 Misc. 262, 92 N. Y. Supp. 170; *Oelbermann v. New York & N. R. Co.*, 14 Misc. 131, 36 N. Y. Supp. 1096. **N. C.**—*Beaman v. Ward*, 132 N. C. 68, 43 S. E. 545. **Ore.**—*Leasure v. Forquer*, 27 Ore. 334, 41 Pac. 665. **Pa.**—*Bradly v. Potts*, 155 Pa. 418, 26 Atl. 734. **R. I.**—*Corey v. Howard*, 19 R. I. 723, 37 Atl. 946. **S. O.**—*Gem Chemical Co. v. Youngblood*, 58 S. C. 56, 36 S. E. 437. **Tex.**—*Miller v. Lovell* (Tex. Civ. App.), 40 S. W. 835. **Utah.**—*Voorhees v. Fisher*, 9 Utah 303, 34 Pac. 64. **Vt.**—*Wright v. Bourdon*, 50 Vt. 494. **Wash.**—*Cade v. Head Camp W. O. W.*, 27 Wash. 218, 67 Pac. 603; *West Coast Groc. Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35; *Murray v. Shoudy*, 13 Wash. 33, 42 Pac. 631. **W. Va.**—*Billingsley v. Menear*, 44 W. Va. 651, 30 S. E. 61; *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611. **Wis.**—*Steinberg v. Saltzman*, 130 Wis. 419, 110 N. W. 198; *New Bank of Eau Claire v. Kleiner*, 112 Wis. 287, 87 N. W. 1090; *Crowley v. Hicks*, 98 Wis. 566, 74 N. W. 348. **Wyo.**—*Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 311, 35 Pac. 933. **Eng.**—*Knight v. Peachy*, T. Raym. 303, 83 Eng. Reprint 157; *Meriel Tresham's Case*, 9 Coke 108a, 77 Eng. Reprint 891; *Kington v. Corker*, L. R. 29 Ir. 364; *Byrne v. Muzio*, L. R. 8 Ir. 396.

See the title "**Fraud.**"

38. *Taggart v. Kern*, 22 Ind. App. 271, 53 N. E. 651.

That defendants "by threats of intimidation and coercion," have done certain acts. *Boyer v. Western Union Tel. Co.*, 124 Fed. 246.

39. *Taylor v. Blake*, 11 Minn. 255; *Pennsylvania Trust Co. v. Kline*, 192 Pa. 1, 43 Atl. 401; *McPeck's Heirs v. Graham's Heirs*, 49 S. E. 175. See the title "**Duress.**"

40. **Idaho.**—*Kelly v. Perrault*, 5 Idaho 221, 48 Pac. 45. **Minn.**—*Taylor v. Blake*, 11 Minn. 255. **Mo.**—*Barber*

Asphalt Pav. Co. v. Field, 188 Mo. 182, 86 S. W. 860.

41. **Ga.**—*Mansfield v. Barber*, 59 Ga. 851. **Kan.**—*Knox v. Pearson*, 64 Kan. 711, 68 Pac. 613. **Ky.**—*Gains v. Park*, 3 B. Mon. 223, 38 Am. Dec. 185. Compare *Smelzer v. Pugh*, 29 Ind. App. 614, 64 N. E. 943.

42. **U. S.**—*United States v. Rose*, 166 Fed. 999. **Ala.**—*Green v. Emens*, 135 Ala. 563, 33 So. 540. **Cal.**—*Peckham v. Watsonville*, 138 Cal. 242, 71 Pac. 169 (that a board of trustees "corruptly and fraudulently conspired" to squander public funds); *Triscony v. Orr*, 49 Cal. 612, averment that property was taken unlawfully and fraudulently. **Ill.**—*Ward v. Luneer*, 25 Ill. App. 160. **Vt.**—*Wright v. Bourdon*, 50 Vt. 494. **Wash.**—*West Coast Groc. Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35, that a conveyance was made to defraud creditors. **Wyo.**—*Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

In *Porter v. Ullman*, 105 Ala. 623, 17 So. 111, the court says: "No conclusion of the pleader that certain stated facts which entered into a transaction was a fraud, or that certain acts done to complete a transaction were done with a fraudulent intent, can impart or inject fraud into the transaction. The law infers the fraud from the facts, and not from the averment of fraud independent of the facts. Unless the facts show fraud, the conclusion of the pleader that they were fraudulent is without force."

In *Cella v. Brown*, 144 Fed. 742, 75 C. C. A. 608, the court says: "The mere charge in a bill in equity that by a fraudulent scheme a reorganization of two railroad companies was fraudulently designed by the promoters is a mere *brutum fulmen*. . . . The allegation is but a conclusion of law by the pleader, and no relief could be administered thereon."

"**Fraudulent**" and "fraudulently" mean nothing in the absence of supporting facts. *Williamson v. Beardsley*, 137 Fed. 467, 69 C. C. A. 615. And

or innocent purchaser or holder,⁴³ or that acts were founded on improper motives,⁴⁴ or that the selection of certain lots by a town for condemnation was not made in good faith,⁴⁵ are legal conclusions.

K. INDEBTEDNESS.—A general allegation⁴⁶ or denial⁴⁷ of indebtedness or liability, without an averment or denial of other facts, is a conclusion of law and raises no issue,⁴⁸ as is also the case as to an averment that a certain amount is due and owing.⁴⁹

L. LEGALITY AND VALIDITY OF ACTS OR PROCEEDINGS.—General allegations that certain acts or proceedings are illegal and void, are mere conclusions of law, and wholly insufficient in the absence of facts from which such conclusions will follow as a matter of law.⁵⁰

see *Lumley v. Wabash R. Co.*, 71 Fed. 21.

43. *Cal.*—*Aurrecoechea v. Sinclair*, 60 Cal. 532. *Ky.*—*Wing v. Hayden*, 10 Bush 276. *La.*—*State v. Hackley*, 124 La. 854, 50 So. 772. *Minn.*—*Downer v. Read*, 17 Minn. 493. *N. Y.*—*White v. Brown*, 14 How. Pr. 282, 286; *Ludlow v. Woodward*, 117 App. Div. 525, 102 N. Y. Supp. 647. *Utah.*—*Voorhees v. Fisher*, 9 Utah 303, 34 Pac. 64.

44. *Kittinger v. Buffalo Tract. Co.*, 160 N. Y. 377, 54 N. E. 1081.

45. *Lavelle v. Town of Julesburg*, 49 Colo. 290, 112 Pac. 774.

46. *U. S.*—*Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. 132, 27 L. ed. 903.

Ala.—*Lawton v. Ricketts*, 104 Ala. 430, 16 So. 59. *Cal.*—*Callahan v. Broderick*, 124 Cal. 80, 56 Pac. 782. *Ky.*—*Cooper v. McKee*, 121 Ky. 287, 89 S. W. 203; *Camplin v. Eads*, 15 Ky. L. Rep. 666, 24 S. W. 1068. *Minn.*—*Holgate v. Broome*, 8 Minn. 243. *Mo.*—*Butts v. Phelps*, 79 Mo. 302, applying rule to justices' courts. *Nev.*—*California State Tel. Co. v. Patterson*, 1 Nev. 150. *N. Y.*—*Tate v. American Woolen Co.*, 114 App. Div. 106, 99 N. Y. Supp. 673; *Nealis v. Marks*, 96 N. Y. Supp. 740; *Sampson v. Grand Rapids School Furn. Co.*, 55 App. Div. 163, 66 N. Y. Supp. 815. *N. C.*—*Moore v. Hobbs*, 79 N. C. 535. *S. C.*—*Crane, Boylston & Co. v. Lipscomb*, 24 S. C. 430. *Tex.*—*Gray v. Osborne*, 24 Tex. 157, 76 Am. Dec. 99. *Wis.*—*State v. Egerer*, 55 Wis. 527, 13 N. W. 461; *Williams v. Brunson*, 41 Wis. 418 ("is now justly indebted to the plaintiff therefor").

47. *Ala.*—*T. J. Scott & Sons v. Rawls*, 159 Ala. 399, 48 So. 710. *Cal.*—*McConoughey v. Jackson*, 101 Cal. 265, 35 Pac. 863, 40 Am. St. Rep. 53; *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749; *Curtis v. Richards*, 9 Cal. 33. *Del.*

Reynolds v. Fahay, 4 Penne. 264, 55 Atl. 221. *D. C.*—*Bryan v. Harr*, 21 App. Cas. 190. *Ky.*—*Guenther v. American Steel Hoop Co.*, 116 Ky. 580, 76 S. W. 419; *Aultman & Taylor Co. v. Mead*, 109 Ky. 583, 22 Ky. L. Rep. 1189, 60 S. W. 294; *Overley v. Given*, 21 Ky. L. Rep. 760, 52 S. W. 1059; *Haggard v. Hay's Admr.*, 13 B. Mon. 175. *Mo.*—*Sapington v. Jeffries*, 15 Mo. 623. *Mont.*—*Higgins v. Germaine*, 1 Mont. 230. *Neb.*—*Baldwin v. Burt*, 43 Neb. 245, 61 N. W. 601. *N. Y.*—*Fosdick v. Groff*, 22 How. Pr. 153; *Gilbert v. Covell*, 16 How. Pr. 34. *Ohio.*—*Knox County Bank v. Lloyd's Admr.*, 18 Ohio St. 353.

48. Nil debt, therefore, is not a proper plea under codes. *Ark.*—*Taylor v. Purcell*, 60 Ark. 606, 31 S. W. 567. *Cal.*—*McConoughey v. Jackson*, 101 Cal. 265, 35 Pac. 863. *Colo.*—*Gale v. James*, 11 Colo. 540, 19 Pac. 446. *N. Y.*—*Hoffman v. Richter*, 7 Misc. 438, 27 N. Y. Supp. 935. *S. C.*—*Grayson v. Harris*, 37 S. C. 606, 16 S. E. 154.

49. *Cal.*—*Penrose v. Winter*, 135 Cal. 289, 67 Pac. 772; *Richards v. Lake View Land Co.*, 115 Cal. 642, 47 Pac. 683; *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891; *Frisch v. Caler*, 21 Cal. 71. *N. Y.*—*Allen v. Malcolm*, 12 Abb. Pr. (N. S.) 335. *Ore.*—*Creecy v. Joy*, 40 Ore. 28, 66 Pac. 295.

Words "Due," "Owing," and "Payable."—*Irwin v. Ins. Co. of North America* (Cal. App.), 116 Pac. 294.

50. *Ladd v. Nystol*, 63 Kan. 23, 64 Pac. 985; *Thomas v. New York, etc. R. Co.*, 139 N. Y. 163, 34 N. E. 877.

That an order "was without authority of law, and without jurisdiction, and null and void, and without notice to these plaintiffs." *Carlson v. County Comrs.*, 38 Wash. 616, 80 Pac. 795.

For example, such averments as the following have been held to be legal conclusions: that a certain appraisalment⁵¹ or tax or assessment⁵² was illegal and void, or was not levied in accordance with law;⁵³ that a tax or valuation on property was unequal and unjust;⁵⁴ that an ordinance is illegal and void,⁵⁵ or was not published in accordance with law;⁵⁶ that certain acts were done wrongfully or unlawfully;⁵⁷

Non-existence of illegality, or want of organization of a town. *Pratt v. Lincoln County*, 61 Wis. 62, 20 N. W. 726.

In *Southern Pacific Co. v. Campbell*, 189 Fed. 182, in an action to enjoin rates, the following averment was held to state conclusions of law: "That said pretended order is void and of no force and effect, in this, that the rates sought to be prescribed by said order, in lieu of existing rates, are confiscatory of the property of your orators, and will deprive your orators of their property without compensation and without due process of law."

Unconstitutionality of Laws.—In *Southern Ry. Co. v. King*, 217 U. S. 524, 30 Sup. Ct. 594, 54 L. ed. 868, where the defense was the unconstitutionality of a statute, the court says in part: "The amended answer contains a general statement that the statute is in violation of the commerce clause of the constitution, and a direct burden upon, and impedes interstate traffic, and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mails and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional."

Execution Sale.—"That there was no such sale of the property as the law provides, and that there was no compliance with the law after the property was offered for sale." *Cooper v. French*, 52 Iowa 531, 3 N. W. 538.

Attachment.—That an attachment was "illegal, unauthorized and void." *Sprague v. Parsons*, 14 Abb. N. C. (N. Y.) 320.

51. *Kellogg v. Tout*, 65 Ind. 152.

52. *Ohio*.—*Pelton v. Bemis*, 44 Ohio St. 51, 4 N. E. 714. *Oklahoma*.—*Jones v. Carnes*, 17 Okla. 470, 87 Pac. 652. *Ore.*—*Shannon v. City of Portland*, 38 Ore. 382, 62 Pac. 50; *O'Hara v. Parker*, 27 Ore. 156, 39 Pac. 1004. *Wyo.*—*Ricketts*

v. Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

Tax Levy.—That "the premises were not properly assessed for taxes, and that there was no legal and sufficient levy of taxes for said year." *Weston v. Meyers*, 45 Neb. 95, 63 N. W. 117.

53. *Johnson v. Kirby*, 65 Cal. 482, 4 Pac. 458; *Beckett v. Morse*, 4 Cal. App. 228, 87 Pac. 408.

54. *Mayor v. Beasley*, 1 Humph. (Tenn.) 232, 34 Am. Dec. 646.

An averment that a valuation of property is "unjust, disproportioned, and unequal," is insufficient. *Guy v. Washburn*, 23 Cal. 111.

A mere unsupported averment that a "license tax of \$25.00 is unequal, unjust and disproportionate to that levied upon other similar occupations." *City of Covington v. Herzog*, 116 Ky. 725, 25 Ky. L. Rep. 938, 76 S. W. 538.

An allegation that a tax levy is an attempt to take private property for public use without just compensation and without due process of law, is a conclusion. *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163.

55. *Knapp, Stout & Co. v. City of St. Louis*, 156 Mo. 343, 56 S. W. 1102.

56. *Lutien v. City of Kewanee*, 143 Wis. 242, 126 N. W. 662, 127 N. W. 942.

57. *Ala.*—*City Council v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562. *Ga.*—*Whaley v. Mayor of Columbus*, 89 Ga. 781, 15 S. E. 694. *N. Y.*—*Talcott v. City of Buffalo*, 125 N. Y. 280, 26 N. E. 263.

In *Joyce v. McAvoy*, 31 Cal. 273, the court says: "Such words as 'duly,' 'wrongfully,' and 'unlawfully,' so frequently used in pleadings, might better be omitted. They tender no issue, and serve only to detract from that logical directness and simplicity of statement which ought always to be observed in a pleading. But while they do no good, and should not be used for the reason suggested, they do not vitiate the pleading, for they

that a list of candidates for election was illegally certified;⁵⁸ that a building is an unlawful structure built in violation of a certain ordinance.⁵⁹

As to Invalidity of a Judgment.—Allegations that a judgment is void, and of no force and effect, state mere conclusions and are unavailing without a statement of the facts which make it so.⁶⁰ Also averments that the court which rendered the judgment did not have jurisdiction of the person of the defendant,⁶¹ or of the subject-matter of the action,⁶² are mere conclusions and insufficient.

Similarly if the judgment is attacked on the ground of fraud, the facts must, as in other cases, be stated; for a general allegation that a judgment was obtained by fraud is a conclusion.⁶³

M. LIENS.—General averments as to the creation,⁶⁴ or existence,⁶⁵

are but surplusage, and may be disregarded."

58. *Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L. R. A. 754.

59. *Morton v. Wessinger* (Ore.), 113 Pac. 7.

60. *Cal.*—*People v. Supervisors of San Francisco*, 27 Cal. 655, holding that an answer which attempts to collaterally attack a judgment, must specify facts constituting the invalidity. *Fla.*—*Sammis v. Wightman*, 31 Fla. 10, 12 So. 526. *Idaho.*—*Ollis v. Orr*, 6 Idaho 474, 56 Pac. 162, an averment that an affidavit of publication of summons was insufficient. *Ind.*—*Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700. *N. Y.*—*Town of Ontario v. First Nat. Bank*, 59 Hun 29, 12 N. Y. Supp. 434; *Henriques v. Miriam Osborn Memorial Home*, 22 Misc. 653, 51 N. Y. Supp. 133. *Tex.*—*Miller v. Lovell* (Tex. Civ. App.), 40 S. W. 835; *Gilbert v. Cooper*, 43 Tex. Civ. App. 328, 95 S. W. 753.

That a judgment was "an irregular and void judgment," and "without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings in said action." *Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. ed. 133.

An averment that no proper, legal or sufficient judgment of the ouster of an officer was entered, is a conclusion. *Doherty v. City of Galveston*, 19 Tex. Civ. App. 708, 48 S. W. 804.

In *Naddo v. Bardon*, 51 Fed. 493, 2 C. C. A. 335, the court says: "An averment that the judgment was in-

formal, irregular and void, without the specification of any fact showing its invalidity, will be considered as a mere allegation of a conclusion of law; and not as a statement of fact."

61. *Fla.*—*Sammis v. Wightman*, 31 Fla. 10, 12 So. 526. *Ind.*—*Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700. *Mo.*—*Martin v. Castle*, 193 Mo. 183, 91 S. W. 930.

62. *Cal.*—*Del Campo v. Camarillo*, 154 Cal. 647, 98 Pac. 1049. *Ind.*—*Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700. *Mo.*—*Martin v. Castle*, 193 Mo. 183, 91 S. W. 930.

63. *Kuhling v. Beidenhorn*, 30 Ky. L. Rep. 811, 99 S. W. 646; *Machen v. Bermheim*, 29 Ky. L. Rep. 427, 93 S. W. 621; *Thomas v. Markmann*, 43 Neb. 823, 62 N. W. 206 ("that said judgment was procured by fraud, misrepresentation, and contrary to law").

64. *Cal.*—*Shea v. Johnson*, 101 Cal. 455, 35 Pac. 1023, that a person retained a lien on certain property. *Minn.*—*Price v. Doyle*, 34 Minn. 400, 26 N. W. 14 (that a certain claim constituted a lien); *Griggs v. City of St. Paul*, 9 Minn. 246. *Neb.*—*Omaha Brew. Assn. v. Tildenburg*, 2 Neb. (Unof.) 277, 96 N. W. 107, that defendant gave plaintiff a lien.

Compliance With Lien Laws.—A denial that plaintiff has complied with certain lien laws, is a conclusion. *Curnow v. Blue Gravel, etc. Co.*, 68 Cal. 262, 9 Pac. 149.

65. *Alabama, etc. Assn. v. Alabama Gas, etc. Co.*, 131 Ala. 256, 31 So. 26 (that plaintiff has no lien); *Frazier v. Thomas*, 6 Ala. 169.

or priority⁶⁶ of liens on certain property, are mere conclusions of law and insufficient.

N. OTHER ILLUSTRATIONS. — Of course the cases cited here are intended to be merely by way of illustration, and the reference cannot be exhaustive. Among other illustrations of conclusions of law, where allegations have been held insufficient for failure to state the facts from which the conclusion follows may be mentioned averments that plaintiff and defendant were partners;⁶⁷ an allegation that a wife abandoned her husband;⁶⁸ that plaintiff is a tenant in common with certain other persons;⁶⁹ that plaintiff has a priority to the use of certain water;⁷⁰ that a tender was made;⁷¹ that plaintiff did not furnish defendant with proper and sufficient proofs of loss;⁷² that an act was done without probable cause;⁷³ that certain services were necessary;⁷⁴ or that there was a reasonable necessity for making a contract on Sunday;⁷⁵ that an obligation is barred by a discharge in insolvency;⁷⁶ that plaintiff was a passenger,⁷⁷ or was lawfully in a certain car;⁷⁸ that excessive bail was required;⁷⁹ that a person is executor of the estate of another;⁸⁰ that a certain thing could not be

66. *Ia.*—*Koon v. Tramel*, 71 Iowa 132, 32 N. W. 243. *Neb.*—*First Nat. Bank v. Myers*, 44 Neb. 306, 62 N. W. 459. *Ohio.*—*Fuher v. Buckeye Supply Co.*, 5 Ohio Dec. 187, 7 Ohio N. P. 420. *Tex.*—*Farmers' & Merchants' Nat. Bank v. Taylor*, 91 Tex. 78, 40 S. W. 966.

67. *Reddington v. Lanahan*, 59 Md. 429; *Baum v. Stephenson*, 133 Mo. App. 187, 113 S. W. 225.

68. *Williams v. Noma Mills Co.*, 128 La. —, 55 So. 414.

69. *Mason v. Mason*, 219 Ill. 609, 76 N. E. 692.

70. *Farmers' High Line Canal v. Southworth*, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767.

71. *Indiana Bond Co. v. Jameson*, 24 Ind. App. 8, 56 N. E. 37.

That defendant tendered "the money and cotton called for by the mortgage." *Wittmeier v. Tidwell*, 147 Ala. 354, 40 So. 963.

Discharge by Tender.—An averment that a mortgage lien was discharged by a tender states a conclusion. *Harris v. Staples* (Tex. Civ. App.), 89 S. W. 801.

72. *Moore v. Susquehanna Mut. Fire Ins. Co.*, 196 Pa. 30, 46 Atl. 266.

73. *Schooler v. Yancey*, 133 Ky. 695, 118 S. W. 940.

Contra.—*Struby-Estabrook Mercantile Co. v. Kyes*, 9 Colo. App. 190, 48 Pac. 663, where the court says: "The

question of probable cause is a mixed question of law and fact. What the facts may be must be found by the jury; but the court must say whether they constitute probable cause or not. Probable cause or the want of it, is a conclusion of law; but it is also an ultimate fact."

74. *Cleveland, etc. R. Co. v. Shrum*, 24 Ind. App. 96, 55 N. E. 515.

An averment that a reserve fund of a certain amount is unnecessary for the uses of a corporation, is a conclusion. *Mulcahy v. Hibernia Sav. & L. Society*, 144 Cal. 219, 77 Pac. 910.

75. *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775.

76. *Christy v. Dana*, 42 Cal. 174; *Christy v. Dana*, 34 Cal. 548, 73 Am. Dec. 470.

77. *Fremont, etc. R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254.

That "plaintiff was in the act of getting on one of the defendant's passenger cars as a passenger, as he had the right to do." *North Birmingham R. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18.

78. *State v. Western Maryland R. Co.*, 98 Md. 125, 56 Atl. 394, 103 Am. St. Rep. 388.

79. *Schooler v. Yancey*, 133 Ky. 695, 118 S. W. 940.

80. *Brinkerhoff v. Tierman*, 61 Misc. 586, 114 N. Y. Supp. 698.

discovered by a casual observer;⁸¹ that there was no constructive delivery;⁸² that a note was "not outstanding;"⁸³ that a city took possession of property under a title paramount;⁸⁴ that a person was of unsound mind,⁸⁵ or that one's character is bad;⁸⁶ that property was not dedicated to public use by a certain plat;⁸⁷ that a controversy is between citizens of different states;⁸⁸ that certain persons were not legally qualified voters;⁸⁹ that the facts alleged in an amended complaint constitute a different cause of action from that originally declared on;⁹⁰ that goods delivered were of a different kind from those purchased;⁹¹ that plaintiff was entitled to possession of land and to the rents and profits;⁹² that a person holds property in trust for another;⁹³ that certain money is a trust fund;⁹⁴ that a street railway injures plaintiff in a manner different from the inconvenience suffered by the public;⁹⁵ that plaintiff has prosecuted a claim with diligence;⁹⁶ that certain property is plaintiff's separate estate;⁹⁷ that plaintiff is a foreign corporation and has not complied with certain statutes relating to such corporations;⁹⁸ that the manner of using certain property was reasonable and proper;⁹⁹ that certain property was

81. *Snipes v. Bomar Cotton Oil Co.* (Tex. Civ. App.), 137 S. W. 428.

82. *Newman v. Newman* (Tex. Civ. App.), 86 S. W. 635.

83. *Larimore v. Wells*, 29 Ohio St. 13.

84. *Pabst Brewing Co. v. Thornley*, 127 Fed. 439.

85. *Batman v. Snoddy*, 132 Ind. 480, 32 N. E. 327.

But under an Indiana statute this phase has been held not to state a conclusion of law. *Humphrey v. Harris* (Ind. App.), 96 N. E. 38.

Averment that a slave was unsound, states a fact. *Stone v. Watson*, 37 Ala. 279.

86. *School Dist. No. 2 v. Shuck*, 49 Colo. 526, 113 Pac. 511. "His acts, or things he does, which make it bad must be pleaded. Others might form different conclusions. The pleader has no right to make himself the judge of another's character, and deprive the court of the facts upon which he bases his conclusion."

87. *Bellevue Improvement Co. v. Kayser*, 1 Neb. (Unof.) 63, 95 N. W. 499.

88. *Grace v. American Central Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. ed. 932; *O'Connor v. Chicago, etc. R. Co.*, 144 Iowa 289, 117 N. W. 979, 122 N. W. 947.

89. *Ham v. State*, 156 Ala. 645, 47 So. 126.

Averments that plaintiff "was a

legally qualified elector at such municipal election, . . . and was entitled to vote . . . at such election," are conclusions of law. *Brown v. Phillips*, 71 Wis. 239, 36 N. W. 242.

90. *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367; *Dennis v. Nelson*, 55 Minn. 144, 56 N. W. 589.

91. *McAllister-Coman Co. v. Matthews*, 150 Ala. 167, 43 So. 747.

92. *Sheridan v. Jackson*, 72 N. Y. 170.

93. *Lienan v. Lincoln*, 2 Duer (N. Y.) 670; *Binkowski v. Moskiewitz*, 128 N. Y. Supp. 803.

94. *Francis v. Gisborn*, 30 Utah 67, 83 Pac. 571.

95. *Placke v. Union Depot R. Co.*, 140 Mo. 634, 41 S. W. 915.

96. *Ind.*—*Harrington v. Witherow*, 2 Blackf. 37. *Ia.*—*Leas v. White*, 15 Iowa 187. *Ky.*—*Wakefield v. First Nat. Bank*, 19 Ky. L. Rep. 426, 40 S. W. 921.

97. *Leahy v. Leahy*, 97 Ky. 59, 17 Ky. L. Rep. 187, 29 S. W. 852.

98. *E. T. Burrowes Co. v. Rapid Safety Filter Co.*, 49 Misc. 539, 97 N. Y. Supp. 1048.

99. "To allege that the use which the city was making of a stream was reasonable, or natural, or proper and consistent with the rights of the plaintiff, without stating what that use was, or the manner of the use, was but the statement of a conclusion." *Kellogg*

exempt;¹ that one-fifth of a tax will not be collected;² that plaintiff has a perfect and substantial defense to a claim;³ that all corporate stock issued over a certain amount is null and void;⁴ that a deed was never lawfully delivered.⁵

Other instances of allegations which have been held statements of fact properly, or mixed conclusions of law and fact which by usage and precedent are pleaded as facts,⁶ are averments that plaintiff is the lessee of a certain person;⁷ that defendants "succeeded to and became possessed of" a certain life estate;⁸ that a demand was "simulated;"⁹ that there existed as appurtenant to land a right of way for ingress and egress to the same;¹⁰ that the defendant has not paid any part of the amount due;¹¹ that an animal has a fierce and dangerous nature;¹² that injuries were sustained through accidental means;¹³ that a particular place is a public highway;¹⁴ that a person or corporation is insolvent.¹⁵

O. NEGLIGENCE. — "An averment of negligence whether stated as a cause of action or as a defense, is not required to be as specific as the proof essential to support it."¹⁶ The facts upon which the alleged negligence is predicated must be averred, therefore, with reasonable certainty;¹⁷ but it has been held that they may be alleged in

v. City of New Britain, 62 Conn. 232, 24 Atl. 996.

1. *Ark.*—*Donnelly v. Wheeler*, 34 Ark. 111. *Ia.*—*Pratt v. Delavan*, 17 Iowa 307, homestead exemption. *Ky.* *Oldham's Admx. v. Oldham's Admx.*, 141 Ky. 526, 133 S. W. 232. *Neb.* *Bell v. Sherer*, 12 Neb. 409, 11 N. W. 861, holding that while this is a conclusion, any objection thereto was waived by failure to demur. *R. I.* *McTwiggan v. Hunter*, 19 R. I. 68, 31 Atl. 693, an averment that property was "duly exempted from taxation," held a conclusion. *Wis.*—*Quinney v. Town of Stockbridge*, 33 Wis. 505.

2. *City of Lexington v. Board of Education*, 23 Ky. L. Rep. 1663, 65 S. W. 827.

3. *Iron Co. v. Quesenberry*, 50 W. Va. 451, 40 S. E. 487. This averment was held insufficient in an action in equity seeking relief against a judgment.

4. *Jones v. Ezell Co.*, 134 Ga. 553, 68 S. E. 303, holding that "general allegations of this sort are analogous to a general charge of fraud . . . which has always been held too loose and indefinite to withstand a general demurrer."

5. *Blake v. Ogden*, 223 Ill. 204, 79 N. E. 68.

6. *Travelers' Ins. Co. v. Hallauer*, 131 Wis. 371, 111 N. W. 527; *Gillett v. Robbins*, 12 Wis. 320.

7. *Harris v. Halverson*, 23, Wash. 779, 63 Pac. 549.

8. *Curtiss v. Livingston*, 36 Minn. 380, 31 N. W. 357.

9. *Cartwright v. Bamberger*, 90 Ala. 405, 8 So. 264.

10. *Cincinnati, etc. R. Co. v. Miller*, 36 Ind. App. 26, 72 N. E. 827.

11. *Krieger v. Feeny*, 14 Cal. App. 538, 112 Pac. 901.

12. *Guenther v. Fohey*, 26 Ind. App. 93, 59 N. E. 182.

13. *Western Trav. Acc. Assn. v. Munson*, 73 Neb. 858, 103 N. W. 688, 1 L. R. A. (N. S.) 1068.

14. *Jackson v. Smiley*, 18 Ind. 247.

15. *Chicago, etc. R. Co. v. Kenney*, 159 Ind. 72, 62 N. E. 26.

The reason for this rule is the fact that it is provable not only by evidentiary facts showing its existence, but also by the direct averments of those familiar with the financial condition of the person or corporation. *Chicago, etc. R. Co. v. Kenney*, *supra*.

16. *Pace v. Louisville & N. R. Co.*, 166 Ala. 519, 52 So. 52, where the court said that "a statement in form a conclusion approaches occasionally so nearly the ultimate facts as to make the effort at further analysis futile for the practical purposes of pleading."

17. *Ala.*—*Evans v. Alabama-Georgia Svrup Co.*, 56 So. 529; *Curtis v. Hunt*, 158 Ala. 78, 48 So. 593. *Ark.*—*Chi-*

general terms, short of mere conclusions of the pleader.¹⁸

The same rules are applicable to contributory negligence.¹⁹

P. NOTICE.—Averments that notice was or was not given as required by law²⁰ are mere conclusions of the pleader.²¹

Q. PERFORMANCE, BREACH AND WAIVER.—1. **Performance.**—In the absence of statute a general averment of the performance of conditions, will be construed as a conclusion of law;²² but in actions upon contracts, a general allegation of performance of conditions precedent is declared sufficient by statute in many jurisdictions.²³ But the per-

cago, etc. R. Co. v. Smith, 94 Ark. 524, 127 S. W. 715. Del.—Campbell v. Walker, 76 Atl. 475. Ind.—McCoy v. Board of Trustees, 31 Ind. App. 331, 67 N. E. 1007. Va.—Chesapeake & O. R. Co. v. Melton, 110 Va. 728, 67 S. E. 346; Wright v. Atlantic Coast Line R. Co., 110 Va. 670, 66 S. E. 848; Chesapeake & O. R. Co. v. Hunter, 109 Va. 341, 64 S. E. 44. W. Va.—Bralley v. Norfolk & W. R. Co., 66 W. Va. 462, 66 S. E. 653.

See the title "Negligence."

"So negligently and carelessly operated and ran his automobile." Campbell v. Walker (Del.), 76 Atl. 475.

In an action to recover for injuries to an employe in a mine, based upon an unsafe place, it was held that "merely alleging that they negligently failed to timber the place where plaintiff was employed was but the conclusion of the pleader, without stating the facts upon which such a conclusion was based." Stratton's Independence v. Sterrett (Colo.), 117 Pac. 351.

18. Western Union Tel. Co. v. Saunders, 164 Ala. 234, 51 So. 176; Bralley v. Norfolk & W. R. Co., 66 W. Va. 462, 66 S. E. 653.

"Negligently."—It is proper to aver that an act was done negligently, and the word so used "signifies fact, not law, though it is also susceptible of legal significance." Bralley v. Norfolk & W. R. Co., 66 W. Va. 462, 66 S. E. 653.

19. Brown v. St. Louis & S. F. R. Co. (Ala.), 55 So. 107; Louisville, etc. R. Co. v. Calvert (Ala.), 54 So. 184 (where the facts were held not sufficiently averred).

In Briggs v. Tennessee Coal, etc. Co., 133 Ala. 237, 50 So. 1025, a plea was held demurrable which averred that "plaintiff was himself guilty of negligence, which proximately con-

tributed to cause the injuries complained of in negligently failing to exercise proper care to keep from falling from said trestle."

20. Conn.—Rapelye v. Bailey, 3 Conn. 438, 8 Am. Dec. 199. Ind.—Harris v. Ross, 112 Ind. 314, 13 N. E. 873. Kan.—Townsend v. Burr, 9 Kan. App. 810, 60 Pac. 477. Ore.—Kirkpatrick v. City of Dallas, 115 Pac. 424.

21. That no notice was given is a fact. Wells County v. Gruver, 115 Ind. 224, 17 N. E. 290.

22. Home Ins. Co. v. Duke, 43 Ind. 418.

23. Cal.—Smith v. Mohn, 87 Cal. 489, 25 Pac. 696; Rhoda v. Alameda County, 52 Cal. 350; Griffiths v. Henderson, 49 Cal. 566; Ferrer v. Home Mut. Ins. Co., 47 Cal. 416; California Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511. Ind.—Kenney v. Bevilheimer, 158 Ind. 653, 64 N. E. 215; American Cent. Ins. Co. v. Sweetser, 116 Ind. 370, 19 N. E. 159; Aetna Ins. Co. v. Kittles, 81 Ind. 96; Darnell v. Kellar, 18 Ind. App. 103, 45 N. E. 676. Ia.—Hart v. National Masonic Acc. Assn., 105 Iowa 717, 75 N. W. 508; Brock v. Des Moines Ins. Co., 96 Iowa 39, 64 N. W. 685. Kan.—Milwaukee Mechanics' Ins. Co. v. Winfield, 6 Kan. App. 527, 51 Pac. 567. Mo.—McGannon v. Millers' Nat. Ins. Co., 171 Mo. 143, 71 S. W. 160, 94 Am. St. Rep. 778; McNeese v. Southern Ins. Co., 61 Mo. App. 335; Roy v. Boteler, 40 Mo. App. 213; Parks v. Heman, 7 Mo. App. 14. Neb.—German Ins. Co. v. Shader, 68 Neb. 1, 93 N. W. 972, 60 L. R. A. 918. N. J. Vail v. Pennsylvania Fire Ins. Co., 67 N. J. L. 422, 51 Atl. 929; Ridgway v. Forsyth, 7 N. J. L. 98. N. Y.—Hatch v. Peet, 23 Barb. 575; Canavan Bros. Co. v. Bendheim, 128 N. Y. Supp. 435; Gansevoort Bank v. Empire State Sure-

formance of conditions prescribed by a statute must be specifically averred in order to avoid pleading conclusions.²⁴

2. Breach.—In alleging breach or non-performance, the facts must be specifically set out; averments that a party has violated or failed to carry out the terms of an agreement are legal conclusions.²⁵

3. Waiver.—Similarly general allegations of waiver of performance of conditions are mere conclusions and are insufficient without stating the facts constituting such waiver.²⁶

R. RATIFICATION.—An averment that a contract or other act has been ratified, is a conclusion and insufficient in the absence of a statement of facts showing how the ratification was effected.²⁷

ty Co., 117 App. Div. 455, 102 N. Y. Supp. 544 (holding it sufficient to allege that plaintiff has "duly performed" all conditions). **Ohio.**—Crawford & Morrison v. Satterfield, 27 Ohio St. 421. **Ore.**—Griffin v. Pitman, 8 Ore. 342. **S. D.**—DeFord v. Hyde, 10 S. D. 386, 73 N. W. 265. **Wis.**—Miles v. Mutual Reserve Fund Life Assn., 108 Wis. 421, 84 N. W. 159; Minneapolis Thresher-Mach. Co. v. Crevier, 72 Wis. 535, 40 N. W. 506; Scheiderer v. Travelers' Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. St. Rep. 618; Reif v. Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731. **Can.**—Hennessey v. Weir, 11 U. C. C. P. 179; Great Western R. Co. v. Grand Trunk R. Co., 25 U. C. Q. B. 37.

An allegation that a jack was well and properly cared for as required by a contract, is not a conclusion. *Ash v. Beck* (Tex. Civ. App.), 68 S. W. 53.

24. Cal.—Rhoda v. Alameda County, 52 Cal. 350; Himmelman v. Danos, 35 Cal. 441; People v. Jackson, 24 Cal. 630. **Minn.**—Biron v. Board of Water Comrs., 41 Minn. 519, 43 N. W. 482. **Mo.**—Parks v. Heman, 7 Mo. App. 14. **Neb.**—McCullough v. Colfax County, 4 Neb. (Unof.) 543, 95 N. W. 29.

25. Hearn v. Gower, 1 Ga. App. 265, 57 S. E. 916; Van Schaick v. Winne, 18 Barb. (N. Y.) 89; Armstrong v. Heide, 47 Misc. 609, 94 N. Y. Supp. 434; Coffin v. President, etc., Grand Rapids H. Co., 61 N. Y. Super. 51, 18 N. Y. Supp. 782.

26. U. S.—Phinney v. Mutual Life Ins. Co., 67 Fed. 493, holding that the mere naked conclusion that a contract was waived, abandoned and rescinded, is insufficient. **Ala.**—Mountain Terrace Land Co. v. Brewer, 165 Ala. 242, 51 So. 559; De Leon v. Walters, 163 Ala. 499, 50 So. 934; Western Union Tel. Co.

v. Heathcoat, 149 Ala. 623, 43 So. 117. **Ind.**—Crafton v. Carmichael, 29 Ind. App. 320, 64 N. E. 627. **Ia.**—Barrett v. Des Moines, etc., Ins. Assn., 120 Iowa 184, 94 N. W. 473. **Ky.**—Bishop v. Lawrence, 85 Ky. 25, 2 S. W. 499. **N. Y.**—Pope Mfg. Co. v. Rubber Goods Mfg. Co., 110 App. Div. 341, 97 N. Y. Supp. 73. **Ore.**—Zorn v. Livesley, 44 Ore. 501, 75 Pac. 1057.

That "all the conditions above mentioned were fulfilled or were waived." *Speare's Sons' Co. v. Casein Co.*, 53 Misc. 58, 103 N. Y. Supp. 1015.

In *Macfarland v. Westside Imp. Assn.*, 56 Neb. 277, 76 N. W. 584, it is held that where, in a suit by a corporation against a subscriber to its stock to recover his unpaid subscription, the defense is that the entire capital stock was not subscribed, a reply which avers that defendant waived the non-payment of the entire stock, is an averment of an ultimate fact.

See also *United Fireman's Ins. Co. v. Kukral*, 7 Ohio C. C. 356, 4 Ohio Cir. Dec. 633, where the court says: "The existence of the waiver is an issuable fact. . . . It is not necessary in pleading waiver that the particular circumstances of the waiver be stated. The circumstances are evidential facts."

Waiver of Demand.—In an action on a note, an averment that the defendant waived demand and notice is a conclusion of fact and is sufficient. *Bay View Brewing Co. v. Grubb*, 24 Wash. 163, 63 Pac. 1091.

27. Ala.—Farley Nat. Bank v. Henderson, 118 Ala. 441, 24 So. 428. **Ind.**—Cleveland, etc., R. Co. v. Prewitt, 134 Ind. 557, 33 N. E. 367; Copenrath v. Keinby, 83 Ind. 18; Voiles v. Beard, 58 Ind. 510; Reinskopf v. Rogge, 37 Ind. 207. **Mo.**—Drovers' Live Stock Co. v.

S. RELEASE AND ABANDONMENT.—In pleading release the facts must be specifically averred; mere general allegations are conclusions.²⁹ So in alleging abandonment the facts must be set up.²⁹

T. STATUTE OF LIMITATIONS.—In the absence of statute, in pleading the statute of limitations, the facts must be stated as in other cases, and not the pleader's conclusions of law.³⁰ An averment that the action was not brought within the time required by law is a conclusion.³¹

U. TITLE.—1. Title by Descent.—Some of the courts hold that an averment that a certain person is the heir at law of an intestate, is an allegation of ultimate fact,³² while others hold it to be a mere conclusion and insufficient in the absence of facts showing the relationship.³³

Wilson County Bank, 95 Mo. App. 251, 68 S. W. 967. *Neb.—Markey v. School District*, 58 Neb. 479, 78 N. W. 932, that a purchase of goods was ratified by the legal voters at a certain meeting. *Wis.—Lauenstein v. City of Fond du Lac*, 28 Wis. 336.

28. Ala.—*Maness v. Henry*, 96 Ala. 454, 11 So. 410. **Ill.—***Corwin v. Shoup*, 76 Ill. 246; *Cairo, etc., R. Co. v. Dodge*, 72 Ill. 253. **Ind.—***Kelso v. Fleming*, 104 Ind. 180, 3 N. E. 830 (as to release of defendant's liability on a note); *Marshall v. Mathers*, 103 Ind. 458, 3 N. E. 120. **N. Y.—***Hatch v. Peet*, 23 Barb. 675. **Tex.—***Glasscock v. Hamilton*, 62 Tex. 143.

29. Phinney v. Mutual Life Ins. Co., 67 Fed. 493 (averment that a contract was waived, abandoned and rescinded, held conclusions); *Standard v. Aurora, etc., R. Co.*, 220 Ill. 469, 77 N. E. 254, as to right of way.

30. Scroggin v. National Lumber Co., 41 Neb. 195, 59 N. W. 548; *Barnes v. McMurtry*, 29 Neb. 178, 45 N. W. 285 (where a plea was held insufficient for not stating when the statute began to run).

31. Scroggin v. National Lumb. Co. 41 Neb. 195, 59 N. W. 548. See the title "Limitation of Actions."

32. Physio-Medical College v. Wilkinson, 108 Ind. 314, 9 N. E. 167 (holding that defendants should have interposed a motion to make the allegation more specific, if they desired the details of the relationship); *Evelyn v. Evelyn*, 42 L. T. N. S. 248, 28 W. R. 531. See *Ricknor v. Clabber*, 4 Ind. Terr. 660, 76 S. W. 271.

In *Gillette v. Robbins*, 12 Wis. 320, the court says: "Although it may in strictness be said that, whether one

person is, or is not the heir at law of another who is dead, is a mixed question of law and fact; and that the averment that he is so, is in part a conclusion of law, to be deduced from several intermediate facts, which must be established in evidence; still it is so much in the nature of a fact, and its statement in this form so fully apprises the opposite party of the foundation of the claim which is set up against him, that the law, which favors brevity and conciseness and the avoidance of unnecessary allegations in pleading, treats it as such."

33. Fla.—*Cohen v. Doran*, 58 Fla. 418, 51 So. 282, holding that in pleading title by descent in equity, all the links in the chain of descent must be averred. **Ky.—***Dailey v. O'Brien*, 29 Ky. L. Rep. 811, 96 S. W. 521; *Craig v. Welsh-Hackley Coal & Oil Co.*, 25 Ky. L. Rep. 232, 74 S. W. 1097; *Fite v. Orr*, 8 Ky L. Rep. 349, 1 S. W. 582. **N. Y.—***Henriques v. Yale University*, 28 App. Div. 354, 51 N. Y. Supp. 284; *Reiners v. Brandhorst*, 59 How. Pr. 91. **N. C.—***Kerlee v. Corpening*, 97 N. C. 330, 2 S. E. 664.

Next of kin. *Irving v. Rees*, 131 N. Y. Supp. 523; *In re Stephani*, 75 Hun 188, 26 N. Y. Supp. 1039.

In *Fite v. Orr's Assignee*, 8 Ky. L. Rep. 349, 1 S. W. 582, the court says: "An allegation that certain persons are the only heirs of another is but a conclusion of law. A party who claims his title or right to property by reason of his heirship must state whatever degree of relationship in which he stands to the person through whom he claims, and must also show that there are none standing in a nearer degree of relationship."

2. Ownership—Ownership and seisin are generally held to be ultimate facts and may be alleged in general terms without violating the rule against pleading conclusions;³⁴ but some authorities hold a contrary view.³⁵

V. USURY.—An averment that a contract was usurious is a conclusion; the essential elements must be set out with particularity.³⁶

34. U. S.—O'Keefe v. Cannon, 52 Fed. 898. **Ala.**—Burns v. George, 119 Ala. 504, 24 So. 718. **Cal.**—Johnson v. Vance, 86 Cal. 128, 24 Pac. 863; Souter v. Maguire, 78 Cal. 543, 21 Pac. 183; Payne v. Treadwell, 16 Cal. 220. **Colo.**—Logan v. Clough, 2 Colo. 323. **Ky.**—Louisville & N. R. Co. v. Seomp, 124 Ky. 330, 98 S. W. 1024, where it is said that "the allegation that the plaintiff is the owner of certain property was a sufficient allegation at common law, and it is good under the code." **Minn.**—Buckholz v. Grant, 15 Minn. 406; Gould v. Eagle Creek School Dist., 7 Minn. 203. **Mont.**—McCauley v. Gilmer, 2 Mont. 202. **N. Y.**—Ensign v. Sherman, 14 How. Pr. 439. **S. C.**—Livingston v. Ruff, 65 S. C. 284, 43 S. E. 678; Wilmington, etc., R. Co. v. Garner, 27 S. C. 50, 2 S. E. 634. **S. D.**—Lindsay v. Pettigrew, 5 S. D. 500, 59 N. W. 726. **Wash.**—Kemp v. Folsom, 14 Wash. 16, 43 Pac. 1100; Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123.

In *Adams & Frederick Co. v. South Omaha Nat. Bank*, 123 Fed. 641, 60 C. C. A. 579, the court says: "An averment that one is the owner of certain described property is an averment of an ultimate fact such as is permissible in good pleading. It is not usually deemed necessary, when making an allegation of this sort, to describe the manner in which the pleader became the owner of the property, whether it was by purchase or otherwise. The essential fact necessary to be stated is that he was at a given date the owner."

"An allegation that plaintiff, as sole heir of her husband, owns a cause of action," is a statement of a conclusion in the absence of any statements as to the administration of her husband's estate. *Buttles v. De Baun*, 116 Wis. 323, 93 N. W. 5.

In *Gillett v. Robbins*, 12 Wis. 320, the court says: "The averment that a party is the owner of an article of personal property, in relation to which he claims some right or some redress in

a court of law or equity, will, we think, when subjected to a rigid analysis, be found quite as much, if not more, a conclusion of law, than a statement of fact; yet our daily experience and constant practice prove that such averments are, and ever have been, considered good. The same is true of the title or seizure of real property."

"Duly assigned" when alleged as to a note is "an allegation compounded of fact and law, such as in many instances is very properly permitted for the avoidance of prolixity." *Hoag v. Mendenhall*, 19 Minn. 335.

Ownership of Stock.—An averment that plaintiff is a shareholder and owner of a certain amount of stock states an ultimate fact. *Foss v. People's Gas Light, etc., Co.*, 241 Ill. 238, 89 N. E. 351.

Title by Gift.—Averment that title was acquired "by gift" is an allegation of fact. *McCarty v. Tarr*, 83 Ind. 444.

35. U. S.—McCloskey v. Barr, 38 Fed. 165. **Ill.**—Mason v. Mason, 213 Ill. 609, 76 N. E. 692. **Ky.**—Quisenberry v. Artis, 1 Duv. 30. **N. Y.**—Witherspoon v. Van Dolar, 15 How. Pr. 266; *White v. Brown*, 14 How. Pr. 282 (*bona fide* owner and holder of a note); *Thomas v. Desmond*, 12 How. Pr. 321 (holding an averment that a person is the legal owner of a demand to be a conclusion). **Wis.**—Holden v. Kirby, 21 Wis. 150.

The allegation that plaintiff "became and now is the actual, legal and *bona fide* owner and holder" of a note is but a conclusion drawn from previous averment of indorsement and transfer before delivery. *Downer v. Read*, 17 Minn. 493.

Special Ownership.—An averment that plaintiff has a "special ownership" in certain property, is a conclusion of law. The facts constituting special ownership or interest of the plaintiff must be stated. *Griffing v. Curtis*, 50 Neb. 334, 69 N. W. 968.

36. Farley Nat. Bank v. Henderson, 118 Ala. 441, 24 So. 428; *Woodall v.*

III. OBJECTION, HOW RAISED.—Where a pleading consists merely of averments or denials of conclusions, or is dependent thereon, it is wholly insufficient, and is subject to demurrer,³⁷ or may be stricken out.³⁸ Where conclusions are averred in addition to sufficient facts, they may be stricken out as redundant matter.³⁹ And if not assailed by motion or demurrer the conclusions of a pleader may be taken advantage of by objection to the admission of testimony, or upon review by a higher tribunal.⁴⁰ Where the imperfection resulting

Kelly, 85 Ala. 358, 5 So. 164; Kilpatrick v. Henson, 81 Ala. 464, 1 So. 188. See Lanier v. Union Mortgage, etc., Co., 64 Ark. 39, 40 S. W. 466.

In Farley Nat. Bank v. Henderson, *supra*, the court says: "A plea setting up the defense of usury must aver with distinctness and particularity all the essential statements of the usurious contract, so that an inspection of the plea will reveal the entire transaction, and leave nothing to conjecture, and must state the amount of usurious interest charged."

37. **U. S.**—Chicot County v. Sherwood, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. ed. 546. **Ala.**—Pennsylvania Casualty Co. v. Perdue, 164 Ala. 508, 51 So. 352; Equitable Acc. Ins. Co. v. Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267. **Cal.**—Callahan v. Broderick, 124 Cal. 80, 56 Pac. 782. **Conn.**—Kellogg v. New Britain, 62 Conn. 232, 24 Atl. 996. **Ill.**—Stannard v. Aurora, etc., R. Co., 220 Ill. 469, 77 N. E. 254; Woods v. Cox, 149 Ill. App. 533; Kilgore v. Ferguson, 77 Ill. 213. **Ind.**—Gum Elastic Roofing Co. v. Mexico Pub. Co., 140 Ind. 158, 39 N. E. 443. **Md.**—Strauss v. Denny, 95 Md. 690, 53 Atl. 571. **Minn.**—Cathcart v. Peck, 11 Minn. 45; Griggs v. City of St. Paul, 9 Minn. 246. **Neb.**—Scroggin v. Nat. Lumber Co., 41 Neb. 195, 59 N. W. 548. **N. C.**—Moore v. Hobbs, 79 N. C. 535. **N. D.**—Houghton Imp. Co. v. Vavrosky, 15 N. D. 308, 109 N. W. 1024. **E. I.**—McTwiggan v. Hunter, 19 R. I. 68, 31 Atl. 693.

Objection waived by failure to demur. Penrose v. Winter, 135 Cal. 289, 67 Pac. 772 (holding that the allegation that a sum "is now due and owing" is sufficient allegation of non-payment to sustain a judgment by default); Barrett v. Des Moines, etc., Assn., 120 Iowa 184, 94 N. W. 473.

In Creecy v. Joy, 40 Ore. 28, 66 Pac. 295, the court says: "The complaint al-

leges that there is due and owing on the note mentioned therein a certain sum, and, while this allegation is perhaps a conclusion of law, it is nevertheless an attempt to state a material fact. It is not an omission of a material allegation, but, rather a defective statement thereof, which . . . was waived by answering over."

38. Power v. Gum, 6 Mont. 5, 9 Pac. 575 (where judgment was rendered on pleadings, the answer containing mere conclusions); Gilbert v. Covell, 16 How. Pr. (N. Y.) 34.

"An answer setting forth only conclusions of law may be treated as sham and irrelevant, and may be struck out on motion." Dennis v. Nelson, 55 Minn. 144, 56 N. W. 589.

39. **Cal.**—McDermont v. Anaheim Union Water Co., 124 Cal. 112, 56 Pac. 779; Payne v. Treadwell, 16 Cal. 221. **Colo.**—People v. Lothrop, 3 Colo. 428. **Ga.**—Manry v. Waxelbaum Co., 108 Ga. 14, 33 S. E. 701. **Ia.**—Gipps Brew. Co. v. De France, 91 Iowa 108, 58 N. W. 1087, 51 Am. St. Rep. 329, 28 L. R. A. 386; County v. Hobbs, 72 Iowa 69, 33 N. W. 368; Cooper v. French, 52 Iowa 531, 3 N. W. 538. **Mich.**—Williams v. Raper, 67 Mich. 427, 34 N. W. 890. **Minn.**—Cathcart v. Peck, 11 Minn. 45. **Mo.**—Curran v. Downs, 3 Mo. App. 468. **N. Y.**—Kolb v. Mortimer, 135 App. Div. 542, 120 N. Y. Supp. 543. **Ore.**—Longshore Prtg. & Pub. Co. v. Howell, 26 Ore. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464. **Tex.**—Morrison v. Insurance Co. of North America, 69 Tex. 353, 6 S. W. 605. **Wash.**—Allend v. Spokane Falls, etc., R. Co., 21 Wash. 324, 58 Pac. 244. **Eng.**—Stokes v. Grant, 4 C. P. D. 25, 40 L. T. N. S. 36, 27 W. R. 397.

40. **Ia.**—Koon v. Tramel, 71 Iowa 132, 32 N. W. 243. **Mo.**—Alnutt v. Leper, 48 Mo. 313. **Neb.**—Woodward v. State, 58 Neb. 598, 79 N. W. 164.

from this mode of pleading, pertains to form rather than substance, the proper mode of correction is by a motion to make more certain."¹

41. **Neb.**—*Dorsey v. Hall*, 7 Neb. 460. **Wash.**—*Livingstone v. Lovgren*, 27 Wash. 102, 67 Pac. 599; *Harris v. Halvorson*, 23 Wash. 779, 63 Pac. 549; *Griffith v. Wright*, 21 Wash. 494, 58 Pac. 582. **Wis.**—*Village of Prentice v. Nelson*, 134 Wis. 456, 114 N. W. 830.

In *Harris v. Halvorson*, *supra*, the court says: "The true doctrine is that every reasonable intendment and presumption is to be made in favor of the pleading, and if substantial facts which constitute a cause of action are stated in the complaint or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are conclusions of law, or otherwise imperfect, incomplete and defective, such insufficiency pertaining to the form rather than to the substance, the proper mode of correction is not by demurrer nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment. *Pomeroy Code Remedies*, §§547, 549."

CONDEMNATION PROCEEDINGS. — See **Eminent Domain**.

CONDITIONS. — See **Statutes**.

Vol. V

CONFESSION AND AVOIDANCE

By H. R. BRILL, JR.,
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I. DEFINITION, NATURE AND DISTINCTIONS.—Matter in avoidance is new matter which admits the allegations of the adverse party to be true, but shows, nevertheless, either that the pleader was never liable to the recovery claimed against him, or that he has been discharged from his original liability by something supervenient.²

1. Will's Gould Pl. 98; Andrew's Steph. Pl. (2nd ed.) 311; and the following cases: Conn.—*Mahaive v. Douglass*, 31 Conn. 170. Kan.—*De Lissa v. Fuller Coal & Min. Co.*, 59 Kan. 319, 52 Pac. 886. N. Y.—*Fragner v. Fischel*, 141 App. Div. 869, 126 N. Y. Supp. 478; *Porter v. American Tobacco Co.*, 140 App. Div. 871, 125 N. Y. Supp. 710.

express or implied, and confesses and avoids it, it is a good plea; for by confession and avoidance, he confesses the plaintiff has cause of action against him, were it not for some special matter in law; by which is not meant a question in law, but a thing which in law avoids the cause of action." *Hallett v. Birt*, 12 Mod. 120, 88 Eng. Reprint 1207.

"Wherever the defendant shews a cause of action in the plaintiff, either Matter in justification or excuse must be set up by way of confession and

It is to be distinguished from matter which goes to show that the adverse party never had a good cause of action,² and from matter which merely seeks to show a state of facts contrary to the allegations of the adverse party, and which, therefore, amounts to no more than a denial of them.³

avoidance. *Priest v. Dodsworth*, 235 Ill. 613, 85 N. E. 940.

In an action for breach of warranty in the sale of personalty, "if the making of a sale and warranty is admitted and the defendants would deny the breach of warranty, a plea of confession and avoidance is proper." *Mizell v. Watson*, 57 Fla. 111, 49 So. 149, per Parkhill, J.

In an action on a judgment, a defense requiring evidence to contradict the record must necessarily admit the existence of the record and seek to avoid its effect. *Hill v. Mendenhall*, 21 Wall. (U. S.) 453, 22 L. ed. 616.

Illustrations of pleas, answers and replications held to be in confession and avoidance.

Plea of *liberum tenementum* in trespass *quare clausum fregit*, *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272; *Ryan v. Clark*, 14 Q. B. 65, 117 Eng. Reprint 26.

That after plaintiff acquired his title he conveyed it to a third person. *Kennedy v. McQuaid*, 56 Minn. 450, 58 N. W. 35.

In an action for breach of a covenant against incumbrances, that plaintiff had retained a part of the purchase price of the land involved in settlement and payment of the incumbrance complained of. *Johnson v. Hesser*, 61 Neb. 631, 85 N. W. 894.

That the nuisance complained of necessarily resulted from the operation of defendant's railroad in a lawful manner. *Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654.

Contributory negligence. *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 81 S. W. 1142; *Ramp v. Metropolitan Street R. Co.*, 133 Mo. App. 700, 114 S. W. 59.

That a rule of a telegraph company pleaded as a defense was not a part of the contract made with the defendant. *McGehee v. Western Union Tel. Co. (Ala.)*, 53 So. 205.

In an action for breach of a contract of employment, pleas that defendant was discharged for incompetency, and of former adjudication. *Keedy v.*

Long, 71 Md. 335, 18 Atl. 704, 5 L. R. A. 759.

Bad faith. *Drefahl v. Rabe*, 132 Iowa 563, 107 N. W. 179.

Facts alleged in mitigation of damages. *Springer v. Jenkins*, 47 Ore. 502, 84 Pac. 479.

On General Demurrer.—Where the replication was ambiguous, it was held that it would be treated as a replication in confession and avoidance, which would make it bad, rather than a traverse, which would make it good. *Dunklee v. Goodenough*, 65 Vt. 257, 28 Atl. 988.

2. *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956.

For example, infancy, coverture, usury and gaming. *Baltimore & Ohio R. R. Co. v. Polly-Woods & Co.*, 14 Gratt. (Va.) 447.

3. *Owensboro, etc. R. Co. v. Harrison*, 94 Ky. 408, 22 S. W. 545.

Such as matter which merely goes to disprove the cause of action pleaded (*Cooper v. American Cent. Ins. Co.*, 139 Mo. App. 570, 123 S. W. 497); or matter which may be proved under a general denial (*Fragner v. Fischel*, 141 App. Div. 869, 126 N. Y. Supp. 478).

If a plea in denial of the execution of an instrument, and another asserting fraud in its execution are not inconsistent, the latter cannot be held to be in confession and avoidance. *De Liessa v. Fuller Coal & Min. Co.*, 59 Kan. 319, 52 Pac. 886.

Illustrations of pleas, answers and replications which have been held not to be in confession and avoidance:

An answer which in effect merely denied plaintiff's title to the land in controversy. *Roberts v. Center*, 26 Wash. 435, 67 Pac. 151.

Replication in trespass *quare clausum fregit*, in which plaintiff set up her own title. *Lavin v. Dodge*, 30 E. I. 8, 73 Atl. 376.

In an action for obstructing an easement of way, an answer denying that plaintiff owned the easement and alleging that defendant had obstructed it as agent of the owner of the fee.

A plea in estoppel is not ordinarily a plea in confession and avoidance, since it does not admit the averments of the adverse party,⁴ but the contrary is true where the alleged estoppel consists of a waiver or abandonment of a previously existing cause of action.⁵

The plea of the statute of limitations is not a technical plea in confession and avoidance.⁶

Is a Plea in Bar.—A plea in confession and avoidance is a plea in bar.⁷

In Reply.—Matter in confession and avoidance of new matter in the answer may be set up in the replication or reply.⁸

II. COMMENCEMENT AND CONCLUSION OF PLEA.—At common law pleas in confession and avoidance commence with the formula *actio non*,⁹ and conclude with a verification,¹⁰ and a prayer

Hornsey v. Adams, 27 Ky. L. Rep. 683, 86 S. W. 514.

Where the complainant alleges a contract in certain terms, an answer admitting the existence of those terms, but alleging that the contract contained other terms and conditions not mentioned by complainant. *Nichols v. Cecil*, 106 Tenn. 455, 61 S. W. 768.

An answer in an action for breach of an irrigation contract which set up that plaintiff made a crop without irrigation and refused to take water from defendant. *Carr v. Miller-Morris Canal, Irr. & L. Co.*, 105 La. 239, 29 So. 715.

An answer alleging that alleged libelous articles were substantially true, but denying that defendant had procured the publication thereof or that he was actuated by any malicious intent. *Claverne v. Fabacher*, 123 La. 44, 48 So. 578.

An averment that "if plaintiff received any injuries, the same were caused by plaintiff's own fault and negligence." *Ramp v. Metropolitan Street R. Co.*, 133 Mo. App. 700, 114 S. W. 59.

4. Will's Gould Pl. 98, 99.

Such a plea sets up new matter inconsistent with such allegations which precludes the opposite party from availing himself of them. *Dana v. Bryant*, 6 Ill. 104; *City of East St. Louis v. Flannigen*, 34 Ill. App. 596.

As in the case of an estoppel arising out of the very transaction or circumstances on which plaintiff relies for a recovery, where the plea amounts to a practical denial of plaintiff's cause of action, or an estoppel based on conduct of the plaintiff since the alleged

accrual of his supposed cause of action, which has led defendant to believe that it did not exist or would not be asserted, where the question whether or not plaintiff has a good cause of action arising out of the facts alleged by him is immaterial. *Webber v. Ingersoll*, 74 Neb. 393, 104 N. W. 600.

A reply reiterating the allegations of the petition that defendant signed the note in suit, and averring that defendant was estopped to deny his signature. *Ekenberry & Co. v. Edwards*, 71 Iowa 82, 32 N. W. 183.

See also the title "Estoppel."

5. *Webber v. Ingersoll*, 74 Neb. 393, 104 N. W. 600. See also the title "Estoppel."

6. It is not inconsistent with a contention that plaintiff never had a cause of action. *Webber v. Ingersoll*, 74 Neb. 393, 104 N. W. 600.

It need not in fact confess the cause of action. *Merten v. San Angelo Nat. Bk.*, 5 Okla. 585, 49 Pac. 913. See also the title "Limitation of Actions."

7. *State v. Ruhlman*, 111 Ind. 17, 11 N. E. 793; *Kunkle v. Coleman* (Ind. App.), 92 N. E. 61.

8. As fraud in procuring a settlement pleaded by defendant in bar of the action. *Colorado Fuel & Iron Co. v. Chappell*, 12 Colo. App. 385, 55 Pac. 611.

Plaintiff has the burden of proving the matters so alleged in avoidance. *Meeh v. Missouri Pac. R. Co.*, 61 Kan. 630, 60 Pac. 319.

9. *Andrew's Steph. Pl.* (2nd ed.) 446.

10. Will's Gould Pl., 323; *Andrew's Steph. Pl.* (2nd ed.) 312; 1 Chit. Pl., 557; and the following cases: U. S.

for judgment.¹¹ This rule as to the conclusion of pleas, however, does not apply where the new matter pleaded is merely negative,¹² or where new matter is set up by way of inducement to a general traverse.¹³

Where matters of fact as well as of record are averred in a plea, the conclusion should be by a general verification, and not with a verification by the record.¹⁴

Under the codes no particular form of commencement or conclusion is ordinarily required,¹⁵ and the matter of verification is regulated entirely by statute.¹⁶

Objections to the form of the conclusion must be taken by special demurrer,¹⁷ and not by a general demurrer.¹⁸

III. COLOR.—A. EXPLANATION OF TERM.—A plea of confession and avoidance must at least give color to the matter to which it is applied by so far confessing the matter adversely alleged as to give the adverse party an apparent right.¹⁹

See *United States v. Linn*, 1 How. 104, 11 L. ed. 64; *Tucker v. Lee*, 3 Cranch C. C. 684, 24 Fed. Cas. No. 14,221. Conn.—*Bailey v. Smith*, 1 Root 243. Ill.—*Harding v. Horton*, 79 Ill. App. 123. Md.—*Burgess v. Lloyd*, 7 Md. 178. Mass.—*Hampshire Mfgs. Bank v. Billings*, 17 Pick. 87; *Brinley v. Whiting*, 5 Pick. 347. N. H.—*Leslie v. Harlow*, 18 N. H. 518. N. Y.—*Service v. Heermance*, 1 Johns. 91; *M'Clure v. Erwin*, 3 Cow. 313. R. I.—*Elsbree v. Burt*, 24 R. I. 322, 53 Atl. 60; *Brown v. Foster*, 6 R. I. 564; *Ellis v. Appleby*, 4 R. I. 462. Vt.—*Joslyn v. Tracy*, 19 Vt. 569. W. Va.—*Baltimore & O. R. R. Co. v. Faulkner*, 4 W. Va. 180. Eng. *Goodchild v. Pledge*, 1 M. & W. 363.

Examples.—Plea of the pendency of proceedings under an assignment for the benefit of creditors. *Chamberlain v. Perkins*, 51 N. H. 336.

In replevin for cattle impounded, where "defendant avowed the taking of the cattle 'in a field and enclosure, used and improved, in which grass and grain was then and there growing,'" and which was the soil and freehold of defendant, it was held that a plea that the field was not inclosed with a legal fence improperly, concluded to the country. *Keith v. Bradford*, 39 Vt. 34.

A special plea concluding "and this, etc.," was held bad on special demurrer, since the quoted words would equally admit of a conclusion to the court or jury, and hence the omitted words could not be supplied by necessary implication. *Cooke v. Beale's Exrs.*, 1 Wash. (Va.) 313.

11. *Andrew's Steph. Pl.* (2nd ed.) 312; *Conover v. Tindall*, 20 N. J. L. 513.

12. *Will's Gould Pl.* 324; *Burgess v. Lloyd*, 7 Md. 178. And see *Dawes v. Winship*, 16 Mass. 291; *Everett v. Bartlett*, 20 N. J. L. 117.

A plea that the bond in suit was delivered in escrow should conclude to the country. *Watts v. Roswell*, 1 Salk. 274, 91 Eng. Reprint 240.

13. In the replication. *Sampson v. Henry*, 11 Pick. (Mass.) 379.

14. *Shafer v. Stonebraker*, 4 Gill. & J. (Md.) 345; *Lytle v. Lee*, 5 Johns. 112.

15. West Va. Code 1906, §3842, provides that "it shall not be necessary to use any allegation of *actionem non* or *precludi non*, or to the like effect, or any prayer of judgment," and §3846 that pleas may commence "The defendant says that."

Under the Florida code, though it is unnecessary to use the allegation *actionem non*, its use will not invalidate a plea otherwise unobjectionable. *Staford v. Anders*, 8 Fla. 34.

16. See the title "Verification," and the codes of the various states.

17. *Andrew's Steph. Pl.* (2nd ed.) 450; *Leslie v. Harlow*, 18 N. H. 518; *Cooke v. Beale's Exrs.*, 1 Wash. (Va.) 313.

As where there is no prayer for judgment. *Conover v. Tindall*, 20 N. J. L. 513. See the title "Demurrer."

18. *Chamberlain v. Perkins*, 51 N. H. 336. See the title "Demurrer."

19. *Chit. Pl.* 527, *et seq.*; *Andrew's Steph. Pl.* 312, *et seq.*; and the fol-

B. **EXPRESS COLOR.**—This was a fiction resorted to in trespass to permit a special plea of a possessory title in defendant which would otherwise have been bad as amounting to the general issue. It consisted in assigning to plaintiff in the plea some colorable but fictitious title, so that the question which was the better title of the two would appear on the face of the plea as a question of law, and was necessary where the plea in itself took away all implied color or pretense for maintaining the action.²⁰

C. **IMPLIED COLOR.**—A plea in confession and avoidance need not expressly admit the allegations to which it is addressed, but it is sufficient if it does so by reasonable implication,²¹ the question being

lowing cases: **U. S.**—*Halstead v. Lyon*, 2 McLean 226, 11 Fed. Cas. No. 5,968; *Dibble v. Duncan*, 2 McLean 553, 7 Fed. Cas. No. 3,880. **Ill.**—*Sefton v. Mitchell*, 120 Ill. App. 256; *Wiley & Drake v. National Wall P. Co.*, 70 Ill. App. 543. **Ia.**—*Bunkle v. Hartford Ins. Co.*, 99 Iowa 414, 68 N. W. 712; *Day v. Mill Owners' Mut. Fire Ins. Co.*, 75 Iowa 694, 38 N. W. 113; *Meadows v. Hawkeye Ins. Co.*, 62 Iowa 387, 17 N. W. 600. **Ky.**—*McNinimy v. Avis*, 4 Ky. L. Rep. (abstract) 905. **Mass.**—*Thayer v. Brewer*, 15 Pick. 217. **Mo.**—*Ledbetter v. Ledbetter*, 88 Mo. 60. **Neb.**—*Home Fire Ins. Co. v. Johansen*, 59 Neb. 349, 80 N. W. 1047. **N. J.**—*Willets Mfg. Co. v. Board of Chosen Freeholders of Mercer County*, 60 N. J. L. 29, 37 Atl. 609. **N. Y.**—*McCormick v. Pickering*, 4 N. Y. 276; *Arthur v. Brooks*, 14 Barb. 533; *Collet v. Flinn*, 5 Cow. 466; *Conger v. Johnston*, 2 Denio 96; *Goodman v. Robb*, 41 Hun 805. **Okla.**—*Merton v. San Angelo Nat. Bank*, 5 Okla. 585, 49 Pac. 913. **R. I.**—*Granite Bldg. Corp. v. Greene*, 25 R. I. 586, 57 Atl. 649; *Cole v. Lippitt*, 23 R. I. 541, 51 Atl. 202. **Vt.**—*Dunlevey v. Fenton*, 80 Vt. 505, 68 Atl. 651; *Dunklee v. Goodenough*, 65 Vt. 257, 26 Atl. 988; *Blood v. Adams*, 33 Vt. 52. **Va.**—*Baltimore & O. R. R. Co. v. Polly-Woods & Co.*, 14 Gratt. 447. **Can.**—*Perdue v. Corporation of Township of Chinguacousy*, 25 U. C. Q. B. 61; *McGee v. Great West. R. Co.*, 23 U. C. Q. B. 293. **Eng.**—*McPherson v. Daniels*, 10 B. & C. 263, 109 Eng. Reprint 448; *Gibbons v. Pepper*, 1 Ld. Raym. 38, 4 Mod. 404, 91 Eng. Reprint 922.

A plea in confession and avoidance which in effect denies the existence of the claim it opposes is defective. *Dun-*

levey v. Fenton, 80 Vt. 505, 68 Atl. 651.

An answer in an action for wrongful death cannot be regarded as in confession and avoidance where it avers plaintiff's negligence and expressly denies defendant's negligence, such as affirmative matter is pleaded, such as payment, accord and satisfaction, or the like. *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956.

A plea of justification in an action for slander must admit the speaking of the defamatory words. *Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730. And see *Davis v. Mathews*, 2 Ohio 257.

20. *Will's Gould Pl.* 516, 517; *Chitty Pl.* 530, 531; *Andrew's Steph. Pl.* (2nd ed.) 316.

May surmise possession in plaintiff, setting up a mere fiction, not traversable. *Brown v. Archer*, 1 Hill (N. Y.) 266.

In trespass *de bonis* a plea alleging that the goods were those of a third person and were taken by defendants by virtue of an attachment against him was held bad where it gave no express color, since it cut off all implied color. *Brown v. Archer*, 1 Hill (N. Y.) 266.

In trespass *quare clausum fregit*, a plea that a third person was seised in fee of the premises and demised to the defendant for one year, and that by virtue of this demise he entered, was held bad as amounting to the general issue where it did not give express color. *Collet v. Flinn*, 5 Cow. (N. Y.) 466, and note.

21. **Ia.**—*Jackson v. Indiana School Dist.*, 110 Iowa 313, 81 N. W. 596; *Runkle v. Hartford Ins. Co.*, 99 Iowa 414, 68 N. W. 712; *Morgan & Rogers*

whether the language of the plea can fairly be construed as an admission of the act complained of.²²

D. SUFFICIENCY OF CONFESSION.—It is not necessary to confess the cause of action precisely as alleged,²³ nor absolutely and for all purposes,²⁴ the confession of a *prima facie* cause of action being all that is required.²⁵ Nor need the plea confess the theory of the adverse party, but it is enough when the conduct complained of is confessed, and is justified by a theory sufficient, though different from that upon which complaint is made.²⁶

Hypothetical Admissions.—It may be stated as a general rule that an hypothetical admission is insufficient. Thus, the use of the words "if,"²⁷ "if any,"²⁸ and "if any such there were,"²⁹ with reference to plaintiff

v. Hawkeye Ins. Co., 37 Iowa 359; *Anson v. Dwight*, 18 Iowa 241. **Mo.** *Ledbetter v. Ledbetter*, 88 Mo. 60. **Tenn.**—*Snyder v. Witt*, 99 Tenn. 618, 42 S. W. 441. **Vt.**—*Dunlevey v. Fenton*, 80 Vt. 505, 68 Atl. 651; *Baker v. Sherman*, 75 Vt. 88, 53 Atl. 330. **Can.** *Driscoll v. Barker*, 18 New Bruns. 407.

Plea of liberum tenementum gives implied color, it admitting such a possession in plaintiff as would enable him to maintain the action against a wrongdoer, but asserting a freehold in defendant with a right to the immediate possession. **Ill.**—*Fort Dearborn Lodge v. Kline*, 115 Ill. 177. **N. Y.** *Collett v. Flinn*, 5 Cow. 466. **Eng.** *Ryan v. Clark*, 14 Q. B. 65, 117 Eng. Reprint 26.

Admission By Failing to Deny.—An admission of the allegations of the answer by failing to deny them in the reply has been held to be a sufficient admission. *Day v. Mill Owners' Mut. Fire Ins. Co.*, 75 Iowa 694, 38 N. W. 113.

There is no such thing as a mere colorable admission under the code, since all matters not denied are as fully confessed as though specifically admitted. *McMinimy v. Avis*, 4 Ky. L. Rep. (abstract) 905. See the title "Answers."

22. *Baker v. Sherman*, 75 Vt. 88, 53 Atl. 330; *Blood v. Adams*, 33 Vt. 52.

An admission by defendant of plaintiff's right of recovery "unless it sustains its affirmative defense set out in the other counts of the answer" has been held to be a sufficient admission by implication. *Jackson v. Indiana School Dist.*, 110 Iowa 313, 81 N. W. 596.

An admission of a different contract

of indorsement than that alleged in the declaration is insufficient. *Mahaiwe Bank v. Douglass*, 31 Conn. 170.

A plea was held to sufficiently confess the declaration though it professed to add more terms to the contract sued on. *Fillien v. Armstrong*, 7 Ad. & E. 557, 112 Eng. Reprint 530.

23. *Cooper v. Smith*, 119 Ind. 313, 21 N. E. 887.

24. *Dunklee v. Goodenough*, 65 Vt. 257, 26 Atl. 988.

25. **Ill.**—*Wiley & Drake v. National Wall Paper Co.*, 70 Ill. App. 543. **Ind.** *Cooper v. Smith*, 119 Ind. 313, 21 N. E. 887. **Okla.**—*Merten v. San Angelo Nat. Bank*, 5 Okla. 585, 49 Pac. 913.

26. *Hawkins v. Stanford*, 138 Ind. 267, 37 N. E. 794.

27. *Goodman v. Robb*, 41 Hun (N. Y.) 605; *Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730.

28. *Saleeby v. Central R. R. of N. J.*, 40 Misc. 269, 81 N. Y. Supp. 903.

29. "If any such there were or still are." *Conger v. Johnston*, 2 Denio (N. Y.) 96.

Plea "that the supposed debt in the said declaration mentioned, if any such there be," did not accrue, etc. *Margetts v. Bays*, 4 Ad. & E. 489, 111 Eng. Reprint 871.

"If any such filing or entry was made." *Bacon v. Johns*, 6 N. Bruns. 257. But see *Burrowes v. De Blaquiére*, 34 U. C. Q. B. 498.

Use of the words "if any such were made," in reference to the bond in suit, was held not to render a plea bad on demurrer, where the bond was referred to in other parts of the plea without the objectionable words, and in view of the fact that defendant also pleaded non est factum, which ren-

iff's cause of action, have been held to render a plea or answer bad. The contrary has been held with reference to the words "if at all,"³⁰ and "supposed cause of action."³¹

In some code states hypothetical pleading is permitted in certain cases, and the use of the word "if" does not render a plea of new matter bad.³²

E. EFFECT OF PLEA.—If well pleaded,³³ a plea of confession and avoidance admits the facts stated in the count to which it is directed.³⁴ Such admission does not, however, necessarily render a judgment based thereon *res adjudicata* of the existence of the cause of action so admitted.³⁵

IV. AVOIDANCE.—The plea or answer must avoid, as well as confess, the allegations to which it is addressed.³⁶ The avoidance

dered the defect merely formal. *McCormick v. Pickering*, 4 N. Y. 276.

30. *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367.

31. *Eavestaff v. Russell*, 10 M. & W. (Eng.) 365.

32. *Corn v. Levy*, 97 App. Div. 48, 89 N. Y. Supp. 658; *Wiley v. Village of Rouse's Point*, 86 Hun 495, 33 N. Y. Supp. 773; *Taylor v. Richards*, 9 Bosw. (N. Y.) 679.

A plea that "if plaintiffs have any cause of action, it is against" defendants and a third person jointly, etc., was held good in *Snyder v. Witt*, 99 Tenn. 618, 42 S. W. 441. See also *Zeidler v. Johnson*, 38 Wis. 335; *Grace v. Newbre*, 31 Wis. 19; *Willard v. Giles*, 24 Wis. 319; and the title "Answers," Vol. 2, p. 49.

33. Where the matter alleged is no answer to the breach of contract assigned in the declaration, it cannot be considered as an admission of the cause of action stated in the declaration. *Simonton v. Winter*, 5 Pet. (U. S.) 141, 8 L. ed. 75.

34. **U. S.**—*Simonton v. Winter*, 5 Pet. 141, 8 L. ed. 75. **Ind.**—*Bowlus v. Phoenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400. **Neb.**—*Johnson v. Hesser*, 61 Neb. 631, 85 N. W. 894.

35. An answer is sufficient in this respect where it alleges facts which relieve defendant from any liability by reason of the facts alleged by plaintiff. *Cooper v. Smith*, 119 Ind. 313, 21 N. E. 887.

In an action on a foreign judgment on a note defendant pleaded limitations and that the judgment was void because not based on sufficient process.

Judgment was rendered for defendant by default on failure of plaintiff to reply. In a subsequent action on the note, in which it was conceded that the original judgment was void, held that the second judgment sustaining the plea of limitations was not *res adjudicata* of the existence of the first judgment on the theory that such plea admitted the existence of such judgment. *Merten v. San Angelo Nat. Bank*, 5 Okla. 585, 49 Pac. 913.

36. **U. S.**—*Stratton's Independence v. Dines*, 135 Fed. 449, 68 C. C. A. 177. **Ill.**—*Sefton v. Mitchell*, 120 Ill. App. 256. **Ind.**—*Bowlus v. Phoenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400; *Robbins v. Magee*, 76 Ind. 381. **Eng.**—*McPherson v. Daniels*, 10 B. & C. 263, 109 Eng. Reprint 448.

Special matter pleaded in bar must be such that if true in point of fact, it will bar the action and defeat plaintiff's right to recover. *United States v. Linn*, 1 How. (U. S.) 104, 11 L. ed. 64.

For an answer to be good as a plea in confession and avoidance it must overcome by affirmative allegations the *prima facie* case which confesses and seeks to avoid. The affirmative allegations are the controlling ones, and those which are equivalent to the denials embraced in an answer of general denial are without influence. *Racer v. State*, 131 Ind. 393, 31 N. E. 81.

In an action for malicious prosecution, a plea that defendant acted under professional advice could not be regarded as a plea in confession and avoidance on the theory that it admitted the charge of malice and want of probable cause by failing to spe-

must be as broad as the confession,³⁷ but the defendant is not required to anticipate matter in avoidance of his own allegations.³⁸ A plea in bar must be pleaded to the action, and not to the damages merely,³⁹ though matters in mitigation of damages may be pleaded as partial defenses under the codes of some states.⁴⁰

Facts rather than conclusions must be alleged.⁴¹

Judgment. — Where a plea confesses and does not avoid, judgment must be given on the confession, even after verdict.⁴² The judgment in such case is on the merits, and not upon the form of the pleading.⁴³

V. NEW MATTER UNDER THE CODES. — The codes generally provide that the answer shall contain, among other things, a statement of any new matter constituting a defense.⁴⁴ Plaintiff may also in his reply set up new matter in avoidance of any new matter alleged in the answer provided it is not inconsistent with the averments of the complaint or petition.⁴⁵

New matter may be defined to be matter which expressly or impliedly admits the allegations of the opposite party, but seeks to avoid their legal effect.⁴⁶ It includes matter in confession and avoidance,

cifically deny them, since in that case it contained nothing to avoid such charge. *Johnson v. Clem*, 4 Ky. L. Rep. 860.

A pure plea of the statute of limitations is no bar where there are facts stated in the bill that take the case out of it unless the plea be accompanied by an averment or answer destroying the force of such circumstances. *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417.

37. *Hathorn v. Congress Spring Co.*, 44 Hun 608. If it does not fully avoid or bar, the mere allegation in the answer of a contract of other terms or of a different character than that declared on has no function or effect on demurrer. *Barnard v. Lawyers' Title Ins. Co.*, 91 N. Y. Supp. 41, citing *Marx v. Gross*, 2 Misc. 511, 22 N. Y. Supp. 393, affirmed, 142 N. Y. 678, 37 N. E. 824; *Smith v. Coe*, 170 N. Y. 162, 63 N. E. 57; *Fleischmann v. Stern*, 90 N. Y. 110. See also the title "Answers."

38. In pleading the illegality of the note in suit defendant is not required to go further than to set out facts showing a prima facie case of illegality. *Lutz v. Pender Nat. Bank*, 73 Neb. 314, 102 N. W. 673; *Larson v. First Nat. Bank*, 66 Neb. 595, 92 N. W. 729.

39. Matters in mitigation of damages cannot be pleaded, but can only be given in evidence under the gen-

eral issue. *Hopple v. Higbee*, 23 N. J. L. 342.

See the title "Answers," Vol. 2, p. 45, and the title "Denial."

40. See the title "Answers," §§12E, 16.

41. *Ga.*—*Graham v. Marks & Co.*, 98 Ga. 67, 25 S. E. 931. *Ind.*—*Smith v. Wickard*, 42 Ind. App. 508, 85 N. E. 1030. *Tenn.*—*Kelly v. Fritz*, 11 Heisk. 7.

See the title "Conclusions of Law."

42. *Gaffney v. St. Paul, M. & M. B. Co.*, 38 Minn. 111, 35 N. W. 728.

Plaintiff's motion for judgment notwithstanding the verdict for defendant should be granted in such case. *Lough v. Bragg*, 18 Minn. 121; *Williams v. Anderson*, 9 Minn. 50.

See the title "Judgment."

43. *Lough v. Bragg*, 18 Minn. 121; *Williams v. Anderson*, 9 Minn. 50.

44. *Cal. Code Civ. Proc.*, §437; *Mills' Ann. Code (Colo.)* §56; *N. Y. Code Civ. Proc.*, §500; *Rucker v. Bolles*, 133 Fed. 858, 67 C. C. A. 30; *Mauldin v. Ball*, 5 Mont. 96. For a full discussion of this subject see the title "Answers," Vol. 2, p. 37, *et seq.*

45. *Rich v. Donovan*, 81 Mo. App. 184. See the title "Replication and Reply."

46. New matter includes everything outside of the material statements of fact in the complaint which operates

but is broader in scope than confession and avoidance at common law.⁴⁷ It is to be distinguished from matter which merely tends to

to avoid their legal effect, but not to impugn their truth. *Rucker v. Bolles*, 133 Fed. 858, 87 C. C. A. 30.

The defense of new matter, necessarily, either expressly or by implication, admits the averments of the complaint; and alleges facts that destroy their effect or defeat them. *Mauldin v. Ball*, 5 Mont. 96.

New matter is matter which impliedly admits the allegations of the petition and seeks otherwise to destroy their force and effect. *Iba v. Central Assn.*, 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

An answer setting up new matter, by way of defense, should confess and avoid the plaintiff's cause of action. *State v. Williams*, 48 Mo. 210.

Matters in "excuse, justification, or avoidance" required by the forcible detainer statute to be pleaded, are such as constitute "new matter" under the general practice act. *Sodini v. Gaber*, 101 Minn. 155, 111 N. W. 962.

A defense that concedes that plaintiff once had a cause of action, but insists that it no longer exists is new matter. *Landis v. Morrissey*, 69 Cal. 83, 10 Pac. 258; *Coles v. Soulsby*, 21 Cal. 47; *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692.

Matter relied on by defendant which is not put in issue by the plaintiff is new matter. *Bridges v. Paige*, 13 Cal. 640.

New matter is that which under the rules of evidence the defendant must affirmatively establish and as to which the onus of proof rests on him. *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Glazer v. Clift*, 10 Cal. 304.

"New matter constituting a defense is not pleaded by averments which merely deny the allegations of the complaint, but only when they constitute a statement of facts, the proof of which avoids the legal conclusion otherwise to be drawn from the statement of facts in the complaint. It is in the nature of a plea in confession and avoidance. *Pomeroy on Remedies*, §§690-692." *Craig v. Cook*, 28 Minn. 232, 9 N. W. 712.

An affirmative defense logically carries the idea that a cause of action once existed, but has ceased because of facts pleaded in the answer, or that

a cause of action would have arisen out of the facts set forth in the petition but for the additional contemporaneous facts pleaded in the answer. *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 81 S. W. 1142.

An affirmative defense is a plea interposed as a basis for proving some new fact. *F. V. Smith Contracting Co. v. City of New York*, 70 Misc. 132, 128 N. Y. Supp. 351.

A defense can consist only of new matter, that is matter which cannot be proved under an issue raised by denial. *Schultz v. Greenwood Cemetery*, 93 N. Y. Supp. 180.

A defense differs from a denial in that the denial puts the plaintiff to his proof, and the defense is a plea by way of confession and avoidance. *Rogers v. Morton*, 46 Misc. 494, 95 N. Y. Supp. 49.

Every special defense which goes to disprove any material allegation in the complaint is defective. *Benedict v. Seymour*, 6 How. Pr. (N. Y.) 298.

A defense which admits the apparent validity of the transaction or contract set out in the complaint, but seeks to avoid its effect by establishing some circumstance, transaction or conclusion of fact not inconsistent with the complaint is new matter. *Butchtel v. Evans*, 21 Ore. 309, 28 Pac. 67.

Examples of defenses which have been held to be new matter: That the action is prematurely brought (*Iselin v. Simon*, 62 Minn. 128, 64 N. W. 43); duress (*Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. 599); that plaintiff's claim is based on a series of illegal acts (*Denton v. Logan*, 3 Metc. (Ky.) 434); that the contract sued on is illegal (*U. S.—Rucker v. Bolles*, 133 Fed. 858, 67 C. C. A. 30. *Ore.—Ah Doon v. Smith*, 25 Ore. 89, 34 Pac. 1093; *Buchtel v. Evans*, 21 Ore. 309, 28 Pac. 67. *Wash.* *Maitland v. Zamga*, 14 Wash. 92, 44 Pac. 117); ultra vires (*Richmond County Soc. for Prevention of Cruelty to Children v. City of New York*, 73 App. Div. 607, 77 N. Y. Supp. 41); that the contract sued on was abrogated by mutual consent (*Maxon v. Gates*, 136 Wis. 270, 116 N. W. 758; *Salchert v. Reinig*, 135 Wis. 194, 115 N. W. 132).

47. Not every defense comprising new matter is in the nature of a con-

deny the allegations of the adverse party,⁴⁸ or to show that he never had a cause of action,⁴⁹ or has not a right of recovery to the extent

fession and avoidance, since some of the facts stated in the complaint may be true and some false, and there may be facts not therein alleged which are new matter, and the facts stated truly in the complaint, with such new facts, may constitute a complete defense, and yet there may not be a complete confession because other facts stated in the complaint are not true. *Devos v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339.

"Under the code, the plea of new matter in bar does not coincide exactly with a confession and avoidance at common law, as it may set up defenses which the logical severity of the common law system of pleading would not tolerate. A plea of confession and avoidance admits that the cause of action alleged in the petition or declaration once existed, but avers subsequent facts which discharged or satisfied it. A plea of new matter under the code admits the allegations of the petition, and states facts not alleged in the petition which suffice to defeat a recovery, but not necessarily by way of discharging the plaintiff's cause of action. *Pomeroy's Remedies* (3d ed.), §872. Under the code, as legal and equitable procedures are largely blended, equitable defenses may be set up to defeat a plaintiff's case; that is to say, demands which at common law could not be pleaded in defense of a legal action, but had to be enforced by a separate suit in equity." *Dwyer v. Rohan*, 99 Mo. App. 120, 73 S. W. 384.

48. *Mo.*—*State v. Williams*, 48 Mo. 210. *Mont.*—*Mauldin v. Ball*, 5 Mont. 96. *N. Y.*—*Shaff v. United Surety Co.*, 142 App. Div. 465, 127 N. Y. Supp. 8. *Wyo.*—*Iba v. Central Assn.*, 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

Matter which is provable under a denial is not new matter. *Fragner v. Fischel*, 141 App. Div. 869, 126 N. Y. Supp. 478; *Mauldin v. Ball*, 5 Mont. 96.

A defense is not negative and cannot consist of facts which may be proved under a denial, but can only be of new matter, that is facts outside of the issues that are or may be raised by a denial. *Frank v. Miller*, 116 App. Div. 855, 102 N. Y. Supp. 277.

Form of Denial Not Controlling.—*Frisch v. Caler*, 21 Cal. 71.

That the answer consists of affirmative allegations, instead of a direct negative of the allegations of the complaint does not determine that it consists of new matter, but if it is in substance and effect merely a denial it will not be new matter. *Goddard v. Fulton*, 21 Cal. 430.

As where plaintiff alleged that goods were sold to defendant at the agreed and reasonable value of a specified sum, and the answer admitted the sale but alleged that the agreed and reasonable value was a less sum. *King v. Burnham*, 93 Minn. 288, 101 N. W. 302.

In an action to foreclose a street-assessment lien, an allegation that third persons owned a part of the land involved, was held not to be new matter, but to be in legal effect merely a denial of the averment of the complaint as to ownership. *Robinson v. Merrill*, 87 Cal. 11, 25 Pac. 162.

Examples of defenses which have been held not to be new matter:

In an action for malicious prosecution, that defendant acted under advice of counsel (*Levy v. Brannan*, 39 Cal. 485); that defendant never made any agreement in writing (*Dennison v. Barney*, 49 Colo. 442, 113 Pac. 519); in an action to recover for goods sold, in which the complaint alleged a promise to pay on demand, that the goods were sold on a credit of sixty days, the period of which had not expired when the action was commenced (*Landis v. Morrissey*, 69 Cal. 83, 10 Pac. 258); in an action upon an account for services rendered and money expended, where defendant pleaded a general denial, a defense that the services counted upon by plaintiff were performed pursuant to an express contract between plaintiff and defendant, the terms of which he fully set out (*Dykemah v. Johnson*, 83 Ohio St. 126, 93 N. E. 226).

49. Anything which shows that plaintiff has not the right of recovery at all, is not new matter. *Bridges v. Paige*, 13 Cal. 640.

Matter is not such new matter as is required to be affirmatively pleaded, where neither its purpose nor effect is

claimed,⁵⁰ or which is merely a necessary conclusion from the facts alleged by the adverse party.⁵¹

Manner of Pleading.—Each separate defense must be complete in itself,⁵² and sufficient in itself, if true, to constitute a complete defense,⁵³ except that matters alleged in one may be incorporated into others by reference.⁵⁴

VI. MUST BE SPECIALLY PLEADED.—As a general rule, to be available, all matters in confession and avoidance, including new matter under the codes, must be specially pleaded,⁵⁵ and cannot be

to discharge or avoid a cause of action theretofore existing, but to prove that the cause of action never did exist, by showing that the material allegation of injury or damage to plaintiff is not true. *Churchill v. Baumann*, 95 Cal. 541, 30 Pac. 770.

50. In an action on a quantum meruit for attorney's services it was held that under an answer denying the value of the services as charged defendant was entitled to prove unskillfulness and negligence on the part of the attorneys. *Bridges v. Paige*, 15 Cal. 640.

51. An allegation that more than six years had elapsed since the cause of action sued on accrued was held not to be new matter, where the facts alleged in the complaint showed that such was the case. *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 797.

52. *Welles v. Colorado Nat. Life Assur. Co.*, 49 Colo. 508, 113 Pac. 524; *Travelers' Ins. Co. v. Redfield*, 6 Colo. App. 190, 40 Pac. 195; *Devoe v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339.

Separate defense which does not reiterate or refer to previous denials must stand or fall independently of them. *Barnard v. Lawyers' Title Ins. Co.*, 91 N. Y. Supp. 41.

See the title "**Answers**," Vol. 2, p. 61, *et seq.*

53. *Welles v. Colorado Nat. Life Assur. Co.*, 49 Colo. 508, 113 Pac. 524; *Eells v. Dumary*, 84 App. Div. 105, 82 N. Y. Supp. 531.

54. *Welles v. Colorado Nat. Life Assur. Co.*, 49 Colo. 508, 113 Pac. 524; *Wiener v. Boehm*, 126 App. Div. 703, 111 N. Y. Supp. 126; *Wiener v. Mayer*, 126 App. Div. 708, 111 N. Y. Supp. 132; *Outcault v. Bonheur*, 120 App. Div. 168, 104 N. Y. Supp. 1099.

An allegation in one count of the answer, whereby defendant admitted plaintiff's right of recovery "unless it

sustains its affirmative defense set out in the other counts of the answer," is to be regarded as a part of each count. *Jackson v. Independent School Dist.*, 110 Iowa 313, 81 N. W. 596.

See the title "**Answers**," Vol. 2, p. 61, *et seq.*

55. **U. S.**—*Hill v. Mendenhall*, 21 Wall. 453, 22 L. ed. 616; *Rucker v. Bolles*, 133 Fed. 858, 67 C. C. A. 30. **Ala.**—*American Oak Extract Co. v. Ryan*, 112 Ala. 337, 20 So. 644; *Lunsford v. Walker*, 93 Ala. 36, 8 So. 386; *Petty v. Dill*, 53 Ala. 641. **Cal.**—*Coles v. Soulsby*, 21 Cal. 47; *Glazer v. Clift*, 10 Cal. 304; *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692. **Minn.**—*Gaffney v. St. Paul, M. & M. R. Co.*, 38 Minn. 111, 35 N. W. 728; *Livingston v. Ives*, 35 Minn. 55, 27 N. W. 74. **Mo.**—*England v. Denham*, 93 Mo. App. 13. **Mont.**—*Swenson v. Kleinschmidt*, 10 Mont. 473. **Neb.**—*Lowe v. Prospect Hill Cemetery Assn.*, 58 Neb. 94, 78 N. W. 488.

For a full discussion of this question see the title "**Answers**," Vol. 2, p. 37.

All matters of defense which give color of action to plaintiff must be specially pleaded, and all matters of defense which do not give such color, amount to the general issue, and must be given in evidence under it. *Baltimore & O. R. R. Co. v. Polly-Woods & Co.*, 14 Gratt (Va.) 447.

Facts which are consistent with plaintiff's statements of fact, but show, notwithstanding, that he has no cause of action, must be specially alleged. *Southey v. Dowling*, 70 Conn. 153, 39 Atl. 113.

Under rule 6d of the circuit court in common law actions, all matters in confession and avoidance, including those by way of discharge or performance, must be specially pleaded. *Nuzell v. Watson*, 57 Fla. 111, 49 So. 149; *Skin-*

shown either under a general denial or under a plea of the general issue.⁵⁶

ner Mfg. Co. v. Danville, 57 Fla. 180, 49 So. 125.

Under B. & C. Comp., §73, requiring the answer to contain a statement of any new matter constituting a defense, matter which does not go merely to disprove plaintiff's cause of action must be specially pleaded. Springer v. Jenkins, 47 Ore. 502, 84 Pac. 479.

New matter not pleaded as a defense can not be considered on appeal for the purpose of reversing the judgment below, though evidence was received in regard to it, and the court made an affirmative finding of fact in defendant's favor thereon, where defendant made no request to have its answer amended to conform to the proof. Blixt v. Eltoma Realty Co., 138 App. Div. 499, 122 N. Y. Supp. 861.

Examples of defenses which it has been held must be specially pleaded:

That the action was prematurely brought (Reed v. Inhabitants of Scituate, 7 Allen (Mass.) 141); want of consideration, unless the contract imports a consideration (Griffith v. Wright, 21 Wash. 494, 58 Pac. 582); illegality of consideration (Cal.—Sharon v. Sharon, 68 Cal. 29, 8 Pac. 614. Ind.—Casad v. Holdridge, 50 Ind. 529); that the contract sued on is illegal (Mo.—St. Louis Agricultural & Mechanical Assn. v. Delano, 108 Mo. 217, 18 S. W. 1101; Cummiskey v. Williams, 20 Mo. App. 606; Neb.—Aitchison & N. R. R. Co. v. Miller, 16 Neb. 661, 21 N. W. 451), unless it is disclosed by plaintiff's own proof or pleadings (Ore.—Ah Doon v. Smith, 25 Ore. 89, 34 Pac. 1093; Buchtel v. Evans, 21 Ore. 309, 28 Pac. 67. Wash.—Maitland v. Zanga, 14 Wash. 92, 44 Pac. 117), that the contract was void because made on Sunday (Riech v. Bolch, 68 Iowa 526, 27 N. W. 507); that plaintiff's claim is based on a series of illegal acts (Denton v. Logan, 3 Metc. (Ky.) 434); that the transaction was illegal as being a mere wager (Dodge v. McMahan, 61 Minn. 175, 63 N. W. 487); that the contract sued on was abrogated by mutual consent (Maxon v. Gates, 136 Wis. 270, 116 N. W. 758; Salehert v. Reinig, 135 Wis. 194, 115 N. W. 132); that plaintiff had elected to treat the contract as at an end, and therefore could not maintain an action for specific performance of it

(Blixt v. Eltoma Realty Co., 138 App. Div. 499, 122 N. Y. Supp. 861); waiver (Brown Const. Co. v. Macarthur Bros. (Mo.), 139 S. W. 104; Loofbourn v. Hicks, 24 Utah 49, 66 Pac. 602); duress (Nordholt v. Nordholt, 87 Cal. 552, 26 Pac. 599); Champerty (Moore v. Ringo, 82 Mo. 468); payment (Welles v. Colorado Nat. Life Assur. Co., 49 Colo. 508, 113 Pac. 524); accord and satisfaction and release (Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151); settlement, in action for money had and received (Hall v. Skahen, 101 Minn. 460, 112 N. W. 865); bona fide purchaser (Deseret Nat. Bank v. Kidman, 25 Utah 379, 71 Pac. 873); leave and license or consent (Cone v. Iverson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933); all grounds relied on in avoidance of a title to property specifically pleaded by plaintiff (Dickson v. City of St. Paul, 105 Minn. 165, 117 N. W. 426); that the claim was not presented within the time prescribed by the contract (Brooks v. Western Union Tel. Co., 26 Utah 147, 72 Pac. 499); assumed risk (Faulkner v. Mammoth Min. Co., 23 Utah 437, 66 Pac. 799).

The question of *ultra vires* cannot be raised by demurring to a complaint which simply sets out the making of a contract with a corporation and its performance by the other party. Richmond County Soc. for Prevention of Cruelty to Children v. City of New York, 73 App. Div. 607, 77 N. Y. Supp. 41.

56. Glazer v. Clift, 10 Cal. 304; Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692; Christianson v. Chicago, St. P., M. & O. Ry. Co., 61 Minn. 249, 63 N. W. 639.

That the contract sued on is illegal. Mo.—St. Louis Agricultural & Mechanical Assn. v. Delano, 108 Mo. 217, 18 S. W. 1101; Cummiskey v. Williams, 20 Mo. App. 606. N. Y.—Milbank v. Jones, 127 N. Y. 370, 28 N. E. 31. Ore.—Ah Doon v. Smith, 25 Ore. 89, 34 Pac. 1093; Buchtel v. Evans, 21 Ore. 309, 28 Pac. 67.

In a personal injury action any evidence affecting the extent of the suffering for which a recovery is sought is admissible under the general issue. Forth Worth & D. C. R. Co. v. Travis, 45 Tex. Civ. App. 117, 99 S. W. 1141.

An exception to the rule is recognized in some jurisdictions where the case of the plaintiff is based on the violation of some statute, or of some rule of public policy or public morals.⁵⁷

It is not necessary to affirmatively plead facts which tend only to contradict the allegations of the complaint.⁵⁸

One may also avail himself of an affirmative defense which is shown by the proof of his adversary, even though he has not himself pleaded it.⁵⁹

An affirmative defense may also be taken advantage of by demurrer where apparent on the face of the pleading of the opposite party,⁶⁰ or by motion for nonsuit, if it appears from the opposite party's own evidence.⁶¹

It is not necessary that the new matter shall be stated to be pleaded as a defense, it being sufficient if it is set up in a defensive pleading and is in fact a defense,⁶² nor does the fact that it is improperly pleaded as a counterclaim deprive the pleader of the benefit of it as a defense.⁶³

VII. SPECIAL PLEAS AMOUNTING TO THE GENERAL ISSUE.— Except where permitted by statute,⁶⁴ a special plea amounting

For a full discussion of this question see the title "**Denial.**"

57. As where the contract sued on is illegal. *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. ed. 539; *Skinner Mfg. Co. v. Danville*, 57 Fla. 130, 49 So. 125. See the title "**Denial.**"

58. All such facts may be shown under the general issue. *Sodini v. Gaber*, 101 Minn. 155, 111 N. W. 962; *Hanson v. Diamond Iron Mining Co.*, 87 Minn. 505, 92 N. W. 447.

59. *Reed v. Inhabitants of Scituate*, 7 Allen (Mass.) 141. Contributory negligence. *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 81 S. W. 1142.

As where the illegality of the contract sued on appears from plaintiff's own pleadings or proofs, in which case the court will dismiss the action of its own motion. N. Y.—*Milbank v. Jones*, 127 N. Y. 370, 28 N. E. 31. Ore.—*Ah Doon v. Smith*, 25 Ore. 89, 34 Pac. 1093; *Buchtel v. Evans*, 21 Ore. 309, 28 Pac. 67. Wash.—*Maitland v. Zanga*, 14 Wash. 92, 44 Pac. 117.

60. Limitations (*Devoe v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339); that the action is prematurely brought (*Goodrich v. Atlanta National Bldg. & Loan Assn.*, 96 Ga. 803, 22 S. E. 585; *Iselin v. Simon*, 62 Minn. 128, 64 N. W. 143).

See the title "**Demurrer.**"

61. Where plaintiff's proof discloses a fatal defect in his case, a motion to dismiss lies whether the defect is or is not alluded to in the answer. *F. V. Smith Contracting Co. v. City of New York*, 70 Misc. 132, 128 N. Y. Supp. 351.

That the action is prematurely brought. *Goodrich v. Atlanta National Bldg. & Loan Assn.*, 96 Ga. 803, 22 S. E. 585; *Iselin v. Simon*, 62 Minn. 128, 64 N. W. 143. See the title "**Dismissal and Nonsuit.**"

62. *Townsend v. Minneapolis Cold Storage & Freezer Co.*, 46 Minn. 121, 48 N. W. 682.

A paragraph manifestly intended as a separate defense should be so treated in testing its sufficiency on demurrer, regardless of the words by which it is introduced or the name given it by the pleader. *Eells v. Dumary*, 84 App. Div. 105, 82 N. Y. Supp. 531.

63. *Townsend v. Minneapolis Cold Storage & Freezer Co.*, 46 Minn. 121, 48 N. W. 682.

64. In Mississippi, under Code 1906, §761, providing that "A pleading shall not be deemed insufficient for any defect which could heretofore be objected to only by special demurrer," it is error to sustain a demurrer to a special plea as amounting to the general issue. *Merchants & Farmers Bank v. Calmes*, 82 Miss. 603, 35 So. 161;

to the general issue is bad,⁶⁵ as a plea which merely sets up matter in denial of what the plaintiff would be bound to prove on the gen-

Polkinghorne v. Hendricks, 61 Miss. 366.

In *Alabama* it was held in the case of *Hopkinson v. Shelton*, 37 Ala. 306, that, in view of the statute allowing the filing of a plurality of pleas, it is no valid objection to a plea that it amounts to the general issue, the court stating that the refusal to reverse on account of the erroneous sustaining of a demurrer to such a plea in other cases was based, not upon the ground that the plea was objectionable, but that no injury resulted from the erroneous action of the court, and citing *Rogers v. Brazeale*, 34 Ala. 512, which so holds in regard to the plea there involved. The *Hopkins* case cites as authority for holding that such a plea is not objectionable *Dunham v. Ridgel*, 2 Stew. & P. (Ala.) 402, which, however, only holds that it is no objection to a legitimate special plea that the same matter of defense would be available under the general issue, and recognizes the distinction between pleas of matter available under the general issue and plea amounting to the general issue. In *Postal Telegraph Cable Co. v. Jones*, 133 Ala. 217, 32 So. 500, it was held that defendant could take nothing by the fact that demurrers were sustained to certain pleas which were mere denials of negligence and set up only facts which were provable under the general issue, and that such pleas might well have been stricken on that ground.

In *Reeves v. Anniston Knitting Mills*, 166 Ala. 645, 52 So. 142, it was held that a plea that plaintiff's injury resulted proximately from dangers ordinarily incident to the service in which he was engaged might well have been stricken on motion as being within the general issue pleaded.

In *Huggins v. Southern R. Co.*, 159 Ala. 189, 49 So. 299, a plea was held demurrable because the matters set up therein could be shown under the general issue, and in *McClendon v. Equitable Mortgage Co.*, 122 Ala. 384, 25 So. 30, a special plea in ejectment alleging that the instrument under which plaintiffs claimed was not executed by defendant or anyone authorized to bind him was held demurrable.

65. *Andrew's Steph. Pl.* (2nd ed.)

459, *et seq.*, and the following cases: *U. S.*—*Liter v. Green*, 2 Wheat. 306, 4 L. ed. 246; *Van Ness v. Forrest*, 8 Cranch C. C. 30, 3 L. ed. 478; *Butter v. Evening Leader Co.*, 134 Fed. 994. *Del.*—*Emmons v. Home Ins. Co.*, 1 Penne. 83, 39 Atl. 775. *Fla.*—*McKinnon v. Johnson*, 57 Fla. 120, 43 So. 910; *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 So. 318; *Peacock v. Feaster*, 51 Fla. 269, 40 So. 74; *Hubbard v. Anderson*, 50 Fla. 219, 39 So. 107; *Barco v. Fennell*, 24 Fla. 373, 5 So. 9. *Ill.*—*Finch & Co. v. Zenith Furniture Co.*, 245 Ill. 586, 92 N. E. 521, *affirming* 146 Ill. App. 257; *Roosevelt v. Hungate*, 110 Ill. 595; *Smith v. Peoria County*, 59 Ill. 412; *Wiggins Ferry Co. v. Blakeman*, 54 Ill. 201; *Warner v. Crane*, 20 Ill. 48; *Tokheim Mfg. Co. v. Stoyles*, 142 Ill. App. 198; *Hubbard Milling Co. v. Roche*, 133 Ill. App. 602. *Ky.*—*McMinimy v. Avis*, 4 Ky. L. Rep. (abstract) 905. *Md.*—*Citizens Mut. Fire Ins. Co. v. Conowingo Bridge Co.*, 113 Md. 430, 77 Atl. 378; *Baltimore Belt Line R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654; *Hagerstown v. Klotz*, 93 Md. 437, 49 Atl. 836, 86 Am. St. Rep. 437, 54 L. R. A. 940; *Fox v. State*, 89 Md. 381, 43 Atl. 775. *Mass.*—*Gardner v. Webber*, 17 Pick. 407; *Thayer v. Brewer*, 15 Pick. 217. *N. J.*—*Camp v. Allen*, 12 N. J. L. 1. *B. I.*—*Granite Bldg. Corp. v. Green*, 25 R. I. 586, 57 Atl. 649; *Cole v. Lippitt*, 23 R. I. 541, 51 Atl. 202. *Vt.*—*Dunlevy v. Fenton*, 80 Vt. 505, 68 Atl. 851; *Kimball v. Boston, C. & M. R. Co.*, 55 Vt. 95. *Va.*—*Norfolk & W. Ry. Co. v. Mundy*, 110 Va. 422, 66 S. E. 61; *Blankenship v. Ely*, 98 Va. 359, 38 S. E. 484; *Virginia Fire & Marine Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973; *Baltimore & O. R. R. Co. v. Polly-Woods & Co.*, 14 Gratt. 447. *W. Va.*—*Walls v. Zufall & Co.*, 61 W. Va. 166, 56 S. E. 179; *Richards v. Riverside Iron Works*, 56 W. Va. 510, 49 S. E. 437. *Eng.*—*Hayselden v. Staff*, 5 Ad. & E. 153, 111 Eng. Reprint 1124.

In *American Bonding & Trust Co. v. Milstead*, 102 Va. 683, 47 S. E. 353, it was held not to be error to refuse to allow the filing of pleas amounting to the general issue, where the matters set up therein were such as could have been proven under the general is-

eral issue in order to support his case,⁶⁶ or merely sets up evidence on the issue made by a traverse,⁶⁷ or which fails to give color,⁶⁸ or which denies and attempts to justify the same facts,⁶⁹ or which avers that a third person committed the wrong complained of,⁷⁰ or which sets up a different contract from the one alleged by the adverse party.⁷¹

sue, and the order rejecting the pleas reserved to defendant the privilege of offering any evidence under the general issue that was proper to be offered under such pleas.

In trespass by a sheriff for taking and carrying away attached property it was held that the defense that defendant purchased the property from the original owner prior to the attachment could not be specially pleaded. *Merritt v. Miller*, 13 Vt. 416.

In an action on a note it was held to be error to strike a plea going to the reasonableness of the attorney's fees sought to be recovered. *Proctor v. Crooker*, 129 Ga. 732, 59 S. E. 781.

The usual test as to whether a plea amounts to the general issue is whether it takes away all color for maintaining an action by fixing a negative upon the plaintiff's right in the first instance. *Brown v. Artcher*, 1 Hill (N. Y.) 266.

The case of *Thayer v. Brewer*, 15 Pick. 217, lays down the following test for determining whether a plea in bar is bad as amounting to the general issue: "If it be any matter of defense which denies what the plaintiff, on the general issue, would be bound to prove, it may and ought to be given in evidence under the general issue, and a plea setting up such facts negatively is bad on special demurrer; but if it be any ground of defense which admits the facts alleged in the declaration but avoids the action by matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue, it may be specially pleaded." 1 Chitty on Pl. 497; 1 Tidd 599, 600; *Bank of Auburn v. Weed*, 19 Johns. R. 300; *Kennedy v. Strong*, 10 Johns. R. 289; *Com. Dig. Pleader*, E. 14; *Bac. Abr. Pleas*, etc., G. 3; *Priestly v. White*, *Yelv.* 174a."

Statute Allowing Several Defenses. The statute allowing a defendant to plead as many defenses as he may elect does not confer on him the absolute right to file special pleas setting up

defenses covered by a plea of the general issue already received. *Virginia Fire & Marine Ins. Co. v. Buck*, 88 Va. 517, 13 S. E. 973. But see *Hopkinson v. Shelton*, 37 Ala. 306.

Harmless Error.—The failure to strike pleas where their averments are equivalent to the general issue does not of itself constitute reversible error. *Norfolk & W. R. Co. v. Mundy*, 110 Va. 422, 66 S. E. 61.

66. U. S.—*Halsted v. Lyon*, 2 McLean 226, 11 Fed. Cas. No. 5,968. Md. *Seff v. Brotman*, 108 Md. 278, 70 Atl. 106. Mass.—*Thayer v. Brewer*, 15 Pick. 217. Vt.—*Boyden v. Fitchburg R. R. Co.*, 70 Vt. 125, 39 Atl. 771; *Kimball v. Boston, C. & M. R. R. Co.*, 55 Vt. 95. Va.—*Chesapeake & Ohio Ry. Co. v. Rison*, 99 Va. 18, 37 S. E. 320; *Maggort v. Hansbarger*, 8 Leigh 532.

67. In an action for malicious prosecution, where defendant denied the material and issuable facts of malice and want of probable cause, it was held that a further paragraph alleging that he acted under professional advice should be stricken. *Johnson v. Clem*, 4 Ky. L. Rep. 860.

68. In trespass *quare clausum fregit*, a plea that a third person was seized in fee of the premises and demised to the defendant for one year; and that by virtue of this demise he entered, was held bad where it did not give express color. *Collet v. Flinn*, 5 Cow. (N. Y.) 466.

In trespass *de bonis* a plea that the goods were the property of a third person and that defendants took them under an attachment against said third person was held bad. *Brown v. Artcher*, 1 Hill (N. Y.) 266.

69. *Blood v. Adams*, 33 Vt. 52.

70. *Hagerstown v. Klotz*, 93 Md. 437, 49 Atl. 836, 86 Am. St. Rep. 437, 54 L. R. A. 940.

71. Vt.—*Dunlevy v. Fenton*, 80 Vt. 505, 68 Atl. 651; *Kimball v. Boston, C. & M. R. R. Co.*, 55 Vt. 95. Wash. *Petterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543,

On the other hand, a plea which gives express or implied color to the allegations of the opposite party and sets up new matter in avoidance can never be objectionable on this ground, since the element of denial is absent.⁷³

The objection is available only when the general issue has in fact been filed.⁷³

There is a distinction to be observed between the case of a plea which amounts to the general issue and one which discloses matter which may be given in evidence under the general issue.⁷⁴

VIII. JOINDER WITH DENIALS.—The authorities are in conflict as to whether a party may at the same time deny and confess and avoid the allegations of his adversary.⁷⁵ In some jurisdictions it is held that pleas or answers both in denial and in confession and avoidance may be filed together and may be relied on at the same time, and that one may not be used to destroy the other,⁷⁶ provided

53 L. R. A. 546; *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534. *Wash. Ter. Puget Sound Iron Co. v. Worthington*, 2 Wash. Ter. 472, 7 Pac. 882. *Eng. Hayselden v. Staff*, 5 Ad. & E. 153, 111 Eng. Reprint 1124.

72. *Andrew's Steph. Pl.* (2nd ed.) 461, and the following cases: *U. S. Dibble v. Duncan*, 2 McLean 553, 7 Fed. Cas. No. 3,880. *Md.—McAllister v. State*, 94 Md. 290, 50 Atl. 1046; *Keedy v. Long*, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759. *N. Y.—Brown v. Archer*, 1 Hill 266. *Va.—Baltimore & O. R. R. Co. v. Polly-Woods & Co.*, 14 Gratt. 447.

Which admits that plaintiff once had a cause of action. *Brown v. Cornish*, 1 Ld. Raym. 217, 91 Eng. Reprint 1041.

Examples of pleas that have been held not to amount to the general issue:

In an action on a fire insurance policy on an automobile, a special plea of fraud. *British & Foreign Marine Ins. Co. v. Cummings*, 113 Md. 350, 76 Atl. 571.

In trespass *de bonis* a plea alleging that plaintiff claimed the goods under a pretended sale thereof to him by a third person, which pretended sale was void, and that the goods were the property of such third person and were taken by defendants by virtue of an attachment against him, but further admitting that the goods were taken from the possession of plaintiff. *Van Etten v. Hoist*, 6 Hill (N. Y.) 311.

73. *Chicago, C. & St. L. R. Co. v. Bozarth*, 91 Ill. App. 68. See also *Stoddard v. Johnson*, 75 Ind. 20.

74. *Andrew's Steph. Pl.* (2nd ed.) 461, and the following cases: *Md. Keedy v. Long*, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759. *Vt.—Baker v. Sherman*, 75 Vt. 88, 53 Atl. 330; *Kimball v. Boston, C. & M. R. R. Co.*, 55 Vt. 95. *Eng.—Hayselden v. Staff*, 5 Ad. & El. 153, 111 Eng. Reprint 1124.

A special plea alleging facts which will maintain the defense under the general issue does not necessarily amount to the general issue. *Deivees v. Manhattan Ins. Co.*, 34 N. J. L. 244.

See further the title "**General Issue and General Denial.**"

75. See the title "**Answers.**"

76. *Cal.—Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076; *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613; *Billings v. Drew*, 52 Cal. 565; *Buhne v. Corbett*, 43 Cal. 264; *Snipsic Co. v. Smith*, 7 Cal. App. 150, 93 Pac. 1035. *Colo.—Welles v. Colorado Nat. Life Assur. Co.*, 49 Colo. 508, 113 Pac. 524; *Pike v. Sutton*, 21 Colo. 84, 39 Pac. 1084; *Koll v. Bush*, 6 Colo. App. 294, 40 Pac. 579. *Ill.—Derby Cycle Co. v. White*, 64 Ill. App. 245. *Ia.—Rudd v. Dewey*, 121 Iowa 454, 96 N. W. 973; *Runkle v. Hartford Ins. Co.*, 99 Iowa 414, 68 N. W. 712; *Treadway v. S. C. & St. P. R. Co.*, 40 Iowa 526; *Quigley v. Merritt*, 11 Iowa 147. *N. Y.—Societa Italiana v. Sulzer*, 138 N. Y. 463, 34 N. E. 193; *Goodwin v. Wertheimer*, 99 N. Y. 149, 1 N. E. 404; *Schlesinger v. Wise*, 106 App. Div. 587, 94 N. Y. Supp. 718. *N. C.—Reed v. Reed*, 93 N. C. 462; *Ten' Broeck v. Orchard*, 79

they are pleaded in separate paragraphs," and that there is no distinction in this respect between pleadings that are verified and those

N. C. 518. S. D.—Lawrence v. Peck, 3 S. D. 645, 54 N. W. 808; Stebbins v. Lardner, 2 S. D. 127, 48 N. W. 847. Tenn.—Shelby County v. Bickford, 102 Tenn. 395, 52 S. W. 772; Noel v. McCrory, 7 Cald. 623. Tex.—Fowler v. Davenport, 21 Tex. 627. Vt.—Blood v. Adams, 33 Vt. 52.

In the Reply.—Plaintiff may in one replication traverse a plea and in another confess and avoid it. Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940.

The pleading of matter in confession and avoidance in the reply does not waive the general denial which under the statute is deemed interposed to all new matter in the answer. Budd v. Dewey, 121 Iowa 454, 96 N. W. 793; Schulte v. Coulthurst, 94 Iowa 418, 62 N. W. 770; Day v. Mill Owners' Mut. Fire Ins. Co., 75 Iowa 694, 38 N. W. 113.

The implied admission resulting from a reference in the reply to a matter in the answer as "an alleged fact" does not waive the general denial imposed by operation of law. Nichols v. Chicago G. W. Ry. Co., 94 Iowa 202, 62 N. W. 769; Day v. Mill Owners' Mut. Fire Ins. Co., 75 Iowa 694, 38 N. W. 113.

Examples of defenses which it has been held may be pleaded together: Denial and waiver (Tobin v. Western Mut. Aid Soc., 72 Iowa 261, 33 N. W. 663); accord and satisfaction and the general issue (Prince v. Puckett, 12 Ala. 832); denial of title and limitations, in ejectment (Willson v. Cleveland, 30 Cal. 192); in slander, not guilty or a general denial and justification (Ala.—Pope v. Welsh's Admr., 18 Ala. 631; Ia. Herzman v. Oberfelder, 54 Iowa 83; N. C.—Sumner v. Shipman, 65 N. C. 623); slander, not guilty, limitations, and justification (Kelly v. Craig, 9 Humph. (Tenn.) 215); not guilty and justification, in trespass (Grash v. Sater, 6 Iowa 301; Shallcross v. West Jersey & S. E. Co., 75 N. J. L. 395, 67 Atl. 931); in assumpsit on promissory notes, denial of execution, want of execution, and usury (Granite State Bank v. Otis, 53 Me. 133); *non est factum* and alteration (Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895).

77. Ill.—Priest v. Dodsworth, 235 Ill. 613, 85 N. E. 940. Ind.—Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895. Ia.—Runkle v. Hartford Ins. Co., 99 Iowa 414.

Denial and Admission of Same Facts.

A single paragraph or plea may not both deny and admit the same facts. Duffy v. England (Ind.), 96 N. E. 704; Borolus v. Phoenix Ins. Co., 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400; Racer v. State, 131 Ind. 393, 31 N. E. 81; Nysewander v. Lowman, 124 Ind. 584, 24 N. E. 355; Petty v. Trustees, etc., 95 Ind. 278; State v. St. Paul & Morristown Turnpike Co., 92 Ind. 42; Unger v. Mellinger, 37 Ind. App. 639, 77 N. E. 814, 117 Am. St. Rep. 348; Weser v. Welty, 18 Ind. App. 664, 47 N. E. 639; Board of Comrs. v. Woodring, 12 Ind. App. 173, 40 N. E. 31; Dunklee v. Goodenough, 65 Vt. 257, 26 Atl. 988; Blood v. Adams, 33 Vt. 52.

Denial of Certain Allegations and Admission of Others.

A single paragraph of answer may confess certain allegations of the complaint, and avoid the same by affirmative facts and deny all others, and such paragraph will be treated as containing but one ground of defense. Colglazier v. Colglazier, 117 Ind. 460, 20 N. E. 490; State v. St. Paul & Morristown Turnpike Co., 92 Ind. 42; Unger v. Mellinger, 37 Ind. App. 639, 77 N. E. 814, 117 Am. St. Rep. 348; Board of Comrs. v. Woodring, 12 Ind. App. 173, 40 N. E. 31.

In New York.—The New York cases are not in accord as to whether a denial may be incorporated in a defense. Green v. Brown, 22 Misc. 279, 49 N. Y. Supp. 163, and Carter v. Eighth Ward Bank, 33 Misc. 128, 67 N. Y. Supp. 800, hold that it may not be, while Rogers v. Morton, 95 N. Y. Supp. 49, 46 Misc. 494, holds that, since to state a valid defense it may be necessary to deny specific allegations of the complaint, all denials in a defense not necessarily surplusage or immaterial. Devoe v. Lutz, 133 App. Div. 336, 117 N. Y. Supp. 339, seems to support the same view, and this seems to be in accord with the holding of the court of appeals in Douglass v. Phenix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448, where it

that are not.⁷⁸ In others it is held that a general denial is overcome by a subsequent confession and avoidance,⁷⁹ and that the two can go together only where they are not actually inconsistent.⁸⁰

The test of consistency is whether the one necessarily and actually

is said that an affirmative defense is to be treated as a separate plea, "and the defendant is not entitled to the benefit of denials made in another part of the answer, unless repeated or incorporated by reference and made a part of the affirmative defense," thereby implying that a denial may be included in such a defense. See also *Eells v. Dumary*, 84 App. Div. 105, 82 N. Y. Supp. 531, and cases there cited.

In *Benjamin v. White*, 105 N. Y. Supp. 991, it is held that a general denial may not be pleaded by iteration or otherwise in a separate defense which is a plea by confession and avoidance, but that such a defense may contain a denial of a specific allegation of the complaint when necessary to make such defense complete.

78. *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *McDonald v. Southern Cal. R. Co.*, 101 Cal. 206, 35 Pac. 646; *Buhne v. Corbett*, 43 Cal. 264.

79. *U. S.—Northern Pac. R. v. Paine*, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. ed. 513; *School Dist. No. 11 v. Chapman*, 152 Fed. 887, 82 C. C. A. 35. *Kan.—De Lissa v. Fuller Coal & Min. Co.*, 59 Kan. 319, 52 Pac. 886; *Yandle v. Crane*, 13 Kan. 258; *Butler v. Kaulback*, 8 Kan. 668; *Wiley v. Keokuk*, 6 Kan. 94. *Minn.—Scott v. King*, 7 Minn. 494; *Derby v. Gallup*, 5 Minn. 119. *Mo.—State v. Delmar Jockey Club*, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539; *Whitwell v. Aurora*, 139 Mo. App. 597, 123 S. W. 1045; *Aull v. Missouri Pac. R. Co.*, 136 Mo. App. 291, 116 S. W. 1122. *Neb.—Nason v. Nason*, 79 Neb. 582, 113 N. W. 139; *Dwelling House Ins. Co. v. Brewster*, 43 Neb. 528, 61 N. W. 746. *Ore.—Johnson v. Sheridan Lumb. Co.*, 51 Ore. 35, 93 Pac. 470; *Baines v. Coos Bay Nav. Co.*, 41 Ore. 135, 68 Pac. 397.

Defendant cannot, by making repugnant allegations, compel plaintiff, in order to avoid a denial in one part of the answer to prove any fact specifically admitted in another part. *Hartwell v. Page*, 14 Wis. 53.

Where a separate affirmative defense,

complete in itself, in the nature of a confession and avoidance of plaintiff's cause of action, is good in law, the action is defeated though defendant has also pleaded a general denial. *Stratton's Independence v. Dines*, 135 Fed. 449, 68 C. C. A. 177.

Where a case is submitted on the merits without requiring an election, the pleading will be construed most strongly against the pleader, and the denial will be regarded as overcome by the subsequent confession. *Oldham's Admx. v. Oldham's Admx.*, 141 Ky. 526, 133 S. W. 232; *State v. Delmar Jockey Club*, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539.

80. *Ledbetter v. Ledbetter*, 88 Mo. 60; *Aull v. Missouri Pac. R. Co.*, 136 Mo. App. 291, 116 S. W. 1122; *Kimble v. Stackpole*, 60 Wash. 35, 110 Pac. 677; *Bowers v. Good*, 52 Wash. 384, 100 Pac. 848; *Irwin v. Holbrook*, 32 Wash. 349, 73 Pac. 360.

If, when the answer is sworn to, they are not contradictory. *Burnham v. Call*, 2 Utah 453.

Necessity of Verification.—The only limitation on the right to plead several defenses is that implied in the provision that the pleadings shall be verified by oath. *Pavey v. Pavey*, 30 Ohio St. 600; *Citizens' Bank v. Closson*, 29 Ohio St. 78.

Where two grounds plainly contradict each other, they are not susceptible of verification, since the verification of one is the falsification of the other and it is impossible for both to be true, and in such case the answer, though sworn to, is not verified, and should be stricken from the files on motion, or defendant should be put to his election. *Citizens' Bank v. Closson*, 29 Ohio St. 78.

Where, from the nature of the case, it is rendered uncertain which of two grounds of defense is the true and proper one, defendant may set them both up, provided they admit of being stated in such form that the answer can be sworn to without falsehood and in good faith. *Citizens' Bank v. Closson*, 29 Ohio St. 78.

contradicts the other, so that the proof or admission of one would necessarily disprove the other.⁸¹ A seeming or logical inconsistency

81. **Ky.**—Caruso *v.* Brown, 142 Ky. 76, 133 S. W. 948; Smith *v.* Doherty, 109 Ky. 616, 60 S. W. 380. **Minn.**—Rees *v.* Storms, 101 Minn. 381, 112 N. W. 419; Steenerson *v.* Waterbury, 52 Minn. 211, 53 N. W. 1146. **Ohio.**—Pavey *v.* Pavey, 30 Ohio St. 600. **Wash.**—Seattle Nat. Bank *v.* Carter, 13 Wash. 281, 43 Pac. 331. **Wis.**—Gates *v.* Avery, 112 Wis. 271, 87 N. W. 1091; Hartwell *v.* Page, 14 Wis. 53.

Not inconsistent if both may be true. Lake Shore & M. S. Ry. Co. *v.* Warren, 3 Wyo. 134, 6 Pac. 724.

Are inconsistent only where they are so contradictory that one of them must necessarily be false. Dutro *v.* Ladd, 50 Ore. 120, 91 Pac. 459; Snodgrass *v.* Andross, 19 Ore. 236, 23 Pac. 969.

Defenses That Have Been Held Not To Be Inconsistent.—Denial of execution of instrument, and pleas of fraud and want of consideration. Veasey *v.* Humphreys, 27 Ore. 515, 41 Pac. 8; Citizens' Bank *v.* Closson, 29 Ohio St. 78.

Non est factum and no consideration. First Nat. Bank *v.* Windom's Ex'rs., 111 Ky. 135, 63 S. W. 461; Smith *v.* Doherty, 109 Ky. 616, 60 S. W. 380; Pavey *v.* Pavey, 30 Ohio St. 600.

Denial of execution and fraud. Loveland *v.* Jenkins-Boys Co., 49 Wash. 369, 95 Pac. 490.

In an action on a note, general denial and fraud. De Lissa *v.* Fuller Coal & Mining Co., 59 Kan. 319, 52 Pac. 886.

General denial and payment. Steenerson *v.* Waterbury, 52 Minn. 211, 53 N. W. 1146.

Denial, and payment, submission of the claim to arbitration, and payment of the award of the arbitrators. Snodgrass *v.* Andross, 19 Ore. 236, 23 Pac. 969.

Where it is attempted to charge one with liability on a note in his individual capacity, he may deny execution of the note in that capacity, and may also plead payment, fraud, and accord and satisfaction. Caruso *v.* Brown, 142 Ky. 76, 133 S. W. 948.

Non est factum, and receipt and acceptance of certain checks in full sat-

isfaction of the claim. Accident Ins. Co. of N. A. *v.* Baker, 34 W. Va. 667, 12 S. E. 834.

Denial of the execution of the contract sued on, and averment of an oral contract, the failure of plaintiffs to perform it, and its subsequent settlement and release. Bowers *v.* Good, 52 Wash. 384, 100 Pac. 848.

General denial and special plea that the contract required notice of loss which was not given. Aull *v.* Missouri Pac. R. Co., 136 Mo. App. 291, 116 S. W. 1122.

In an action on a stock subscription, a general denial and a special defense that whatever agreement, if any, defendant made was rescinded by mutual consent. Palais Du Costume Co. *v.* Beach, 144 Mo. App. 456, 129 S. W. 270.

In an action by a landlord to recover rent under a written lease, a general denial and a subsequent oral agreement inconsistent with plaintiff's right to recover. Rees *v.* Storms, 101 Minn. 381, 112 N. W. 419.

Denial and limitations. Dutro *v.* Ladd, 50 Ore. 120, 91 Pac. 459; Irwin *v.* Holbrook, 32 Wash. 349, 73 Pac. 360.

General denial and contributory negligence. Leavenworth Light & Heating Co. *v.* Waller, 65 Kan. 514, 70 Pac. 365; Kimble *v.* Stackpole, 60 Wash. 35, 110 Pac. 677; Pugh *v.* Oregon Improvement Co., 14 Wash. 331, 44 Pac. 547-639.

In an action against carrier for damages for loss of a trunk, general denial and plea that defendant had tendered the trunk to plaintiff since the commencement of the action. Lake Shore & M. S. Ry. Co. *v.* Warren, 3 Wyo. 134, 6 Pac. 724.

General denial and justification in libel. Murphy *v.* Carter, 1 Utah 17.

In slander, denial that defendant used the language charged, and that it is true. Cole *v.* Woodson, 32 Kan. 272, 4 Pac. 321.

In ejectment, general denial except of possession, adverse possession, and demand for equitable relief in case defendant's title should fail. Goodman *v.* Nichols, 44 Kan. 22, 23 Pac. 957.

General denial and an equitable de-

is not enough to condemn the pleading.⁸² It is no test of consistency that if one is proved the other is unnecessary.⁸³

Statutes in some states expressly permit the pleading of denials and certain specified matters in confession and avoidance together.⁸⁴ Under the conformity act the federal courts will follow the rule applicable in the courts of the state in this regard.⁸⁵

Remedy.—Where inconsistent pleas or defenses are improperly pleaded together the remedy is by motion to strike,⁸⁶ or to require an

fense in action of ejectment. *Fisher v. Stevens*, 143 Mo. 181, 44 S. W. 769; *Ledbetter v. Ledbetter*, 88 Mo. 60.

Defenses That Have Been Held To Be Inconsistent.—Non est factum and breach. *Accident Ins. Co. of N. A. v. Baker*, 34 W. Va. 667, 12 S. E. 834.

Denial of execution of writing and averment that it was made for a specific purpose. *Johnson v. Sheridan Lumb. Co.*, 51 Ore. 35, 93 Pac. 470.

Denial of execution of note, and allegation that it was made with fraudulent intent. *Baines v. Coos Bay Nav. Co.*, 41 Ore. 135, 68 Pac. 397.

Denial of purchase of property, and plea of fraud and breach of warranty. *Brown v. Emerson*, 155 Mo. App. 459, 134 S. W. 1108.

In suit by creditors to set aside as fraudulent a conveyance to decedent's widow, a denial that decedent paid the consideration for the property, and a plea that he paid for it with the proceeds of exempt property. *Oldham's Admx. v. Oldham's Admx.*, 141 Ky. 526, 133 S. W. 232.

In trespass *quare clausum*, general denial and plea of *liberum tenementum*. *Lavin v. Dodge*, 30 R. I. 8, 73 Atl. 376.

In an action of trover for the taking and converting of personalty, general and specific denials, and that said personalty was the property of a third person and was seized under a writ issued against him. *Derby v. Gallup*, 5 Minn. 119.

In an action to recover the value and damages for the alleged wrongful taking of certain personal property by defendant, justification and a denial of the possession of plaintiff. *Zimmerman v. Lamb*, 7 Minn. 421.

Where, in an action against a sheriff for unlawfully taking plaintiff's goods, the answer was a general denial, and a justification under a writ of attachment against plaintiff's vendor, and

it was specifically admitted that the goods were sold to plaintiff, it being claimed that such sale was fraudulent as to creditors, held that plaintiff was entitled to judgment unless defendant established such fraud. *Hartwell v. Page*, 14 Wis. 53.

82. *Caruso v. Brown*, 142 Ky. 76, 133 S. W. 948; *Smith v. Doherty*, 109 Ky. 616, 60 S. W. 380; *Kimble v. Stackpole*, 60 Wash. 35, 110 Pac. 677; *Bowers v. Good*, 52 Wash. 384, 100 Pac. 848; *Irwin v. Holbrook*, 32 Wash. 349, 73 Pac. 360.

Where both may be true, he will not be concluded from proving the truth of one by any implied admission contained in the other, or by any implication of law arising therefrom. *Lake Shore & M. S. Ry. Co. v. Warren*, 3 Wyo. 134, 6 Pac. 724.

Consistency must be one of fact merely. *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. 346.

83. *Rees v. Storms*, 101 Minn. 381, 112 N. W. 419; *Gammon v. Ganfield*, 42 Minn. 368, 44 N. W. 125.

84. Code 1906 (Miss.), §741. See *Lay v. Filmore*, 75 Miss. 493, 23 So. 184; *State v. Morgan*, 59 Miss. 349.

85. *Northern Pac. R. v. Paine*, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. ed. 513; *School Dist. No. 11 v. Chapman*, 152 Fed. 887, 82 C. C. A. 35.

86. In *Buhne v. Corbett*, 43 Cal. 264, it is said: "Assuming that the defenses, as thus pleaded, were inconsistent upon the point of the possession of the defendants, it would not follow that the plaintiff would be at liberty to disregard them, or either of them, at the trial. If he desired to present that question, he should have moved to strike out the one or the other, or applied for an order compelling the defendants to elect as to which particular one of them they would rely upon."

Remedy is by motion to strike out, or in some cases by demurrer, and if

election,⁸⁷ or plaintiff may have judgment on the pleadings.⁸⁸

no objection be taken to the answer on this ground, defendant, on the trial may rely on any of the defenses. *Uridias v. Morrell*, 25 Cal. 31; *Klink v. Cohen*, 13 Cal. 623.

See the title "**Motions.**"

87. *Oldham's Admx. v. Oldham's Admx.*, 141 Ky. 526, 133 S. W. 232.

When the answer is not attacked, plaintiff cannot disregard such defenses, or either of them, at the trial. *Buhne v. Corbett*, 43 Cal. 264.

88. The confession will be taken as true, and under it plaintiff will be entitled to a verdict for some damages unless defendant proves the matter of avoidance, but he will not in such case be entitled to recover more than nominal damages unless the pleadings in terms admit the value or damages which plaintiff claims, or some other value or damages. *Bank of Monett v. Stone & Prickett*, 93 Mo. App. 292; *McCord v. Doniphan Branch R. Co.*, 21 Mo. App. 92.

CONFESSION OF JUDGMENT.— See **Judgments.**

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CONSOLIDATION OF ACTIONS

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I. INTRODUCTORY STATEMENT.—A. **DEFINITION.**—Consolidation of actions means simply the creation of one action out of two or more that might originally have been brought as one.¹

B. **PURPOSE OF CONSOLIDATION.**—The power which the courts exercise in consolidating actions has for its object the attainment of justice with the least expense and vexation to the parties. The practice is resorted to to prevent harassing defendants by the delays of needless litigation and by unnecessary accumulation of costs.²

It is a well recognized principle of the common law, that where a plaintiff has two or more causes of action which may be joined in one, he ought to bring one suit only; and if he commences more than one, he may be compelled to consolidate them.³

1. *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

"The chief ground for the union is that the plaintiff should have brought but one action." *Gillin v. Canary*, 15 App. Div. 594, 26 Civ. Proc. 230, 44 N. Y. Supp. 313.

2. **U. S.**—*Toledo, etc. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 36 C. C. A. 155; *Keep v. Indianapolis, etc. R. Co.*, 10 Fed. 454; *Wolverton v. Lacey*, 30 Fed. Cas. No. 17,932. **Ala.** *Powell v. Gray*, 1 Ala. 77. **Ark.**—*St. Louis, etc. R. Co. v. Broomfield*, 83 Ark. 288, 104 S. W. 133. **Ind.**—*Horne v. Harness*, 18 Ind. App. 214, 47 N. E. 638; *Oldfather v. Zent*, 11 Ind. App. 430, 39 N. E. 221. **Mont.**—*Handley v. Sprinkle*, 31 Mont. 57, 77 Pac. 296. **N. J.**—*Lee v. Twp. of Kearny*, 42 N. J. L. 543; *Den v. Kimble*, 9 N. J. L. 335. **N. Y.**—*Brewster v. Stewart*, 3 Wend. 441; *Miller v. Baillard*, 124 App. Div. 555, 108 N. Y. Supp. 973; *Perkins v. Merchants' Lithographing Co.*, 21 Misc. 516, 47 N. Y. Supp. 712; *Hiscox v. New Yorker Staats Zeitung*, 30 Abb. N. C. 131, 23 Civ. Proc. 87, 3 Misc. 110, 23 N. Y. Supp. 682; *Bush v. Abrahams*, 2 N. Y. Supp. 391. **N. C.**—*Persson v. State Bank*, 11 N. C. 294. **Ohio.** *Brigel v. Creed*, 65 Ohio St. 40, 60 N. E. 991. **S. C.**—*William Scott & Co.*

v. Brown, 1 Nott & McC. 417. **Wash.** *First Nat. Bank v. Fowler*, 51 Wash. 638, 99 Pac. 1034; *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397. **Wis.**—*Winninghoff v. Wittig*, 64 Wis. 180, 24 N. W. 912.

"The law discourages multiplicity of suits, and will not tolerate a practice which might lead to unnecessary and oppressive litigation." *Powell v. Weiler & Co.*, 11 B. Mon. (Ky.) 186.

In *Aultman Co. v. Ferguson*, 8 S. D. 453, 66 N. W. 1081, the court said: "To avoid unnecessary costs, promote the convenience of litigants, and subserve the ends of justice, courts are authorized, in the exercise of a sound legal discretion to consolidate two or more actions pending at the same time between the same parties."

3. *Wolverton v. Lacey*, 30 Fed. Cas. No. 17,932; *Cecil v. Briggs*, 2 T. R. 639, 100 Eng. Reprint 344.

In *New Hampshire* a consolidation of actions is not allowed, but as a substitute the courts may, in case several actions are brought which might have been joined, allow only such costs as seem equitable. *Curtis v. Baldwin*, 42 N. H. 398.

In *Union Garment Co. v. Newburger*, 124 La. 820, 50 So. 740, the court says

C. GENERALLY AS TO THE METHODS OF CONSOLIDATING ACTIONS. Consolidation has been effected in the following ways: First, by actually consolidating two or more actions into one suit;⁴ second, by applying what is known as the "consolidation rule," which was first devised and established by Lord Mansfield and under which, where many cases were pending in which the same issues were involved, one case was tried, and all proceedings in the other cases are stayed until after such trial;⁵ and third, that obtaining in the old equity practice, under which each case was decided upon its own pleadings and evidence.⁶

II. POWER TO CONSOLIDATE. — A. INHERENT IN COURT. The power to consolidate actions is generally considered to be one of the inherent powers of the court, since a court should always be possessed of the power to make orders which will expedite its business, and prevent costs and a multiplicity of suits.⁷

that "reason would dictate that two suits before the same court, between the same parties, and involving the same issues should be consolidated."

4. See the cases generally throughout this article.

5. U. S.—Keep v. Indianapolis, etc. R. Co., 10 Fed. 454. Mont.—Handley v. Sprinkle, 31 Mont. 57, 77 Pac. 296. N. J.—See Lee v. Twp. of Kearny, 52 N. J. L. 543. N. Y.—Jackson v. Shauber, 4 Cow. 78.

In Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. ed. 707, Mr. Justice Gray said: "The consolidation rule, introduced in England by Lord Mansfield, to avoid the expense and delay attending the trial of a multiplicity of actions upon the same question arising under different policies of insurance, enabled the several insurers to have proceedings stayed in all actions except one, upon undertaking to be bound by the verdict in that one, to admit all facts not meant to be seriously disputed, and not to file a bill in equity or bring a writ of error."

In Lee v. Twp. of Kearny, 42 N. J. L. 543, quoting from 3 Chit. Gen. Pr., p. 642, §27, Judge Scudder goes on to say that "if the terms 'consolidation' and 'stay of proceedings' until one action is tried, were kept distinct, some of the confusion found in the cases would be obviated."

This method is often referred to as quasi consolidation. Den v. Kimble, 9 N. J. L. 335.

6. Toledo, etc. Co. v. Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155; Holmes v. Sheridan, 1 Dill. 351, 12

Fed. Cas. No. 6,644; Handley v. Sprinkle, 31 Mont. 57, 77 Pac. 296.

7. Ind.—Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 87 N. E. 47; Horne v. Harness, 18 Ind. App. 214, 47 N. E. 688; Oldfather v. Zent, 11 Ind. App. 430, 39 N. E. 221. Mo.—Winters v. St. Louis, etc. R. Co., 124 Mo. App. 600, 101 S. W. 1116. N. J.—Burnham v. Dalling, 16 N. J. Eq. 310. N. C. Person v. State Bank, 11 N. C. 294. Wash.—Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397.

Where two actions are pending in different courts one of which only has jurisdiction of the subject-matter, the court which has no jurisdiction cannot order a consolidation. Howe v. Cole (Miss.), 16 So. 531.

In Surrogate's Court.—Where an administrator with a will annexed presented a petition to the surrogates court of the county praying that the executor of the deceased executor be required to account, and upon citation duly issued, the executor presented his petition for a final settlement of the accounts of the deceased as executor, and upon the hearing the court ordered the two consolidated, it was held that such consolidation would not be interfered with since the administrator was not harmed thereby and both proceedings being for the same purpose, although there was no special power given to consolidate the two. In re Shipman's Estate, 82 Hun 108, 31 N. Y. Supp. 571.

Courts of Justices of the Peace. A plaintiff may bring as many suits before a justice of the peace as he has different and independent causes of ac-

When it is allowable to amend an action at law into a bill in equity, and plaintiffs have brought three separate actions at law to enforce a cause of action which could only be enforced by one bill in equity, the court may allow them to consolidate and to amend the consolidated action into a bill in equity.⁸

Appealed Cases.— Causes of action pending in a higher court for trial *de novo*, after separate judgments rendered in a lower court, may be consolidated, in proper cases.⁹ But the appellate court cannot by consolidation acquire jurisdiction over any causes which otherwise it would not have.¹⁰

B. IN EQUITY.— Some of the older authorities have questioned the

tion, subject to the right of the court to consolidate them where the result will not be to oust the jurisdiction, and at the cost of the plaintiff, if it shall appear that the various suits were brought to vex and harass the defendant. *Pittman v. Chrisman*, 59 Miss. 124.

Where a plaintiff brings three suits upon three separate notes before a justice of the peace and obtains judgment on each the court held that there was no power in the justice or any other judicial officer to compel plaintiff to consolidate his actions. *Barns v. Holland*, 3 Mo. 47.

There is no law allowing the consolidation of six cases so as to authorize one proceeding in garnishment for all the cases in a justice court, and especially when it would permit jurisdiction in one case exceeding the limit of the justice's jurisdiction. *Rich & Co. v. Kiser & Co.*, 61 Ga. 370.

A statute which provides that where "two or more actions for payment of money or arising *ex contractu*, by and between the same plaintiff and the same defendant, shall be brought at the same term," the court shall, on motion of the defendant, order a consolidation, does not apply to a justice court, and when such suits are properly brought in such court the appellate court can do nothing but affirm the judgment. *Presstman v. Beach*, 61 Md. 203.

If parties in two actions are reversed, the court may in its discretion compel consolidation. *Lehman v. Warren Webster & Co.*, 110 Ill. App. 298, *affirmed*, 209 Ill. 264, 70 N. E. 600.

8. *Smith v. Butler*, 176 Mass. 38, 57 N. E. 322.

9. *Ala.*—*Berry v. Ferguson*, 58 Ala. 314 (removal by certiorari on single petition); *Cooper v. Maddan*, 6 Ala. 431 (judgments in a justice's court removed to the county court and there consolidated); *Wetumpka & C. R. Co. v. Bingham*, 5 Ala. 657. *Ind.*—*Oldfather v. Zent*, 11 Ind. App. 430, 39 N. E. 221, where while an appeal from the circuit court was pending, appellant filed a complaint against the appellee in that court praying that he be granted a new trial on account of new evidence, and a demurrer to the complaint was sustained, and he appealed from that to the appellate court, the appellate court allowed a consolidation of the appeals. *Mich.*—*Wissner v. Mabley's Estate*, 70 Mich. 271, 38 N. W. 262. *Miss.*—*Ammons v. Whitehead*, 31 Miss. 99, holding that the fact that the justice of the peace could not have ordered a consolidation, does not prevent the appellate court from making the order. *N. H.* *Rollins v. Robinson*, 35 N. H. 381, several appeals from a commissioner's report. *Tenn.*—*Dews v. Eastham*, 5 Yerg. 297.

See also the cases cited in 2 Stand. Proc. 402, "order of consolidation."

Trial together by agreement in circuit court on appeal from justice's court virtually a consolidation. *Turner v. Simpson*, 12 Ind. 413.

Different Sureties on Appeal Bonds. Refusal of consolidation was not reversible error. *Powell v. Gray*, 1 Ala. 77.

Same Sureties on Appeal Bond.—Consolidation proper. *Ammons v. Whitehead*, 31 Miss. 99.

10. *Gulf & S. F. R. Co. v. Ware*, 2 Wills. Civ. Cas. (Tex.) §357.

power of a court of equity to consolidate causes, at least without the consent of the parties,¹¹ but now it is generally recognized that courts of equity are vested with discretionary powers to consolidate causes, and that such discretion will not be reviewed except for abuse.¹² This authority does not depend upon any statute for its existence, but is derived from a power inherent in courts of equity, to make reasonable rules for the transaction and regulation of its business.¹³

Equity suits may be consolidated whenever the subject-matter is the same, without regard to the identity of parties or defenses.¹⁴ But

11. *Claiborne v. Gross*, 7 Leigh (Va.) 331; *Manchester College v. Isherwood*, 2 Sim. 479; *Foreman v. Southwood*, 8 Price 572; *Foreman v. Blake*, 7 Price 654.

In *Ogburn v. Dunlap*, 9 Lea (Tenn.) 162, the court said that "it is very doubtful whether the chancellor has any power to interfere with the rights of the parties, *in invitum*, by an order directing the consolidation of independent suits of purely equitable cognizance."

In *Knight Bros. v. Ogden Bros.*, 3 Tenn. Ch. 409, the court said: "The general rule undoubtedly is, that every suitor shall be at liberty to conduct his suit as he may be advised. The court ought to have no authority to hamper him by tying him on to other parties, compelling him to await their action, or be subject to the delays incident to their judgment; their whim; or their fate, as by death or marriage. There is even less reason for forcing defendants, against their wishes, into a boat with others; for having been brought into court by one party, they may well say, We prefer to fight it out with that party. Nor is there any particular advantage to be gained by a consolidation, *in invitum*, where each record must, after all, be kept separate, and stand or fall on its own merits. Such matters should be left exclusively to the parties, whose self-interest will dictate a better agreement for both than the court can force upon either. And the matter of costs is always in the discretion of the court, to be used so as to prevent a multiplicity of suits and decrees, from proving profitable, where such multiplicity is possible. The less the parties are interfered with by the court, in the exercise of their legitimate rights, the better. . . . I am of the opinion that the Court of Chancery has no power to interfere with the rights of the parties,

in invitum, by an order consolidating independent suits, of purely equitable cognizance."

12. *D. C.*—*Gilbert v. Washington*, etc. Assn., 10 App. Cas. 316. Ill. *Thielman v. Carr*, 75 Ill. 385. Ind. *Grant v. Davis*, 5 Ind. App. 116, 31 N. E. 587. Ia.—*P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa 402, 75 N. W. 316. Mo.—*Owens v. Link*, 48 Mo. App. 534, where it was held proper for the court to hear two cases together, to prevent accumulation of costs and the reassembling of witnesses—the judgment in each case being based on the pleadings and evidence applicable thereto. N. J.—*Burnham v. Dalling*, 16 N. J. Eq. 310. N. Y.—*Wooster v. Case*, 53 Hun 605, 12 N. Y. Supp. 769. N. C. *Sumner v. Staton*, 151 N. C. 198, 65 S. E. 902. Va.—*Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144. Wash.—*Hayward v. Mason*, 54 Wash. 653, 104 Pac. 141; *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397. W. Va.—*Castle v. Castle*, 71 S. E. 385; *McKittrick v. McKittrick*, 43 W. Va. 117, 27 S. E. 303; *Wyatt v. Thompson*, 10 W. Va. 645; *Beach v. Woodyard*, 5 W. Va. 231. Wis. *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Biron v. Edwards*, 77 Wis. 477, 46 N. W. 813.

13. Ia.—*P. Cox Shoe Co. v. Adams*, 105 Iowa 402, 75 N. W. 316. Va. *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144. Wis.—*Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Biron v. Edwards*, 77 Wis. 477, 46 N. W. 813.

It is "a power over the conduct of suitors, resting upon the clearest principles, and absolutely essential to prevent scandalous abuses, and to protect defendants against gross oppression."

Burnham v. Dalling, 16 N. J. Eq. 310. 14. *D. C.*—*Gilbert v. Washington*, etc. Assn., 10 App. Cas. 316, holding, however, that "the exercise of the power should be carefully guarded, as it is frequently apt to lead to greater

it is not in consonance with equity practice to consolidate cases having different parties and involving different rights.¹⁵

The consolidation may be ordered by the court of its own motion.¹⁶

Effect. — Consolidation in equity has no other effect than to hear the

inconveniences than it prevents." *Ill. Russell v. Chicago Mut. & Sav. Bank*, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345; *Thielman v. Carr*, 75 Ill. 385. *Ia. P. Cox Shoe Co. v. Adams*, 105 Iowa 402, 75 N. W. 316. *Ohio.—Taylor v. Standard Brick Co.*, 66 Ohio St. 360, 64 N. E. 428, holding that a court of equity may make such order "wherever the purpose of justice may seem to demand it." *Tex.—Moore's Admr. v. Francis*, 17 Tex. 28. *Va.—Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144, where the actions were by different plaintiffs against substantially the same defendant, and all had a common object, a consolidation was held proper. *W. Va.—McKittrick v. McKittrick*, 43 W. Va. 117, 27 S. E. 303.

"It is no objection to the consolidation that the parties to the two bills were not identically the same. One bill was brought by Walker against Ellis, and the other by the bank against Walker and Ellis. The subject-matters of the two bills, however, were entirely germane to each other, the object of each being to obtain a first lien upon the same fund for the satisfaction of its own judgment. A very different rule would doubtless apply to consolidation of suits at law, for there suits cannot properly be consolidated unless the adverse parties in each are identical. But no such rule applies in chancery, where the court has power to adopt and mould its relief to the particular circumstances of each party litigant however he may be related to the subject-matter of the litigation." *Russell v. Chicago Trust & Sav. Bank*, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345. And see *Woodburn v. Woodburn*, 23 Ill. App. 289, *reversed* on other grounds, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209.

When brought by different plaintiffs and substantially against the same defendants and to a certain extent having a common object. *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144, *overruling* *Claiborne v. Gross*, 7 Leigh (Va.) 331.

"Old Equity Rule."—Distinct ac-

tions for garnishment by distinct parties can be consolidated only to the extent of having them tried together and then only upon consent of the parties. *Pupke, Reid & Phelps v. Meador*, 72 Ga. 230.

15. *Central Trust Co. v. Virginia, etc. Co.*, 55 Fed. 769; *Thielman v. Carr*, 75 Ill. 385; *Miles v. Danforth*, 37 Ill. 156.

"Where the suits are by different plaintiffs, proceeding against different funds of the defendant to satisfy separate and distinct liens, it was improper to consolidate the causes." *Wyatt v. Thompson*, 10 W. Va. 645.

"The causes are certainly not such, in their present condition, as can be consolidated and heard together. The interests involved in the several suits pertain to separate and distinct corporations, as far as the same appear from the record. The parties are different. The complainant in one of the causes appears as defendant in another of the causes; and the complainant in the two other causes brings suits against separate and distinct defendants in each of the said causes. It is true that the petitioners for intervention have asked the court to consolidate all these causes and hear them together, and in the pleadings the counsel for said petitions seem to have assumed that the causes have been consolidated. But this is anticipating the court, and is an assumption, in advance of the court's consideration of the question, that the court would decide as requested. In the condition of the record, and in view of the weight of authorities on the question, the court must decline to consolidate these causes, because it does not appear to the court that it would be reasonable to do so. *Rev. St. U. S. §921; Conk. Treatise*, (5th ed.) 385." *Central Trust Co. of N. Y. v. Virginia, T. & C. Steel & I. Co.*, 55 Fed. 769, 771.

16. *India Rubber Co. v. C. J. Smith & Sons Co.*, 75 Ill. App. 222; *Woodburn v. Woodburn*, 23 Ill. App. 289; *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397.

cases at the same time, and the issues remain precisely on the pleadings as before, and must be determined as if heard separately.¹⁷

C. BY STATUTE.—The majority of statutes provide in substance that whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.¹⁸ Other statutes expressly provide that the actions must be pending in the same court by the same plaintiff against the same defendant,¹⁹ or by the same plaintiff against different defendants,

17. *Handley v. Sprinkle*, 31 Mont. 57, 77 Pac. 296; *Knight Bros. v. Ogden Bros.*, 3 Tenn. Ch. 409; *Ogburn v. Dunlap*, 9 Lea (Tenn.) 162; *Mowry v. Davenport*, 6 Lea (Tenn.) 80; *Masson v. Anderson*, 31 Baxt. (Tenn.) 290; *Lofland v. Coward*, 12 Heisk. (Tenn.) 546; *Brevard v. Summar*, 2 Heisk. (Tenn.) 97.

"The consolidation does not change the rules of equity pleading, nor the rights of the parties, as those rights must still turn on the pleadings, proofs and proceedings in their respective suits. The parties in one suit do not thereby become parties in the other, and a decree in one is not a decree in the other, unless so directed. It operates as a mere carrying on together of two separate suits supposed to involve identical issues and is intended to expedite the hearing and diminish the expense." *Toledo, etc. R. Co. v. Continental Trust Co.*, 95 Fed. 497.

18. *Ala.*—Code, 1896, §3318; *Garrison v. Glass*, 139 Ala. 512, 36 So. 725; *Wilkinson v. Black*, 80 Ala. 329. *Cal.* Code Civ. Proc. §1048; *Wolters v. Rossi*, 126 Cal. 644, 59 Pac. 143; *Smith v. Smith*, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549. *Colo.*—Civ. Code, §20; *Smith v. Smith*, 22 Colo. 480, 46 Pac. 128, 55 Am. St. Rep. 142, 34 L. R. A. 49 (holding actions against different defendants improperly consolidated); *Putnam v. Lyon*, 3 Colo. App. 144, 32 Pac. 492. *Ga.*—Code 1895, §4943 provides only for consolidation of actions on contracts. *Idaho.*—Rev. Codes §4926. *Minn.*—St. 1894, §5271. *Mont.* Code Civ. Proc., 1895, §1894; *Handley v. Sprinkle*, 31 Mont. 57, 77 Pac. 296; *Mason v. Germaine*, 1 Mont. 263. *N. D.* Rev. Code 1905, §7345. *Ore.*—Lord's Ore. Laws, §526. *S. D.*—Comp. Laws, 1910, Code Civ. Proc., §567; *Aultman Co. v. Ferguson*, 8 S. D. 458, 66 N. W. 1081. *Utah.*—Comp. Laws, 1907, §3489.

Where A brings actions against B and C, B and D, and B and E, respectively, and dismisses as to C, D and E, the parties become identical and the actions may be consolidated. *Harwick v. Weddington*, 73 Iowa 300, 34 N. W. 868.

19. *Ariz.*—Rev. St. 1887, par. 918, §270. *Mich.*—How. Ann. St. §§7375-6; Comp. Laws §§10087-8 (also allowing consolidation of suits commenced against joint and several debtors); *Wisner v. Mabley's Estate*, 70 Mich. 271, 38 N. W. 262; *Harris v. Sweetland*, 48 Mich. 110, 11 N. W. 830. *Mo.* Rev. St. 1909, applies to liquidated demands only. *N. Y.*—*Mayor v. Coffin*, 90 N. Y. 312; *Mayor v. Mayor*, 64 How. Pr. 230; *Percy v. Seward*, 6 Abb. Pr. 326; *Solomon v. Belden*, 12 Abb. N. C. 58; *People v. McDonald*, 1 Cow. 189; *Martin v. Prentice*, 133 App. Div. 741, 118 N. Y. Supp. 215; *Argyle Co. v. Griffith*, 128 App. Div. 262, 112 N. Y. Supp. 773; *Miller v. Baillard*, 124 App. Div. 555, 108 N. Y. Supp. 973; *American Groc. Co. v. Flint*, 5 App. Div. 263, 39 N. Y. Supp. 153 (where the actions were by different plaintiffs against same defendant, the consolidation was denied); *Isear v. Daynes*, 1 App. Div. 557, 37 N. Y. Supp. 474; *Waiontha Knitting Co. v. Hecht & Campe*, 58 Misc. 350, 111 N. Y. Supp. 10; *Perkins v. Merchants' Lithographing Co.*, 21 Misc. 516, 47 N. Y. Supp. 712. *Tex.*—Rev. St. 1895, §1454; *Sayles Civ. St.*, Art. 1454; *Raymond v. Cook*, 31 Tex. 374; *Hallam v. Moore* (Tex. Civ. App.), 126 S. W. 908; *McCormick v. Jester*, 53 Tex. Civ. App. 306, 115 S. W. 278; *Bolden v. Hughes*, 48 Tex. Civ. App. 496, 107 S. W. 91; *Texas, etc. Ry. Co. v. Hays*, 2 Wills. Civ. Cas. §390.

In Maryland by statute where two or more actions *ex contractu* are brought by the same plaintiff against the same defendant, at the same term, the court

which may be joined.²⁰ Other statutes are still broader and provide for the consolidation of actions pending in the same court, which might have been joined, without regard to the identity of parties.²¹

Where there is a statute covering the question consolidation should not be permitted unless all the prescribed conditions exist.²²

Removal To Consolidate.—Some statutes confer upon a specified court in which an action is pending power to remove to itself from another court an action between the same parties, and to consolidate the two.²³ Under a statute providing that if an action is pending in one district

shall order a consolidation on motion of defendant. *Bakhaus v. Caledonian Ins. Co.*, 112 Md. 676, 77 Atl. 310.

20. **Ariz.**—Rev. St. 1887, par. 918, §270. **Fla.**—Gen. St., 1906, §1388, provides only for consolidation in such case of actions on a note bound or other contract. **Mo.**—Rev. St. 1909, applies to liquidated demands only. **Tex.**—Rev. St. 1895, §1454; *Sayles Civ. St. Art. 1454*; *Screwmen's Benev. Assn. v. Smith*, 70 Tex. 168, 7 S. W. 793; *Raymond v. Cook*, 31 Tex. 374; *Johnston v. Luling Mfg. Co.* (Tex. Civ. App.), 24 S. W. 996.

21. **Ark.**—Acts of 1905, p. 798 (which gives the court power to consolidate causes of a like nature or relative to the same matter whenever it appears reasonable to do so); *Southern Anthracite Coal Co. v. Bowen*, 93 Ark. 140, 124 S. W. 1048 (actions by different plaintiffs against same defendant, growing out of same transactions); *St. Louis, etc. R. Co. v. Broomfield*, 83 Ark. 288, 104 S. W. 133. **Ia.**—Code §3644; *Jones v. Witousek*, 114 Iowa 14, 86 N. W. 59; *Bank of Montreal v. Ingersoll*, 105 Iowa 349, 75 N. W. 351; *Hodowal v. Yearous*, 103 Iowa 32, 72 N. W. 294. **Kan.**—Gen. St. 1905, §5027. **Neb.**—Cob. Ann. St. 1903, §1150; *Downey v. Coykendall*, 81 Neb. 648, 116 N. W. 503 (holding that where persons who should have joined as plaintiffs in an action split their demands and having separate suits, a consolidation is proper). **N. J.**—Proc. Act. Rev. p. 867, §121 (giving the court a general power to consolidate unnecessary actions); *Lee v. Twp. of Kearny*, 42 N. J. L. 543; *Den v. Kimble*, 9 N. J. L. 335. **Ohio.**—Rev. St., §5120; *Taylor v. Standard Brick Co.*, 66 Ohio St. 360, 64 N. E. 428 (holding that the power is not limited to identity of parties and to causes which ought to be joined). See *Burekhardt*

v. Burekhardt, 36 Ohio St. 261, holding that the statute applies only where actions are prosecuted on behalf of same plaintiff. **Okla.**—Comp. Laws, 1909, §5685. **Wis.**—St. 1898, §2792; *Allen v. McRae*, 122 Wis. 246, 100 N. W. 12; *Lauterbach v. Netzo*, 111 Wis. 326, 87 N. W. 229; *Gross v. Milwaukee Mech. Ins. Co.*, 92 Wis. 656, 66 N. W. 712; *Biron v. Scott*, 77 Wis. 477, 46 N. W. 813; *Winninghoff v. Wittig*, 64 Wis. 180, 24 N. W. 312; *Blesch v. Chicago, etc. R. Co.*, 44 Wis. 593. **Wyo.**—Comp. St. 1910, §4443.

Former Arkansas Statute.—*Kirby's Dig.* §6083. See *Choctaw, etc. R. Co. v. McConnell*, 74 Ark. 54, 84 S. W. 1043; *Meehan v. Watson*, 65 Ark. 216, 47 S. W. 109; *Kahn v. Kuhn*, 44 Ark. 404; *Lindsay v. Wayland*, 17 Ark. 385. 22. *Smith v. Smith*, 22 Colo. 480, 46 Pac. 128, 34 L. R. A. 49 (*construing* Colo. Civ. Code, §20); *Ortman v. Union Pac. R. Co.*, 32 Kan. 419, 4 Pac. 858. 23. See *N. Y. Code Civ. Proc.*, §818; *Martin v. Prentice*, 133 App. Div. 741, 118 N. Y. Supp. 215; *Argyle v. Griffith*, 128 App. Div. 262, 112 N. Y. Supp. 773; *Golpel v. Robinson Match Co.*, 118 App. Div. 160, 103 N. Y. Supp. 5; *Waiontha Knitting Co. v. Hecht & Campe*, 58 Misc. 350, 111 N. Y. Supp. 10.

The power thus given to the supreme court extends to all courts of record. *Sire v. Kneuper*, 15 Civ. Proc. 434, 3 N. Y. Supp. 533; *Boyd v. Stewart*, 30 Abb. N. C. 127, 24 N. Y. Supp. 830; *Carter v. Sully*, 28 Abb. N. C. 130, 19 N. Y. Supp. 244; *Solomon v. Belden*, 12 Abb. N. C. (N. Y.) 58.

The city court also has power to remove actions from the municipal court, and consolidate with actions pending in the former court. *McKay v. Reed*, 12 Abb. N. C. (N. Y.) 58; *Curley v. Schaefer Brew. Co.*, 35 Misc. 131, 71 N. Y. Supp. 318.

a motion therein must be made in that district, and that a motion cannot be made there in an action triable elsewhere, an order made upon motion in another district to consolidate two actions pending in the two districts is void for want of jurisdiction.²⁴ Under such a statute if it is proper that the actions should be consolidated, it would certainly be proper that they should be tried in the same county; and upon a motion being made to change the venue, if it is proper that the actions should be consolidated, the venue of one of them should be changed to the county in which the other is pending, in order that such motion for consolidation might be heard.²⁵

Under the federal statute²⁶ the court may in its discretion order a consolidation of actions involving the same subject-matter, whenever it appears reasonable to do so, and without regard to the identity of parties.²⁷

"It is the common practice in the federal courts to consolidate cases between the same parties, or between the same interests, wherever time, labor, and expense can be saved. . . . But they do not consolidate simply because the cases are between the same parties or upon kindred causes of action. If it is apparent from the pleadings, or otherwise, that no economy of time and labor would result from a consolidation, the courts are very apt to let the cases stand as the parties have brought them."²⁸

III. GENERAL PRINCIPLES GOVERNING CONSOLIDATION.

A. GENERAL STATEMENT. — It is the common practice of the courts to consolidate causes between the same parties or between the same interests wherever time, labor, and expense can be saved.²⁹ The fact

24. *Dupignac v. Van Buskirk*, 44 Hun (N. Y.) 45, followed in *Delahunty v. Canfield*, 106 App. Div. 387, 94 N. Y. Supp. 815.

25. *Dupignac v. Van Buskirk*, 44 Hun 45, affirming 18 Abb. N. C. 204.

In *Percy v. Seward*, 6 Abb. Pr. (N. Y.) 326, an action for libel by the same publication of a newspaper was brought in each of the sixty-two counties of the state. It was held that a consolidation was proper, and that the motion might be made in any county in which the venue of any one of the actions was laid.

26. U. S. Rev. St. §921. This statute applies as well to suits in equity as to actions at law. *Toledo, etc. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 36 C. C. A. 155.

27. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. ed. 706; *Teal v. Bilby*, 123 U. S. 573, 8 Sup. Ct. 239, 31 L. ed. 263 (replevin and for damages, where the rights of the parties depended upon the same contract, and the testimony in

each was pertinent to the other); *Diggs v. Louisville & N. R. Co.*, 156 Fed. 564, 84 C. C. A. 330; *American Tr. & Sav. Bank v. Zeigler Coal Co.*, 165 Fed. 34; *Bird v. People's Gas & Elec. Co.*, 158 Fed. 903; *Central Trust Co. v. Virginia, etc. Co.*, 55 Fed. 769; *Mercantile Trust Co. v. Missouri, etc. R. Co.*, 41 Fed. 8 (holding that a consolidation will be denied where all the cases are not ripe for a decree, and where nothing will be gained thereby); *Deering v. Winona Harvester Works*, 24 Fed. 90 (patent suits consolidated); *Wabash, etc. R. Co. v. Central Trust Co.*, 23 Fed. 513; *Keep v. Indianapolis, etc. R. Co.*, 10 Fed. 454 (where it is said to be proper "when the time of the court could be thereby saved, costs and expenses avoided, and the rights of the parties litigant not prejudiced"); *Young v. Grand Trunk R.*, 9 Fed. 348; *Andrews v. Spear*, 4 Dill. 470, 1 Fed. Cas. No. 379.

28. *Davis v. St. Louis & S. F. R. Co.*, 25 Fed. 786, per Brewer, J.

29. See the cases generally through-

that the actions were brought at different times or that the second had not accrued at the time the first was commenced, is no objection to consolidation.³⁰ Consequently, where the grantor of the plaintiff brought suit against the defendant and obtain a writ of damages for condemning real property, and then sold to the plaintiff, who filed amended pleadings asking to be substituted for such grantor, and such pleadings were separately docketed, the court held that a consolidation of the two was proper.³¹ It is essential, however, for a consolidation of causes at common law that the actions be pending, all perfect and complete, at the same time; that the plaintiffs and defendants be the same; and that the actions be such as may be joined.³²

out this subdivision, and **Ind.**—*Grant v. Davis*, 5 Ind. App. 116, 31 N. E. 587, as to claim against an estate for services and a suit based on a contract for the sale of certain land. **N. J.** *Den v. Kimble*, 9 N. J. L. 335, as to several actions in ejectment brought by the lessor of the plaintiff upon a mortgage against a number of defendants. **N. Y.**—*People v. McDonald*, 1 Cow. 189, as to two separate actions of debt on the same administration bond.

Injuries Resulting From One Cause. Injuries to plaintiff's horse and wagon, and to his person by the same collision. *Rosenberg v. Staten Island R. Co.*, 14 N. Y. Supp. 476. And see *McAndrews v. Lake Shore R. Co.*, 23 N. Y. Supp. 1074.

Infringement of Patents.—A suit for the infringement of two patents and another between the same parties for infringement of five more of the same machine, were consolidated in *Deering v. Winona Harvester Wks.*, 24 Fed. 90.

Collection of Taxes.—*Watkins v. State* (Tex. Civ. App.), 61 S. W. 532, twenty-two suits against different tracts, and unknown owners, where several parties intervened, and consolidation should have been allowed.

Recovery of Lands on Differing Trusts.—Consolidation was allowed where the parties were the same, though one suit involved an express trust and the other a resulting trust. *Mixon v. Farris*, 20 Tex. Civ. App. 253, 48 S. W. 741.

Partial Consolidation.—Where five suits were brought, returnable to the same term, upon bonds between the same parties, the court directed that the four last suits should be consolidated into two, making in the whole

three suits. *T. Prior v. Kelly*, 4 Yeates (Pa.) 128.

Seven suits on protested bills of exchange were consolidated into three, in *Rumsey v. Wynkoop*, 1 Yeates (Pa.) 5.

Hostility of Legislature to Cause of Action.—*Smith v. Howell*, 1 N. C. 200.

30. *Dunning v. Bank of Auburn*, 19 Wend. (N. Y.) 23.

31. *Forney & Thayer v. Ralls & Willits*, 30 Iowa 559.

When No Award Has Been Made. Where a plaintiff sued a railroad for trespass and subsequently the railroad instituted a proceeding to condemn the land in question, the court held that the mere application by the company to condemn the land in which no award had been made by the appraisers was no such suit as should have been consolidated with the action for trespass. *Georgia R. & B. Co. v. Gardner*, 118 Ga. 723, 45 S. E. 600.

32. **Ga.**—*Bones v. Nat. Exchange Bank*, 67 Ga. 339, holding actions must be between same parties. **Ill.**—*Miles v. Danforth*, 37 Ill. 156, citing 1 Tidd's Pr. 614. **Mass.**—*Witherlee v. Ocean Ins. Co.*, 24 Pick. 67. **Miss.**—*Spratley v. Kitchens*, 55 Miss. 578, where it was said that "suits can be consolidated at law only where all the parties are the same on both sides, and a single judgment can settle the rights of all." **N. C.**—*Hartman v. Spiers*, 87 N. C. 28. **Tex.**—*Hallam v. Moore* (Tex. Civ. App.), 126 S. W. 908, holding that the Texas statute is but an enunciation of the common law rules.

In *Powell v. Gray*, 1 Ala. 77, the court says: "The rule in England seems to be, on motion of the defendant, to order a consolidation of suits brought at the same time, between the

Consolidation Rule.— This rule extends only to cases where the parties are, or might have been the same, and the causes of action co-existent and so similar that they might have been united in one action,³³ but is applicable only to actions involving property rights, and not to actions for damages.³⁴

Illustrations.— A consolidation of two writs of attachment sued out by the same plaintiff against the same defendant and returnable to the same court, is proper.³⁵ And an order of consolidation has been held to be proper which is made for the purpose of avoiding the confusion which might ensue from separate decrees subjecting the same property to different claims, without determining the right of the claimants as between each other, as well as against the debtor.³⁶ The courts, however, have refused to consolidate a debt owed by a guardian to his ward's estate with one by the guardian against the ward's administrator.³⁷ Nor will they compel the plaintiff to consolidate distinct matters, each of which would authorize, by itself, independent relief,³⁸ nor order a consolidation where one of the cases is within the summary process jurisdiction, and the other beyond it;³⁹ where one of the actions is not really in existence by reason of it having been vacated or of the court never having had jurisdiction;⁴⁰ where

same parties, when the causes of action might be comprised in the same declaration."

33. *Witherlee v. Ocean Ins. Co.*, 24 Pick. (Mass.) 67, holding that where one plaintiff brings several actions against several defendants who might have been joined, the actions may be united under this rule.

"Where a number of causes are brought and all depend upon the same title, and the questions to be litigated, and the evidence, are the same in all, it is competent for either party to make an application to the Court, before the Circuit arrives, that only one of the causes be carried down to trial; and that the plaintiff be not prejudiced by his omission to try others; and, in a clear case, that they abide the event of the cause to be tried." *Jackson v. Schaubert*, 4 Cow. (N. Y.) 78.

Form of Rule.—"That all the causes abide the event and final determination of the one which the plaintiff may elect to notice for trial; and that whatever judgment may finally be rendered in the cause thus noticed, for trial, shall be entered in all the other causes; and the party prevailing shall be at liberty to make up and file records therein accordingly." *Jackson v. Stiles*, 5 Cow. (N. Y.) 282.

34. *Sherman v. McNitt*, 4 Cow. (N. Y.) 85, several actions for slander.

35. *Barnett v. Ring*, 55 Miss. 97.

In *Lant v. Kinne*, 75 Fed. 636, 21 C. A. 466, a consolidation was allowed of an action to enforce attachment lien and a bill to enjoin such enforcement, the latter being equivalent to a cross-bill.

36. *Tharp v. Cotton's Exrs.*, 7 B. Mon. (Ky.) 636.

Both Claims for Same Property. Where one plaintiff sued a bank to have certain stock issued to him and joined with the bank a claimant as defendant and the claimant also sued the bank for the stock to be issued to him, the court held that a consolidation was proper. *Spencer v. James*, 10 Tex. Civ. App. 327, 31 S. W. 540, 43 S. W. 556.

37. A statute requiring parties in suits before a justice of the peace to consolidate all their respective demands, has no application to suits commenced in courts of record. *Ward v. People*, 77 Ill. App. 522.

38. *Richardson v. Opelt*, 60 Neb. 180, 82 N. W. 377.

39. *Gaffney v. Branham*, 4 McCord (S. C.) 125.

40. *Howe v. Cole* (Miss.), 16 So. 531; *Bank of Orange County v. Kidder's Admrs.*, 20 Vt. 519.

the claims consolidated would aggregate an amount exceeding the monetary jurisdiction of the court;⁴¹ where the rights of sureties upon different bonds required would be jeopardized;⁴² where the cause of action in one case had not arisen when the other action was brought and consolidation would result in delaying the collection upon the first suit;⁴³ or where *scire facias* may be issued on two judgments which should be obtained separately.⁴⁴

B. HOW PARTIES TO THE SUITS AFFECT CONSOLIDATION.—As one of the conditions to consolidation, the parties should be the same in the several suits,⁴⁵ unless the rights of the different parties in the

41. *Ga.*—*Epstein v. Levinson & Co.*, 79 *Ga.* 718, 4 *S. E.* 328; *Jackson v. Deese*, 35 *Ga.* 84. *Mo.*—*Martin v. Chanvin*, 7 *Mo.* 277. *N. Y.*—*Gilllin v. Canary*, 15 *App. Div.* 594, 26 *Civ. Proc.* 230, 44 *N. Y. Supp.* 313. *S. C.* *Pelzer Mfg. Co. v. Sun Fire Office*, 36 *S. C.* 213, 15 *S. E.* 562 (court of common pleas); *Gaffney v. Branham*, 4 *McCord* 125 (summary process jurisdiction); *Parrott v. Green*, 1 *McCord* 531 (summary process jurisdiction); *Planters' & Mechanics' Bank v. Cowing*, 2 *Nott & McC.* 439 (city court of Charleston).

In *Philips v. Delane*, 2 *Brev. (S. C.)* 429, it was held that where two notes are both due at the same time and to the same persons, there is no reason why the suits should not be consolidated, although separately they are within the summary jurisdiction of the courts of common pleas and when consolidated they are not within such jurisdiction.

One Claim Cannot Be Divided Up. When a consolidation of two or more distinct demands would oust the jurisdiction of the court, a consolidation cannot be made, but where one claim or demand is divided up in order to give a justice jurisdiction, and they are of a nature to be consolidated, then the suit must be brought before a court having jurisdiction. *Nickerson v. Rockwell*, 90 *Ill.* 460.

Judgment Within Jurisdiction as Curing Error.—Where by consolidating two suits by a justice of the peace, he was ousted of jurisdiction such consolidation will not stand, but if, after such consolidation, a judgment was rendered by the justice for an amount within his jurisdiction, such judgment will be allowed to stand. *Bridle v. Grau*, 42 *Mo.* 359.

42. *Spratley v. Kitchens*, 55 *Miss.* 578.

43. *Pierce v. Lyon*, 3 *Hill (N. Y.)* 450.

“On moving for a consolidation it is not enough for the defendant to show that the causes of action in the two suits are such as may be joined in one declaration. It must appear in addition, that no defense is intended in either of the suits, or that questions which will arise are substantially the same in both,” and it is not a sufficient objection to consolidation that the second cause of action had not accrued when the first suit was commenced. *Wilkinson v. Johnson*, 4 *Hill (N. Y.)* 46; *Dunning v. Bank of Auburn*, 19 *Wend. (N. Y.)* 23; *Brewster v. Stewart*, 3 *Wend. (N. Y.)* 441.

44. *Mickle v. Brewer*, 8 *N. J. L.* 85.

45. See cases generally throughout this article, and especially the following: *Ala.*—*Powell v. Gray*, 1 *Ala.* 77. *Ga.*—*Hatcher v. National Bank*, 79 *Ga.* 542, 5 *S. E.* 109; *Tarpley v. Corputt*, 65 *Ga.* 257; *Hartman v. Columbus*, 45 *Ga.* 96; *Logan v. Bank*, 13 *Ga.* 201. *Mo.*—*Sykes v. Planters, etc. Co.*, 7 *Mo.* 477. *N. J.*—*Lee v. Kearny*, 42 *N. J. L.* 543. *Wis.*—*McCartney v. Hubbell*, 52 *Wis.* 360, 9 *N. W.* 61.

Where surety is sued alone in two actions on two notes for different makers a consolidation is proper. *Bank of Montreal v. Ingerson*, 105 *Iowa* 349, 75 *N. W.* 351.

Withdrawal of Parties.—Dismissal as to co-defendants in two of three actions. *Harwick v. Weddington*, 73 *Iowa* 300, 34 *N. W.* 868.

Where one agent sues for different parties in different suits, the suits can not be consolidated. *Baughman v. Louisville, etc. R. Co.*, 94 *Ky.* 150, 21 *S. W.* 757; *Bell v. Keppler (N. J.)* 57 *Atl.* 257.

various suits are involved in the settlement of the same transactions.⁴⁶

Where there are two causes, based upon the same contract, in which the parties are reversed, it has been held that such causes may be consolidated for trial,⁴⁷ but otherwise, where the parties are reversed and one of the actions is at law and the other is in equity, under a statute which permits consolidation only of causes which might have been joined.⁴⁸ Consequently, where the parties in the suits are not the same an order to consolidate is erroneous,⁴⁹ and this where there are different plaintiffs,⁵⁰ or different defendants,⁵¹ except

46. See, *infra*, this section.

47. *Lehman v. Webster & Co.*, 110 Ill. App. 298, *affirmed*, 209 Ill. 264, 70 N. E. 600.

48. *Hodowal v. Yearons*, 103 Iowa 32, 72 N. W. 294; *Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726.

49. *Hartman v. Spiers*, 87 N. C. 28; *Dreben v. Russeau* (Tex. Civ. App.), 26 S. W. 867; *Texas-Mexican R. Co. v. Cahill* (Tex. Civ. App.), 23 S. W. 232.

Consolidation Brings in Another Party.—Where two suits were brought upon the same cause of action, the second against the intervenor and the defendants in the first action, but one was brought in the county court while the other was pending in the district court, the court held that a consolidation was proper as it merely brought into the first suit another party, the intervenor, whose rights would have to be determined before a final judgment in the matter could be reached. *Putnam v. Lyon*, 3 Colo. App. 144, 32 Pac. 492.

50. **Ark.**—*Choctaw, O. & G. R. Co. v. McConnell*, 74 Ark. 54, 84 S. W. 1043; *Meehan v. Watson*, 65 Ark. 216, 47 S. W. 109. **Colo.**—*Hendrie & Bolt-hoff Co. v. Collins*, 29 Colo. 102, 67 Pac. 164. **Ill.**—*Hardin v. Kirk*, 49 Ill. 153; *Miles v. Danforth*, 37 Ill. 156. **N. Y.** *American Groc. Co. v. Flint*, 5 App. Div. 263, 39 N. Y. Supp. 153. **Ohio.**—*Burekhardt v. Burekhardt*, 36 Ohio St. 261. **Tex.**—*Raymond v. Cook*, 31 Tex. 373.

In *Baughman v. Louisville, etc. R. Co.*, 94 Ky. 150, 21 S. W. 757, actions for damages against a carrier for injuries to a horse belonging to different parties where, under the statute, if plaintiffs had all united originally in one action the defendant would have had cause for demurrer. The court said: "The subject of each one of the actions was the injury done

to the property of and consequent distinct damage to the plaintiffs who brought it; and the plaintiffs in the other actions did not have any interest in the subject or in obtaining the relief therein demanded. If, then, the plaintiffs need not nor could have united in the same action, nor were, indeed, compelled to bring the different actions at the same time or in the same court, we do not see by what right the defendant could demand a consolidation of the actions after they are brought."

Different guarantors on different notes in suits. *Potter v. Pattengille*, 8 Abb. Pr. N. S. (N. Y.) 189.

Different plaintiffs in execution upon the same property, but only one bond given payable to the plaintiffs in the different writs—consolidation refused. *Green v. Banks*, 24 Tex. 522.

51. **U. S.**—*Central Trust Co. v. Virginia Steel & Iron Co.*, 55 Fed. 769. **Colo.**—*Smith v. Smith*, 22 Colo. 480, 46 Pac. 128. **N. Y.**—*Mayor v. Coffin*, 90 N. Y. 312; *Cooper v. Weed*, 2 How. Pr. 40; *Isear v. Daynes*, 1 App. Div. 557, 37 N. Y. Supp. 474. **S. C.**—*Scott v. Cohen*, 1 Nott & McC. 413.

Matter Pleaded in First Could Be Pleaded in Second.—Where the plaintiff brought a suit in one county of trespass to try title to land situated in that and another county and later brought a suit in the same county against some of the defendants in the first suits, and others to restrain them from selling the land situated in the other county, the court held that the suits were properly consolidated and the matter pleaded in the second suit might properly been set up in the first suit and as the court had jurisdiction of the parties. *Corbett v. Provident Nat. Bank*, 23 Tex. Civ. App. 602, 57 S. W. 61.

Where a surety sues a defendant for

that the courts will permit consolidation, though there be different parties, where the rights of all the parties are involved in the settlement of the same matters,⁵² and in equity cases to enforce liens upon the same property, consolidation will be allowed in order that the rights of all may be settled.⁵³

C. GENERALLY AS TO CAUSES OF ACTION WHICH MAY BE JOINED. Where the cases involved present causes of action which may be joined, the court may compel a consolidation, the parties therein being the same,⁵⁴ unless said consolidation would render the trial protracted

money paid by him for such defendant and later sues another whom he claims is a secret partner of the defendant, the court held that a consolidation of the two suits was irregular. *Peery v. Moore*, 24 Mo. 285.

52. U. S.—*Keep v. Indianapolis & St. L. R. Co.*, 10 Fed. 454. Ga.—*Wilson & Co. v. Riddle*, 48 Ga. 609, involved accounts where different persons claim same debts. Ill.—*Imperial Fire Ins. Co. v. Gunning*, 81 Ill. 236, where but a single cause of action is involved. Ia.—*Viele v. Germania Ins. Co.*, 26 Iowa 9. Tenn.—*Clement v. Clement*, 113 Tenn. 40, 81 S. W. 1249, several beneficiaries under an insurance policy. Tex.—*Herring v. Herring* (Tex. Civ. App.), 51 S. W. 865. Va.—*Moorman v. Crockett*, 90 Va. 185, 17 S. E. 875; *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144 (administration of an estate).

Where different defendants depend upon the same title. *Jackson v. Stiles*, 5 Cow. (N. Y.) 282; *Jackson v. Schaubert*, 4 Cow. (N. Y.) 78.

Discretion of Court.—*City of Springfield v. Sleeper*, 115 Mass. 587, three actions against different signers of a contract.

"The plaintiffs' cause of action, whether against the defendant or the railroad company, was either for a failure to deliver the peaches according to the contract of sale, or of carriage, and the order that the suits should be tried together rather than separately was not only proper, but discretionary with the trial court. *Springfield v. Sleeper*, 115 Mass. 587; *Burt v. Wigglesworth*, 117 Mass. 302; *Com. v. Robinson*, 1 Gray 555; *Com. v. Miller*, 150 Mass. 69, 22 N. E. 434; *Com. v. Brigham*, 158 Mass. 169, 33 N. E. 341." *Sullivan v. Fugazzi*, 193 Mass. 518, 79 N. E. 775.

Same Defense.—*Den v. Kimble*, 9 N. J. L. 335.

If judgment in one would not affect parties in the other there can be no consolidation. *Carpenter v. Haning* (Tex. Civ. App.), 34 S. W. 774, a suit to try title, and an action by the same plaintiff against heirs.

Conflicting Patents for Land.—Where a patent was issued to persons jointly, and their heirs brought separate suits in order to set up their entry against older grants, the court held that consolidation could be had as it fulfilled the requirement that all parties interested should be before the court. *Taylor & Kelly's Heirs v. Watkins*, 7 J. J. Marsh. (Ky.) 363.

53. *Thielman v. Carr*, 75 Ill. 385. Where two actions were brought by the same plaintiff to foreclose a deed of trust, one against one defendant and the other against the same defendant and another, the court held that there was no error in an order of consolidation and under the circumstances. *Johnston v. Luling Mfg. Co.* (Tex. Civ. App.), 24 S. W. 996.

54. *Bullard v. Thorpe*, 66 Vt. 599, 30 Atl. 36, 44 Am. St. Rep. 867, where the court says: "It is a common practice in this state to consolidate actions pending in the same court that might have been brought in one."

In *Screwmen's Benev. Assn. v. Smith*, 70 Tex. 168, 7 S. W. 793, it was held that where actions are "brought against two sets of sureties on official or like bonds, given by a principal and different sureties, to secure the faithful performance of duty by the principal for different terms the one succeeding the other," they cannot under the statute be consolidated, for to authorize such, the causes of action must be such as, under the general rules applicable thereto may be joined.

Where the plaintiff brought thirteen separate suits against the same defendant on as many certificates, for the

and embarrassing, in which event consolidation will not be ordered.⁵⁵

Cross Actions.—Cross actions cannot be consolidated generally, because not such as might have been joined,⁵⁶ but such consolidation is permissible in some jurisdictions.⁵⁷

same consideration, maturing at the same time, and all due when the suits were commenced, the court held that under the statute it was a clear case for the interposition of the lower court to consolidate unnecessary actions. *Lee v. Twp. of Kearny*, 42 N. J. L. 543.

In *Harris v. Sweetland*, 48 Mich. 110, 11 N. W. 830, where the plaintiff sued the defendant in assumpsit and later the defendant sued the plaintiff by attachment, the court held that neither at common law nor by statute could cross-actions be consolidated.

Actions for Rent and Dower.—Where two suits, totally distinct in character, one brought by an administratrix for money due for rent and involving the value of rent and the other for dower to be set apart by appraisers for the widow, the court held that a consolidation was improper. *Bones v. National Exch. Bank*, 67 Ga. 339.

Jurisdiction Not Ousted.—Where two actions were brought by the same plaintiff against the same defendant in a magistrate's court, the court held that the defendant was entitled to have them consolidated where a consolidation would not oust the jurisdiction of the court. *Hartman v. Mayor & Council of Columbus*, 45 Ga. 96.

Actions Upon a Note and an Account.—Where one action was brought by one plaintiff upon a note and another action by another plaintiff upon an open account but who was the assignee of the note to the first plaintiff and who moved to consolidate, alleging one cause of action for the two suits the court held that these actions were not by the same plaintiff for causes of action which might be joined and therefore no consolidation could be had. *Miles v. Danforth*, 37 Ill. 156.

Forcible Entry and Trespass.—Where the plaintiff's suit for forcible entry and detainer was before the district court for trial, that court did not err in refusing to consolidate it with a case by a different plaintiff against the plaintiff therein for trespass to try

title to the land in question. *Texas-Mexican Ry. Co. v. Cahill* (Tex. Civ. App.), 23 S. W. 232.

Federal Court.—Where a plaintiff has two or more causes of action which may be joined in one, he ought to bring one suit only; and in such case, if he commences more than one, he may be compelled to consolidate them, and pay the costs of the application. *Wolverton v. Lacey*, 30 Fed. Cas. No. 17,932.

After Removal.—Where both actions are in the nature of trespass, the one to the person the other to the property of the plaintiff, and they arise out of the same transaction and they were originally brought in the state court and later removed to the United States court, the court held that as they might have been joined, the direction of the court to try them together at the same time and to the same jury but to consider them separately was proper. *Holmes v. Sheridan*, 1 Dill. 351, 12 Fed. Cas. No. 6,644.

"Old Equity Rule" in Federal Court.—The consolidation of suits is within the sound discretion of the court and this applies as well to suits in equity as suits in law, and the consolidation does not change the rules of equity pleading, nor the rights of the parties as those rights must still turn on the pleadings, proofs and proceedings in their respective suits, and the parties in one suit do not thereby become parties in the other, and a decree in one is not a decree in the other unless so directed. *Toledo, etc. R. Co. v. Continental Trust Co.*, 95 Fed. 437, 36 C. C. A. 155.

55. *Winninghoff v. Wittig*, 64 Wis. 180, 24 N. W. 912.

56. *Harris v. Sweetland*, 48 Mich. 110, 11 N. W. 830; *Biron v. Edwards*, 77 Wis. 477, 46 N. W. 813; *Winninghoff v. Wittig*, 64 Wis. 180, 24 N. W. 912.

57. **U. S.**—*American Tr. & Sav. Bank v. Zeigler Coal Co.*, 165 Fed. 34. **Ill.** *Lehman v. Warren Webster & Co.*, 110 Ill. App. 298, affirmed, 209 Ill. 264, 70 N. E. 600, where cross actions were consolidated by stipulation. **La.**—*Lockett v.*

D. GENERALLY AS TO ACTIONS AT LAW.—1. **Actions Ex contractu.**—a. *In General.*—Actions *ex contractu* between the same parties and such as might have been joined, may be properly consolidated,⁵⁸ and this rule would seem especially proper where the actions are based upon the same contract.⁵⁹ But the courts will not consolidate actions upon the same contract where the two actions are based upon facts to be found, such facts being disputed.⁶⁰

Tobey, 10 La. Ann. 713, where actions were consolidated in which the parties plaintiff and defendant were reversed.

58. Ala.—Garrison v. Glass, 139 Ala. 512, 36 So. 725; Birmingham Flavoring Milk v. Wilder, 85 Ala. 593, 5 So. 307 (more especially when made with the consent of the parties litigant). Ark.—St. Louis, etc. R. Co. v. Broomfield, 83 Ark. 288, 104 S. W. 133, where several laborers had been discharged at the same time by the same man and for the same reasons, and separate actions for wages were properly consolidated. Ga.—Tarpley v. Corputt, 65 Ga. 257, actions on separate accounts. Pa.—Eumsey v. Wynkoop, 1 Yeates 5, separate suits on bills of exchange.

“Where separate suits are brought upon notes or contracts made at the same time, and which might have been united in one action, and when the defense is the same in all, a consolidation rule ought to be granted.” Thompson v. Shepherd, 9 Johns. (N. Y.) 262.

Where each of the parties to a contract sues the other for damages for breach, and the actions are brought in different courts, a consolidation cannot be compelled over the defendant's objection as he cannot be forced to interpose his demand in the form of a counter-claim to plaintiff's action. International Post Card Co. v. Lithographing & Mfg. Co., 128 N. Y. Supp. 780.

Taxes.—Where actions against unknown owners were brought to collect taxes on different tracts of land which had been assessed separately, and defendants intervened claiming all the land embraced in the suits, they were not entitled to a consolidation though it would have been otherwise had the land all been assessed together. Watkins v. State (Tex. Civ. App.), 61 S. W. 532.

At common law actions *ex contractu* against different defendants cannot be consolidated because if they ought to

be joined and are not they may plead it in abatement. Scott v. Cahill, 1 Nott. & McC. (S. C.) 413.

Actions on Contract and for Deceit. A consolidation of the action for deceit and the action on contract is not permitted under the practice in this state. Weaver v. Shriver, 79 Md. 530, 30 Atl. 189.

59. Ala.—Garrison v. Glass, 139 Ala. 512, 36 So. 725 (to recover separate installments on the same contract); Wilkinson v. Black, 80 Ala. 329. Ga. Howard v. Chamberlain, Boynton & Co., 64 Ga. 684. Mass.—City of Springfield v. Sleeper, 115 Mass. 587, where three actions on a contract were consolidated although the defendants employed different counsel and the evidence in each case was different. N. Y. People v. McDonald, 1 Cow. 189, actions on the same bond.

Where an action was brought to recover installments due on a contract, and before defendant was served other installments became due, to recover which another action was commenced, the plaintiff was entitled to a consolidation, the defense being the same in both actions, except that in the latter, the defendant set up the pendency of the former. Wilson v. Locke, 116 App. Div. 421, 101 N. Y. Supp. 831.

60. Gloucester Iron Wks. v. Board of Water Comrs., 10 N. Y. Supp. 168.

Where two actions were brought by the same plaintiff against the same defendant to recover damages for the breach of the same contract, the plaintiff in one case being the assignee of a resident corporation, and in the other being the assignee of a non-resident corporation, the court held that in order to call into operation the discretion of the court in favor of consolidation, the defendant should show that the questions which would arise were substantially the same and consolidation should be permitted only if the plaintiff was permitted to elect with which action the other should be con-

b. *As to Suits on Promissory Notes.*—Where there are several suits on promissory notes between the same parties, the court will permit a consolidation, where the plaintiff will not be injured thereby,⁶¹ unless such actions are upon promissory notes maturing at different times, an action being brought upon each at maturity,⁶² or unless the notes are such as that different defenses may be set up and the defendant fails to show that the defense is the same.⁶³

c. *Insurance Policies.*—Actions to recover insurance may be consolidated when they depend on the same policy,⁶⁴ or when brought by the same plaintiff against different companies for the same risk.⁶⁵

2. **Actions Ex Delicto.**—Actions against the same defendant which arise out of the same state of facts may be consolidated where the defenses and the evidence are the same in each;⁶⁶ but not actions

solidated, and that the defendant would not object that the two causes were improperly united. *Mason v. Evening Star Newspaper Co.*, 35 Misc. 77, 71 N. Y. Supp. 203, 73 N. Y. Supp. 1140.

61. *Ala.*—*Berry v. Ferguson*, 58 Ala. 314, notes apparently given in the same transaction. *Ga.*—*Hatcher v. National Bank*, 79 Ga. 542, 5 S. E. 109; *Hartman v. Mayor*, 45 Ga. 96. *N. Y.*—*Thompson v. Shepherd*, 9 Johns. 262. *N. C.*—*Person v. State Bank*, 11 N. C. 294. *S. C.*—*Planters' & Mechanics' Bank v. Moses Cohen*, 2 Nott. & McC. 440. *Wis.*—*Harris v. Wicks*, 28 Wis. 198.

Consolidating an Appeal and an Original Action.—Where the plaintiff appealed an action upon a note from a justice of the peace to the circuit court and thereafter brought another action upon another note in the circuit court against the same defendant the court held that a consolidation under the statute was proper, since the action appealed had to be treated as action *de novo* in the circuit court, the provisions of the statute making such a trial *de novo* having been fully complied with. *Lauterbach v. Netzo*, 111 Wis. 322, 87 N. W. 229.

Suits Against Acceptors and Administrators.—Where the holder of a bill sued all the acceptors and the drawer and the indorser in the same action, and on the same day sued the administratrix of one of the acceptors in another action, the court held that the consolidation by the lower court was correct. *Gibbs v. Anthony*, 31 Tex. 157.

Plaintiff To Consolidate Separate Demands.—Where two actions were brought by the plaintiff on the same

day before a justice of the peace, upon two notes, the amount of which, when consolidated, exceeded the jurisdiction of the justice, the court held that the statute did not require the plaintiff to consolidate the two as each note constituted a separate demand. *Buckner v. Thompson*, 11 Ill. 563.

62. *Gaulden v. Shehee*, 24 Ga. 438.

In the absence of a general rule the court refused to order a consolidation in *Bank of Alexandria v. Young*, 1 Cranch C. C. 458, 2 Fed. Cas. No. 857.

63. *Ga.*—*Gerding v. Anderson, Starr & Co.*, 64 Ga. 304; *Logan v. Mechanics' Bank*, 13 Ga. 201, 58 Am. Dec. 507. *N. J.*—*Worley v. Glentworth*, 10 N. J. L. 241. *N. Y.*—*Thompson v. Shepherd*, 9 Johns. 262. *N. C.*—*Buie v. Kelly*, 52 N. C. 266. *S. C.*—*Scott & Co. v. Brown*, 1 Nott & McC. 417.

64. *Clason & Stanley v. Church*, *Colem. Cas.* 62, 1 Johns. Cas. (N. Y.) 29; *Clement v. Clement*, 113 Tenn. 40, 81 S. W. 1249 (where plaintiffs in the two actions claimed adversely under benefit certificates). But see *Witherlee v. Ocean Ins. Co.*, 24 Pick. (Mass.) 67, actions by different plaintiffs on different policies of defendant were consolidated.

65. *Mutual Life Ins. Co. v. Hillman*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. ed. 706; *Gross v. Milwaukee, etc., Ins. Co.*, 92 Wis. 656, 66 N. W. 712.

Such consolidation is not permissible where the statute requires an identity of parties for consolidation. *Isear v. Daynes*, 1 App. Div. 557, 37 N. Y. Supp. 474; *Camman v. New York Ins. Co.*, 1 Caines (N. Y.) 114.

66. *U. S.*—*Diggs v. Louisville & N.*

against different defendants.⁶⁷ It has been held, however, that actions against different defendants for the same injury may be consolidated where the plaintiff alleges among other omissions of duty the failure of the defendants to make proper rules to govern their joint conduct.⁶⁸

E. ACTIONS AT LAW AND SUITS IN EQUITY.—An action purely cognizable in equity, and another at law, being incongruous cannot be consolidated as a general proposition,⁶⁹ nor, though they be in the same court, under statutes which provide for consolidating actions which may be joined, and providing that the latter are such as may be prosecuted in the same kind of proceedings.⁷⁰ A consolidation will be refused where it takes away the right of having the law questions involved in the law case decided by a jury.⁷¹ However, an action at law may be transferred to equity and there consolidated with an equitable action, where all the disputed questions can be determined in equity only;⁷² or several actions at law may be consolidated into one action,

R. Co., 156 Fed. 564, 84 C. C. A. 330, different plaintiffs injured in the same accident. **Ark.**—Southern Anthracite Coal Co. v. Bowen, 93 Ark. 140, 124 S. W. 1048, personal injury suits. **Ga.** Atlantic Coast Line Ry. Co. v. DuPont, 122 Ga. 251, 50 S. E. 103, for killing animals.

Consolidation was allowed for injuries to plaintiff and to his horse. **McAndrew v. Lake Shore & M. S. R. Co.**, 70 Hun 46, 23 N. Y. Supp. 1074.

Two actions for libel based on publications relating to the same matter and to a single official act were consolidated to protect defendant against greater damages than were properly recoverable. **Cohalan v. Press Pub. Co.**, 123 App. Div. 487, 107 N. Y. Supp. 962. But the court has no power either under the Missouri statute or the common law to consolidate against the objection of the defendant, an action for injuries to two horses caused by their running into a barbed wire fence after being frightened by the negligence of defendant's servants, and one for double damages for injuries to a horse from contact with a locomotive. **Winters v. St. Louis, etc., R. Co.**, 124 Mo. App. 600, 101 S. W. 1118.

⁶⁷ **Cooper v. Weed**, 2 How. Pr. (N. Y.) 40 (actions for libel); **Scott v. Cohen**, 1 Nott & McC. (S. C.) 413.

⁶⁸ **Martin v. Seaboard Air Line R. Co.**, 148 N. C. 259, 61 S. E. 625, injuries received in a collision at a railway crossing.

⁶⁹ **Robinson v. United Trust**, 71 Ark. 222, 72 S. W. 992, ejectment and a bill in equity to redeem.

⁷⁰ **Keller v. Harrison**, 139 Iowa 383, 116 N. W. 327 (action in ejectment and a suit to quiet title); **Hodowal v. Yearous**, 103 Iowa 32, 72 N. W. 294 (forcible entry and detainer, and a suit to set aside a tax deed).

In **Missouri**, consolidation is restricted to the cases provided for by the statute and should not be allowed of actions of ejectment and an action to set aside a deed. **Priddy v. Mackenzie**, 205 Mo. 181, 103 S. W. 968. Similarly it was held error to consolidate a suit in equity to set aside a deed, with an action at law sounding in damages. **Anderson v. Gaines**, 156 Mo. 664, 57 S. W. 726.

In **Georgia**. "We know of no rule of law which empowers the superior court to try an equity and common law case at the same time, and before the same jury against the protest and without the consent of either party." **Bosser v. Cheney**, 64 Ga. 564, ejectment and a bill to enjoin the same. But see **White v. Interstate B. & L. Assn.**, 106 Ga. 146, 32 S. E. 26, holding that such actions may be consolidated under the statute allowing legal and equitable causes to be tried under the same form of pleadings and in the same court.

Election Between Actions.—**Conover v. Conover**, 1 N. J. Eq. 403.

⁷¹ **Estes v. McIntosh**, 9 Ky. L. Rep. 980, 7 S. W. 912; **McGraw v. Dole**, 63 Mich. 1, 29 N. W. 477.

⁷² **Twogood v. Allee**, 125 Iowa 59, 99 N. W. 288 (actions for accounting based on the same transaction); **Evens v. McConnell** (Iowa), 63 N. W.

and such consolidated action converted into one bill in equity."⁷³

F. AS TO SUITS IN EQUITY GENERALLY.—It has been held that the rule for the consolidation of suits is the same in law and in equity,⁷⁴ and that where the parties are the same, and separate suits have been brought in equity upon matters which might have been united in one suit, and the defense is the same in all, a consolidation rule ought to be granted.⁷⁵ And suits between different parties claiming the same property, may be heard together to avoid decrees that might clash with each other.⁷⁶ But a consolidation cannot be ordered where jurisdiction to consolidate is found in the statute. "A consolidation of two proceedings not of exactly similar scope should not be attempted without express authority."⁷⁷

Equitable actions which have been held properly consolidated are: Two injunction suits when they are such as may be joined;⁷⁸ a petition for an injunction and a bill seeking to compel specific performance, the parties and the issues involved being the same;⁷⁹ actions involving

570; *Stone v. Cromie*, 87 Ky. 173, 7 S. W. 920.

An action to cancel a deed and an action to recover a sum of money were properly consolidated, where the parties were the same, and the evidence showed that the money was a part of the price paid for the land, for the purpose of determining whether there was consideration for the deed. *Barnes v. Johnson*, 33 Ky. L. Rep. 803, 111 S. W. 372.

Where an action brought by the administrator of a beneficiary under a will against the executors of the testator, and an action brought by one of the executors of the person making the will asking to settle his accounts, the actions should be consolidated and the consolidated action be transferred to equity. *Drye v. Grundy*, 18 Ky. L. Rep. 13, 35 S. W. 119.

73. *Smith v. Butler*, 176 Mass. 33, 57 N. E. 322. In this case the court said: "There is no question of the power of the superior court to allow an action at law to be amended into a bill in equity, and we have no more doubt of its power when, through a misapprehension, plaintiffs have brought three separate actions at law to enforce a cause of action which can only be enforced by one bill in equity, to consolidate the actions and amend the consolidated action into a bill in equity."

74. *Beach v. Woodyard*, 5 W. Va. 231.

75. *Wyatt v. Thompson*, 10 W. Va. 645, 650.

Suits by several heirs against the administrators of their father and his partner to recover their share of the former's property. *Biron v. Edwards*, 77 Wis. 477, 46 N. W. 813; *Biron v. Scott*, 77 Wis. 477, 46 N. W. 813.

Even without a motion by either party, it is the duty of the court to order consolidation when the substantial identity of the subject matter of two cases comes to its knowledge. *India Rubber Co. v. Smith & Sons Co.*, 75 Ill. App. 222, citing, *Woodburn v. Woodburn*, 23 Ill. App. 296.

Cases Heard Together.—In *Owens v. Link*, 48 Mo. App. 534, the court heard together a petition to remove an administrator and an action to set aside allowance of a fraudulent claim of the administrator, both being determinable by the judge, "to prevent the reassembling of witnesses and the accumulation of costs."

76. *M'Connico v. Moseley*, 4 Call (Va.) 360.

Delay of Interpleader.—But it is not proper to compel by order of consolidation complainants seeking payment out of a fund to await a careless and dilatory preparation of his case by the holder of the fund who interpleads. *Riggs v. Kouns*, 7 Dana (Ky.) 405.

77. *In re Wood's Estate*, 34 Misc. 209, 69 N. Y. Supp. 491.

78. *Hayward v. Mason*, 54 Wash. 653, 104 Pac. 141.

79. *Union Garment Co. v. Newburger*, 124 La. 820, 50 So. 740.

the administration of an insolvent corporation for the benefit of its creditors.⁸⁰

G. AS TO CREDITORS' SUITS.—It is proper to consolidate creditors' bills by which different complaints seek to subject the same funds to the satisfaction of their respective claims, each claiming priority.⁸¹

H. AS TO FORECLOSING LIENS AND MORTGAGES.—A consolidation is proper where the litigation in a number of suits grows out of the enforcement of a number of liens against the same property in order that the rights of all the parties may be adjusted.⁸² So actions to foreclose mortgages,⁸³ or mechanics' liens⁸⁴ on the same property,

80. *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

81. *Continental Trust Co. v. Toledo, etc.*, R. Co., 82 Fed. 642, where a creditors' bill and a foreclosure bill against the same insolvent railroad corporation, were consolidated. Ill.—*Russell v. Chicago Trust & Sav. Bank*, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345, holding that the fact that the parties are not identical is no objection to the order. Md.—*Campbell's Case*, 2 Bland 209, 20 Am. Dec. 360. N. C. *Monroe v. Lewald*, 107 N. C. 655, 12 S. E. 287. Wis.—*Allen v. McRae*, 122 Wis. 246, 100 N. W. 12.

In *Campbell's Case*, 2 Bland (Md.) 209, it was held that, where there were various proceedings, creditors' suits, and bills filed by legatees and devisees, in relation to one estate, in order to facilitate their progress in court, an order of consolidation would be made.

Consolidation of Creditor's Bill and Foreclosure.—"The duty of the court to consolidate causes where no one will be injured thereby, is plainly suggested by the federal statute on the subject, and one of the commonest instances of the exercise of this power is in the consolidation of a creditor's bill and a foreclosure bill against the same insolvent railroad corporation." *Continental Trust Co. v. Toledo, etc.* R. Co., 82 Fed. 642.

82. *Springer v. Kroeschell*, 161 Ill. 358, 43 N. E. 1084; *Thielman v. Carr*, 75 Ill. 385; *Schnell v. Clements*, 73 Ill. 613; *Brown v. Kennicott*, 30 Ill. App. 89; *Lumber Co. v. Sanford*, 112 N. C. 655, 16 S. E. 849 (action against the contractor for the debt and against the owner to enforce the lien).

Removing Cloud From Title.—The suit of an administrator to remove the cloud from the title to the property by reason of a mortgage was not improperly consolidated with a suit to foreclose

the mortgage. *Phillips v. Watkins Land Mortgage Co.* (Tex. Civ. App.), 38 S. W. 270, affirmed in 90 Tex. 195, 38 S. W. 470.

Liens on Part and Liens on Whole Property.—Where suits were brought to foreclose six mechanic's liens, filed against six several properties, and two others were brought to foreclose two single liens upon the entire tract made up of the six above, the court held that consolidation was proper. *Van Laer v. Kansas Triphammer Brick Wks.*, 56 Kan. 545, 43 Pac. 1134.

83. *Davis v. J. I. Case Threshing Machine Co.*, 26 Ky. L. Rep. 235, 80 S. W. 1145; *Eleventh Ward Sav. Bank v. Hays*, 55 How. Pr. (N. Y.) 438.

If separate holders of notes secured by a mortgage sue individually to foreclose, the suits may be consolidated and separate judgments rendered. *Benton v. Barnet*, 59 N. H. 249.

There is no technical error in consolidating an action against a guardian to foreclose a mortgage with an action by the guardian to set aside the same property as a homestead, since in the latter action the relief asked could not be granted. *Leslie v. Elliott*, 26 Tex. Civ. App. 578, 64 S. W. 1037.

Removal and Consolidation.—In *Wabash, etc. R. Co. v. Central Trust Co.*, 23 Fed. 513, a foreclosure suit commenced in a state court, was removed to the federal court and consolidated with a petition by the mortgagor for a receiver, and a cross-bill by the trustee in the mortgage to foreclose.

84. Cal.—*Union Lumb. Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077; *Coghlan v. Quartararo* (Cal. App.), 115 Pac. 664. Ill.—*Springer v. Kroeschell*, 161 Ill. 358, 43 N. E. 1084; *Thielman v. Carr*, 75 Ill. 385. Kan.—*Van Lear v. Kansas Triphammer Brick Works*, 56 Kan. 545, 43 Pac. 1134. Minn.—*Miller v. Condit*, 52 Minn. 455, 55 N. W. 47.

may be consolidated;⁸⁵ but not where the property involved is not the same,⁸⁶ or where the causes of action cannot be joined.⁸⁷

Under the general equity powers an action to foreclose a mechanics' lien, and a suit by the owner to restrain a sale of the property on foreclosure may be consolidated though the parties are not identical;⁸⁸ or a partition suit and an action to foreclose a mortgage may be consolidated where the parties and the property involved are the same in both actions.⁸⁹

I. AS TO PARTITION SUITS. — Courts will consolidate actions of partition, where both of the suits spring out of or relate to the same partition.⁹⁰

If the subject of one of the actions lies in one county and the subject of the other lies in a different county and some of the defendants in the one have no interest in the other there can be no consolidation.⁹¹

J. EJECTMENT. — Actions of ejectment may be consolidated where the causes all depend upon the same title.⁹²

IV. PROCEDURE TO EFFECT CONSOLIDATION. — A. NECESSITY FOR MOTION. — A quasi consolidation is usually effected by an agreement or stipulation of the parties.⁹³ For such purpose an order

N. C. — Lookout Lumber Co. v. Sanford, 112 N. C. 655, 16 S. E. 849.

85. In Title & Trust Co. v. Chapman, 132 Ill. App. 55, it was said: "The rights of the claimants of the property, the mortgage interests and the rights of the lien claimants are so interwoven in both the bills by their averments, that to settle and adjudicate them without conflict in their varied ramifications it became the imperative duty of the chancellor, in the exercise of a sound judicial discretion, to consolidate them for hearing and final determination as one cause. Without so doing, confusion and conflict must inevitably ensue."

86. Wooster v. Case, 12 N. Y. Supp. 769; Kapp v. Delawater, 55 How. Pr. (N. Y.) 183.

87. Harsh v. Morgan, 1 Kan. 293.

88. Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397.

89. Hodgin v. Hodgin (Ind.), 33 N. E. 849.

90. Bixby v. Bent, 59 Cal. 522.

91. Mayor v. Coffin, 90 N. Y. 312; Mayor v. Mayor, 64 How. Pr. (N. Y.) 230.

Under New York Code Civ. Proc. §817 it is only when the parties are the same that it will be allowed. Wooster v. Case, 12 N. Y. Supp. 769.

92. Cal. — Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549, the

causes being such that they might have been joined. D. C. — Welch v. Lynch, 30 App. Cas. 122, holding consolidation proper where the actions are of like nature, involving the same property and the same substantial questions of law and fact, and the defendants in each action being the same. Ill. — Hardin v. Kirk, 49 Ill. 153, 95 Am. Dec. 581. Ky. — Martin's Heirs v. Reynolds, 9 Dana 328. N. J. — Den v. Kimble, 9 N. J. L. 335. N. Y. Jackson v. Stiles, 5 Cow. 282; Jackson v. Schaubert, 4 Cow. 78. Eng. Grimstone v. Burgess, Barnes Notes 176, where sixteen ejectment suits were consolidated.

See, however, Smith v. Crabb, 2 Str. 1149, 93 Eng. Reprint 1093, where the court said to consolidate would be to compel plaintiff to go on against all when perhaps he might be ready in some only.

93. Lee v. Twp. of Kearny, 42 N. J. L. 543; Bush v. Abrahams, 2 N. Y. Supp. 391.

A quasi consolidation may be effected by agreement after trial, pending an appeal, by taking but one case to the appellate court, and having an order entered by consent that the others shall abide the event of the case appealed. Bones v. Nat. Exchange Bank, 67 Ga. 339.

No Order Made. — Although no order

of consolidation is not always necessary.⁹⁴ But where the record shows merely an agreement to try cases together, the finding of the court in the order of appeal that there was a consolidation, and the judicial admissions of the parties in their briefs and at the bar, are ineffective to work out a *nunc pro tunc* consolidation.⁹⁵ A consolidation may be ordered to give effect to an agreement of the parties to that effect,⁹⁶ or the court may make the order upon its own initiative, or upon application of a party.⁹⁷ But trying cases together by consent of all the parties, the parties in all not being the same, does not merge the actions into one, each case preserving its identity.⁹⁸

of consolidation is made, if the cases are tried together, and treated as one action, and but one judgment rendered, it will be treated on appeal as if the order had been properly made. *Bramell v. Adams*, 146 Mo. 70, 47 S. W. 931.

In *Eagles v. Hook*, 22 Gratt. (Va.) 510, but one verdict and one judgment was taken, and the failure of the court to make the order was held not ground for reversal, the parties having agreed to consolidation.

A stipulation that actions "be consolidated for the purposes of trial and appeal; but such consolidation not to affect the question of costs, but such costs to be taxed by the prevailing party in the same manner as though this order had not been made," was held sufficient to effectually consolidate the actions. *Capron v. Supervisors of Adams County*, 43 Wis. 613.

94. *Howard's Admr. v. Gregory*, 79 Ga. 617, 4 S. E. 881 (where the cases were tried together upon consent, in the court of ordinary and again, upon appeal, in the superior court where a mistrial was had, and upon a further trial defendant objected but was overruled); *Rodgers v. Dibrall*, 6 Lea (Tenn.) 69 (where one answer to two bills was filed).

Where one judgment was rendered in two actions of the same and with similar defenses between the same parties, the parties having consented to submit the cases for trial at the same time, it was too late to urge objection that there were not separate judgments and verdicts. *Raulerson v. Rockner's Admr.*, 17 Fla. 809.

95. *Shotter Co. v. Larsen*, 134 Fed. 705, 67 C. C. A. 259.

96. *Van Rees v. Witzenburg*, 112 Iowa 30, 83 N. W. 787; *Beshler's Estate*, 129 Pa. 268, 18 Atl. 137.

An order that cases be "heard to-

gether" is in effect a consolidation, and should be so regarded. *Stone v. Cromie*, 87 Ky. 173, 7 S. W. 920.

An oral agreement to consolidate may be enforced within the discretion of the court. *Burt v. Wigglesworth*, 117 Mass. 302.

In *Midland R. Co. v. Island Coal Co.*, 126 Ind. 384, 26 N. E. 68, "the consolidation was ordered by the court on agreement of all the parties. The consolidation, no doubt, was made for the reason that both complaints asked for the appointment of a receiver; but notwithstanding such consolidation the rights of the plaintiffs in the two actions, as regards their claims against the appellant, remained separate and distinct, and separate and distinct proof had to be made of each claim, and, in so far as the action was for judgment on the accounts of the respective parties, it was separate and distinct, and one plaintiff could not make an agreement in regard to it that would bind the other, and did not attempt to do so."

97. *Jones v. Witousek*, 114 Iowa 14, 86 N. W. 59.

By Court Ex Mero Motu.—Where there was an appeal by the executor and residuary legatee from allowance of the executor's annual account, and these appeals were treated as separate appeals, the court held that the circuit court of its own motion, should have ordered the suits consolidated, being between the same parties and including part of the same account. *Wisner v. Mabley's Estate*, 70 Mich. 271, 38 N. W. 262.

98. *Valdosta Guano Co. v. Hart*, 119 Ga. 909, 47 S. E. 212; *Cole v. Stanley*, 118 Ga. 259, 45 S. E. 282 (therefore the judgments which were rendered separately cannot be received in a single bill of exceptions); *Brown v.*

The proper mode to bring the matter of consolidation before the court is by a motion⁹⁹ made after notice to the adverse party.¹

While the motion to consolidate is usually made by defendant, and in some jurisdictions can be made only by him under the statutes therein,² it is held that the court in a proper case, may make the order at the instance of either plaintiff or defendant.³

B. TIME OF MAKING MOTION.—The motion must be made before trial,⁴ but should not be made until after the answers are in, so that the court may better determine the identity of defenses and the propriety of the consolidation.⁵ But it is held the court may, in the

Louisville & N. R. Co., 117 Ga. 222, 43 S. E. 498 (holding that a writ of error seeking to review two judgments on a single bill of exceptions, will be dismissed for want of jurisdiction); *Erwin v. Ennis*, 104 Ga. 861, 31 S. E. 444. See *Keep v. Indianapolis, etc. R. Co.*, 10 Fed. 459, citing *Holmes v. Sheridan*, 1 Dill. 351, 12 Fed. Cas. No. 6,444, and drawing a distinction between a consolidation proper and for purposes of trial only. Where two causes are tried and considered together only for purposes of trial, the issues being distinct and separate judgments having been rendered, no consolidation is effected technically. *Arcadia, etc. Mfg. Co. v. Fisher*, 120 La. 1076, 46 So. 28.

99. See cases throughout this article and **1a**.—*Bank of Montreal v. Ingersoll*, 105 Iowa 349, 75 N. W. 351; *Hodowal v. Yearous*, 103 Iowa 32, 72 N. W. 294. **Va.**—*M'Rae v. Boast*, 3 Rand. 481. **W. Va.**—*McKittrick v. McKittrick*, 43 W. Va. 117, 27 S. E. 303; *Wyatt v. Thompson*, 10 W. Va. 645.

1. *Harsh v. Morgan*, 1 Kan. 293.

Where one of the defendants is made a party defendant in the foreclosure of a first mortgage, and upon other foreclosure suits being brought, they were consolidated, a decree rendered in favor of the first mortgagee will not be set aside by reason of a failure to give the statutory notice of consolidation, the defendant's rights being inferior to that of the first mortgagee. *Willard v. Calhoun*, 70 Iowa 650, 28 N. W. 22.

2. **Kan.**—*Harsh v. Morgan*, 1 Kan. 293. **Pa.**—*Groff v. Musser*, 3 Serg. & E. 262; *Kemp v. Kemp*, 1 Woodw. 189. **Tenn.**—*Reid's Lessee v. Dodson*, 1 Overt. 396. **Eng.**—See *Amos v. Chadwick*, L. R. 4 Ch. Div. 869.

Where there was a consolidation of

actions in the interest and at the request of the defendant, the inapt or unconsidered expression that the demurrer be sustained when such was not intended, as shown by the consolidation, cannot be made the basis of a reversal. *Hawpe v. Bumgardner*, 103 Va. 91, 48 S. E. 554.

3. **Ala.**—*Powell v. Gray*, 1 Ala. 77. **Ga.**—*Hatcher v. National Bank*, 79 Ga. 542, 5 S. E. 109. **N. Y.**—*Briggs v. Gaunt*, 4 Duer 664, 2 Abb. Pr. 77. **Eng.**—*Amos v. Chadwick*, L. R. 4 Ch. Div. 869.

4. *Eleventh Ward Sav. Bank v. Hay*, 8 Daly (N. Y.) 328; *Eckenroth v. Egan*, 20 Misc. 508, 46 N. Y. Supp. 666; *Eleventh Ward Sav. Bank v. Hay*, 55 How. Pr. (N. Y.) 438 (holding that where the court in its discretion denies motion on ground of laches, the appellate court should not order); *Eckenroth v. Egan*, 20 Misc. 508, 46 N. Y. Supp. 666; *Needham Piano Co. v. Hollingsworth*, 91 Tex. 49, 40 S. W. 787 (or a good reason shown for not doing so).

5. *Gilbert v. Washington, etc. Assn.*, 10 App. Cas. (D. C.) 316; *Boyle v. Staten Island Land Co.*, 87 Hun 233, 33 N. Y. Supp. 836.

Compare *Martin v. Seaboard, etc. R. Co.*, 148 N. C. 259, 61 S. E. 625, where it is said that "the fact that one of the defendants had not answered is immaterial. The order is based upon the allegations in the complaint." But the defendant should not be allowed to delay the trial of a case by asking for its consolidation with another case, the plaintiff being ready for trial. *Adams v. Mineral Development Co. (Ky.)*, 112 S. W. 624.

In *Mercantile Trust Co. v. Missouri, etc. R. Co.*, 41 Fed. 8, the court said: "The mortgagee who is prompt ought

exercise of its discretion, grant the motion before the answers are interposed.⁶

C. FORM OF MOTION.—The motion should show that the causes are such as might have been joined, and that the questions arising are substantially the same in the respective actions;⁷ and the affidavit upon which the motion is based, should state either that no defense is intended or that the defense will be substantially the same in all the actions.⁸

V. EFFECT OF CONSOLIDATION.—**A. IN GENERAL.**—The effect of consolidation is to merge the actions into one, so that after consolidation there is but one action pending between all the parties embraced in the order,⁹ the other actions being in effect discontinued, a

not to suffer for the delay of one who is a laggard."

When Equivalent to Amendment.—"The court had ample power and would have been justified in allowing the plaintiff to amend the complaint in the first action by setting up these two additional causes of action, and it has been held that the court had that power even though judgment had been entered in the first action and had been satisfied by the defendant (*Hatch v. Central National Bank*, 78 N. Y. 487). The result of the consolidation of these two actions is nothing more than an amendment to the complaint in the first action by including in it a demand for recovery upon the two instalments which became due before the summons and complaint were served. A mere delay in making the motion was not such laches as should defeat the plaintiff's right to have the whole question determined in one action. The cases were at issue when the motion was made, but had not been reached for trial. It is not alleged that the defendant has been deprived of any substantial right in consequence of the delay, and we think the motion should have been granted." *Wilson v. Locke*, 116 App. Div. 421, 101 N. Y. Supp. 831.

In equity at any time. *Gilbert v. Washington, etc. Assn.*, 10 App. Cas. (D. C.) 316.

6. *Perkins v. Merchants Lithographing Co.*, 21 Misc. 516, 47 N. Y. Supp. 712 (in this case the affidavit of the defendant sufficiently showed that the questions to be tried were the same); *Worthy v. Chalk*, 10 Rich. (S. C.) 141.

7. *Curtis v. Baldwin*, 42 N. H. 398;

Dunning v. Bank of Auburn, 19 Wend. (N. Y.) 23; *Wilkinson v. Johnson*, 4 Hill (N. Y.) 46; *Crane v. Koehler*, 6 Abb. Pr. (N. Y.) 328n.

8. *Curtis v. Baldwin*, 42 N. H. 398; *Dunning v. Bank of Auburn*, 19 Wend. (N. Y.) 23; *Dunn v. Mason*, 7 Hill (N. Y.) 154; *Wilkinson v. Johnson*, 4 Hill (N. Y.) 46.

9. U. S.—*Young v. Grand Trunk R. Co.*, 9 Fed. 348, holding that this merger does not prevent a plaintiff from dismissing one or more of the original actions. **Cal.**—*Union Lumber Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077; *Willamette Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629. **D. C.**—*Gilbert v. Washington, etc. Assn.*, 10 App. Cas. 316. **La.**—*Vasocu v. Woodward*, 35 La. Ann. 555, holding that the appeal, if any be taken, must be based on one judgment rendered in the consolidated action. **Mont.**—*Handley v. Sprinkle*, 31 Mont. 57, 77 Pac. 296. **Neb.**—*Schallenberg v. Kroeger*, 77 Neb. 738, 110 N. W. 664, where two actions to quiet title were consolidated and two decrees were rendered, this was held a mere matter of form, constituting in fact a single decree disposing of the issues in a single controversy. **Wash.**—*Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397. **Wis.**—*Allen v. McRae*, 122 Wis. 246, 100 N. W. 12; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Eau Claire Fuel & S. Co. v. Laycock*, 92 Wis. 81, 65 N. W. 732.

The legal effect is to turn two or more actions into one. *Gillin v. Canary*, 15 App. Div. 594, 26 Civ. Proc. 230, 44 N. Y. Supp. 313.

In *Castro v. Whitlock*, 15 Tex. 437, the court said: "It is not to be sup-

new and distinct action being created presenting the issues involved in both former actions.¹⁰

posed that, when two suits are consolidated, they are still to be conducted as two separate and distinct suits. That would be an anomaly in practice which cannot be admitted." The object of a statute which allows only one bill of costs in several actions which might have been joined as one is the same as the English consolidation rule. And the effect of it is to melt down several actions into one, and to have one trial instead of many. *Witherlee v. Ocean Ins. Co.*, 24 Pick. (Mass.) 67. See also *Curtis v. Baldwin*, 42 N. H. 398.

On appeal after consolidation only one notice and one bond is necessary to effect the appeal; and the fact that four judgments were rendered does not make more than one notice necessary. *First Nat. Bank v. Fowler*, 51 Wash. 638, 99 Pac. 1034.

Where there is a consolidation of an action for damages for injury to property and an action for the continuance of a nuisance as an action at law, the legal effect is to waive the equitable relief asked for and to make the consolidated action one to recover damages caused by the maintenance of the nuisance. *Pritchard v. Edison Electric Illuminating Co.*, 92 App. Div. 178, 87 N. Y. Supp. 225, *affirmed*, 179 N. Y. 364, 72 N. E. 243.

Parties to Separate Causes Must Be Made Parties.—By a consolidation of a bill with an original case, the plaintiffs in the bill are not "entitled to consider the defendants to the original cases as defendants to their bill and have a decree against them, part of them being minors, without even making an issue with them by the pleading, or giving them a chance to be heard." *Brevard v. Summar*, 2 Heisk. (Tenn.) 97; *Bogle v. Womack*, 2 Heisk. (Tenn.) 97.

The consolidation of a creditor's bill with a foreclosure suit does not permit the former suit to become so merged as that general creditors cannot contest the validity and amount of the mortgage lien, as is done in a regular foreclosure suit. *Continental Trust Co. v. Toledo, etc. R. Co.*, 82 Fed. 642.

Court Without Jurisdiction as to Some of Parties.—When two suits are

consolidated and the court has no jurisdiction of the parties in one of the cases, a judgment rendered in the consolidated case, being the same as would have been rendered in the case over which the court did have jurisdiction, is binding so far as the parties therein are concerned. *Galpin v. Page*, 1 Sawy. 309, 9 Fed. Cas. No. 5,205.

Consolidation in Equity Affecting Rights at Law.—Upon a consolidation of a bill to enforce a trust and one to foreclose, where one of the defendants fails to ask leave to file a cross-bill for the protection of his rights against his co-defendant, as the defendant may still bring an action at law to recover the amount due from a co-defendant, the court will not reverse the order to consolidate. *Miller v. Walker*, 141 Mich. 433, 104 N. W. 780.

Right of Defendant To Recoup Damages.—Where several actions were consolidated, the defendant has a right to recoup the damage they had sustained, as proven by them from the plaintiff's recovery. *Hurst v. Everett*, 91 N. C. 399.

Venue of Consolidated Action. Where a cause appealed from the justice's court to the circuit court was consolidated, by consent of parties, with an original action in the circuit court a new action is created and the venue of the action should be changed to suit the jurisdiction of the court, just as if this consolidated action had been originally brought there. *Browne v. Hickie*, 68 Iowa 330, 27 N. W. 276.

Where a motion to dismiss one action should have been allowed, an order to consolidate it with another is error, but the plaintiff in the action will have the same rights as if consolidation had not been ordered. *Willard Mfg. Co. v. Tierney & Co.*, 130 N. C. 611, 41 S. E. 871.

10. *Hiscox v. New Yorker Staats Zeitung*, 30 Abb. N. C. (N. Y.) 131, 23 Civ. Proc. 87, 3 Misc. 110, 23 N. Y. Supp. 682.

In *Browne v. Hickie*, 68 Iowa 330, 27 N. W. 276, the court said in discussing effect of consolidation: "When the two causes were consolidated a new action was formed, which was distinct in its identity from both of them.

Discontinuance. — And where each cause or right of action springs from an independent contract, the plaintiff, after consolidation, may discontinue as to one or more of the cases.¹¹

The same rules of evidence apply as if the suit had not been consolidated, and a party who could have testified in one of the suits, if they had remained separate, will be permitted to testify in the consolidated action.¹²

And depositions taken in one of the actions before consolidation, if material, should be admitted after consolidation.¹³

Neither of the claims alleged by plaintiff remained to be tried, after the consolidation, as a separate issue, but a new issue was presented, which included all of them. When the parties consented to the consolidation they, in effect, agreed that the two separate actions should be discontinued, and a new and distinct action should be created, in which should be included and litigated all of the questions presented by the pleadings in both of the former actions; and the power and jurisdiction of the courts with reference to this new action were the same as though it had been brought in the manner in which actions are ordinarily instituted."

11. *Young v. Grand Trunk R. Co.*, 9 Fed. 348, where the court said: "It is, however, further urged that as each of the plaintiff's demands, when taken separately, does not involve an amount sufficient to enable the defendant, if ultimately defeated, to take an appeal, and as the amount of all the demands when united is sufficient to give a right to appeal, the court cannot permit a discontinuance as to two of the causes of action without jeopardizing a substantial right, namely, a right of ultimate appeal. It cannot be claimed that there is any vested right of appeal at this stage of the controversy, nor that such right would accrue until verdict and judgment should pass. The most that can be said is that there is a possible future right of that character. It is not a right *in esse*. Possibly it is not even a right *in futuro*, because the defendant may have verdict and judgment in its favor. . . . Upon this point, *Pacific Mail Steamship Co. v. Leuling*, 7 Abb. Pr. (N. S.) 37, was cited, in which case it was at least inferentially held that, where a defendant has acquired a right in infer-

ence to the subject-matter of the action, a discontinuance in disregard of that right would not be permitted. But the right there spoken of is some right acquired by order or decree of the court already made, and in the face of which a discontinuance is asked. Of course, it is not difficult to understand that litigation between the parties to a controversy may proceed to such an extent, even before the final judgment or decree, that substantial and valuable rights may accrue or become established, and in that event a discontinuance or dismissal, which should take away or affect such rights, would not be permitted. But that is not this case." See also *Williams v. Trepagnier*, 1 Mart. N. S. (La.) 271.

Misjoinder as to One Case.—Where there has been a consolidation and one of the suits shows a misjoinder, the parties common to both may have a judgment for the whole amount shown by them to be due from the first case and the second, although the first was dismissed for misjoinder after consolidation. *O'Bannon v. Roberts' Heirs*, 2 Dana (Ky.) 54.

12. *Kimball v. Thompson*, 4 Cush. (Mass.) 441.

13. *Wolters v. Rossi*, 126 Cal. 644, 59 Pac. 143.

Testimony Considered on Appeal Must Appear in Record.—Where cases are consolidated in the equity court, the testimony in each case does not apply as well in the others, and therefore a deposition taken in one of the cases not in transcript on appeal of the consolidated cases cannot be considered by the court. *Lofland v. Coward*, 12 Heisk. (Tenn.) 546. See *Wolters v. Rossi*, 126 Cal. 644, 59 Pac. 143, where it held that depositions taken in one of the cases may be used in the other, and that it was immaterial in

Order Binding.—An order of consolidation, which the court has jurisdiction to make, is binding upon all the parties until it is vacated or set aside.¹⁴

B. UPON THE PLEADINGS.—Where a consolidation of two suits is made, it consolidates the two complaints so that one aids the other,¹⁵ and in like manner the answers are regarded as one answer wherein the defense to each count of the complaint is separately stated.¹⁶ However, in some jurisdictions it is held that the court should require the title of the cause and the pleadings to be amended, and redrafted into one instrument embracing all the causes.¹⁷

Quasi Consolidation.—A consolidation for purposes of trial does not change the issues in the respective cases, nor destroy the effect of admissions in the pleadings when applied to the particular cases in which they were made.¹⁸

C. UPON CHALLENGE TO JURORS.—Where actions against different defendants are consolidated, each of the defendants is entitled to the

which of the actions the deposition was taken.

14. *Wolters v. Rossi*, 126 Cal. 644, 59 Pac. 143.

15. *Ky.*—*O'Bannon v. Roberts' Heirs*, 2 Dana 54. *La.*—*Offut's Heirs v. Roberts*, 12 Mart. (O. S.) 300. *Minn.*—*Pioneer Fuel Co. v. St. Peter Street Imp. Co.*, 64 Minn. 386, 67 N. W. 217. *Tex.*—*Castro v. Whitlock*, 15 Tex. 437. *Wis.*—*Harris v. Wicks*, 28 Wis. 198.

When a consolidation is agreed to by all the parties, the parties in effect agree that the separate actions shall be discontinued, and a new and distinct action shall be created in which shall be included and litigated all the questions presented by the pleadings in the former actions. *Gilbert v. Washington Endow. Assn.*, 10 App. Cas. (D. C.) 316.

"Old Equity Rule."—An order of consolidation in equity simply has no other effect than to have the causes heard together, the issues remaining precisely on the pleadings as they were before, and between the same parties, and are to be determined exactly as if the cases had been heard separately. *Masson v. Anderson*, 3 Baxt. (Tenn.) 290.

"Old Equity Consolidation."—An "order of consolidation of two or more causes cannot change the rules of equity pleading in the rights of the parties. These rights must still turn upon the pleadings, proof and proceed-

ings in the respective causes; and it is very doubtful whether the chancellor has any powers to interfere with the rights of the parties, *in invitum*, by an order directing the consolidation of independent suits of purely equitable cognizance." *Ogburn v. Dunlap*, 9 Lea (Tenn.) 162.

16. *Harris v. Wicks*, 28 Wis. 198.

In papers later than the order of consolidation it is immaterial whether the cause is entitled by the name of the one or the other case. *Thompson's Admr. v. Bailey's Admr.*, 1 Ky. L. Rep. 321.

17. *Ralston v. Aultman, Miller & Co.* (Tex. Civ. App.), 26 S. W. 746; *Eastern Wis. R. & L. Co. v. Hackett*, 135 Wis. 464, 115 N. W. 376, 1130, 1139.

In *Handley v. Sprinkle*, 31 Mont. 57, 77 Pac. 296, the court says that the effect of consolidation is to merge the causes into one suit, and goes on to say that "if this is true, there can be but one judgment in the consolidated suit, and this judgment must settle all the issues involved. All the suits consolidated are ended as separate suits, and exist thereafter only as parts, respectively, of the consolidated suit. Where an order of consolidation is made, the court should require the pleadings to be reconstructed as in one suit."

18. *Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 97 Pac. 414, 420.

same number of preemptory challenges which he would have if the cases were tried separately.¹⁹

D. UPON AN ATTACHMENT.—A consolidation of actions will not operate to vacate an attachment pending in one of the actions.²⁰

E. UPON THE VERDICT AND JUDGMENT.—Because of the merger which is effected by a consolidation, and the termination of the causes which are superseded, the trial of the consolidated action should result in but one verdict and one judgment,²¹ or when tried by the court should result in but one set of findings and one judgment.²² But it has been held immaterial in the absence of any injury, whether one verdict and judgment is taken, on a separate verdict and judgment for each of the actions;²³ and that, in order to avoid confusion,

19. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. ed. 706, where it is said that the "defendants in different actions cannot be deprived of their several challenges, by the order of the court, made for the prompt and convenient administration of justice; that the three cases be tried together."

20. *Goepel v. Robinson Match Co.*, 118 App. Div. 160, 103 N. Y. Supp. 5. In this case the court says: "The plaintiff is entitled to the same security for the payment of any judgment to which he will be entitled in the consolidated action that he had in the two actions which were consolidated."

21. *Ia.*—*Browne v. Hickie*, 68 Iowa 330, 27 N. W. 276. *La.*—*Vascocu v. Woodward*, 35 La. Ann. 555; *Offut's Heirs v. Roberts*, 12 Mart. (O. S.) 300; *Lafon v. Riviere*, 6 Mart. (O. S.) 1 (duty of court to render such judgment as will end all). *Mont.*—*Handley v. Sprinkle*, 31 Mont. 57, 77 Pac. 296. *N. Y.* *Hiscox v. New Yorker Staats Zeitung*, 3 Misc. 110, 23 N. Y. Supp. 682. *Tex.* *Young v. Davidson*, 31 Tex. 153. *Wash.* *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397. *Wis.*—*Allen v. McRae*, 122 Wis. 246, 100 N. W. 12; *Capron v. Supervisors of Adams County*, 43 Wis. 613.

Final Judgment.—Where the plaintiff sued for the land and the defendant sued to have her possession quieted against his paper title, and the suits were consolidated, the one winning was entitled to have a final judgment in the whole case. *Lockett v. Toby*, 10 La. Ann. 713.

Nullity of Judgment as to One Case Only.—When cases are consolidated, a new case is created and a judgment

rendered therein not appealed from is binding, and if the judge signs another judgment adopted to one only of the consolidated suits, it is a nullity. *Vascocu v. Woodward*, 35 La. Ann. 555.

Decree in Suit Subsequent to Consolidation.—A decree in one of the consolidated cases subsequent to consolidation does not vacate the former decree nor any of the proceedings thereunder, all being subject to the revision and control of the court in which they originated, until finally ratified or annulled, actions being to sell lands covered by mortgage. *Holthous v. Nicholas*, 41 Md. 241.

22. *Willamette, etc. Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629; *Coghlan v. Quartararo* (Cal. App.), 115 Pac. 664; *Capron v. Suprs. of Adams County*, 43 Wis. 613.

In *Union Lumb. Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077, the court says: "Upon the consolidation of the several actions there was presented only a single action by the respective plaintiffs against the defendants, and the decision thereon was to be made as if the cause of action had been presented in a single complaint, and was to be embodied in a single set of findings in which all facts in issue in the consolidated action were to be incorporated."

23. In *Lehman v. Warren Webster & Co.*, 110 Ill. App. 298, *affirmed*, 209 Ill. 264, 70 N. E. 600, the court had directed a separate verdict in each case, and a separate verdict was entered in each case. It was held that even though irregular, which is not decided, no one was prejudiced thereby, and the judgment was affirmed.

the court may give a special charge applicable to each case, and have a separate verdict rendered in each.²⁴ But where there is simply an agreement to try the cases together, without formal entries thereon, separate judgments may be entered for each case.²⁵

VI. COSTS.—The taxation of costs upon consolidation is largely in the discretion of the court,²⁶ and frequently costs are allowed to abide the issue.²⁷

When the order of consolidation is made the court should determine what costs if any should be charged to either party in the original suits;²⁸ for the successful party will be entitled to tax only the costs of the consolidated action, unless the right to recover costs of the discontinued action is reserved in the order.²⁹

If a plaintiff who has instituted several suits makes a motion to consolidate he should be ordered, as a condition precedent, to pay accrued costs to the time of consolidation in all the suits save one.³⁰

Costs of the Motion.—The court may direct the costs of the motion to be paid by the plaintiff,³¹ and should so order when the actions were commenced at the same time, or a disposition is shown to make the proceedings burdensome.³²

24. *Union Pac. Co. v. Jones*, 49 Fed. 343, 1 C. C. A. 282 (where three actions by different plaintiffs against the same defendants for injuries sustained in the same accident, were consolidated, and it was held proper to direct a separate verdict for each case); *Mills v. Paul* (Tex. Civ. App.), 30 S. W. 242.

25. *Chicago & Great Western Land Co. v. Peck*, 112 Ill. 403.

Where there is an agreement that the actions shall be consolidated and tried together the court held that without formal entries, all defendants were to defend upon the general issue and there was no error in rendering judgments upon a verdict in favor of all. *Martin's Heirs v. Reynolds*, 9 Dana (Ky.) 328.

26. *Lindsay v. Wayland*, 17 Ark. 385.

27. *Lindsay v. Wayland*, 17 Ark. 385; *Buie v. Kelly*, 52 N. C. 266.

28. *Handley v. Sprinkle*, 31 Mont. 57, 77 Pac. 296.

Where the second cause had not accrued at the time the first was brought, a consolidation does not prevent plaintiff from recovering his costs in each. *Ft. Wayne, etc. R. Co. v. Clark*, 59 Ind. 191.

29. *Hiscox v. New Yorker Staats Zeitung*, 30 Abb. N. C. 131, 23 Civ. Proc. 87, 3 Misc. 110, 23 N. Y. Supp. 682; *Avery v. Popper* (Tex.), 48 S. W.

572, *modified* in another particular in 92 Tex. 337, 49 S. W. 219.

"I know of no principle by which costs, in actions discontinued, can be included in another action, even though it embraces the cause of action in the first. Provision for such costs must be made in the discontinued actions before they finally cease to exist. *Blake v. Michigan, etc. R. Co.*, 17 How. Pr. (N. Y.) 228.

Costs in the consolidated action accrue only after the consolidation is effected. *Handley v. Sprinkle*, 31 Mont. 57, 77 Pac. 296.

30. *Hatcher v. National Bank*, 79 Ga. 542, 5 S. E. 109.

When Party Moving to Consolidate Taxed With Costs.—Where a defendant in attachment first sued upon the bond and afterward choosing to assert his right of action against the plaintiffs for suing out the attachment, in that suit, and to litigate both causes in one action pleaded in reconvention to the attachment suit the same matter which was pleaded by him in his suit upon the bond and then moved to consolidate, the court held that consolidation should not have been granted except upon the defendant's paying the costs. *Castro v. Whitlock*, 15 Tex. 437.

31. *Buie v. Kelly*, 52 N. C. 266.

32. *Dunning v. Bank of Auburn*, 19

Reviewing Order For Costs.—An exception to a ruling of the court relative to the matter of costs, must be taken at the time the order is made; otherwise such ruling is not reviewable.³³

VII. APPEAL AND REVIEW.—The consent of a party will estop him from afterwards objecting to the consolidation.³⁴ One seeking a reversal because of consolidation must show that it was made over his objection or present some reasonable excuse for not then objecting,³⁵ especially if he sustained no injury.³⁶

If no exception was taken in the lower court, acquiescence will be presumed.³⁷

As the granting of an order of consolidation in causes which may be consolidated is discretionary with the court,³⁸ the exercise of such

Wend. (N. Y.) 23; *Cecil v. Briggs*, 2 T. R. 639, 100 Eng. Reprint 344.

33. *Turner v. Simpson*, 12 Ind. 413.

34. *Ill.—Hardin v. Kirk*, 49 Ill. 153, 95 Am. Dec. 581. *Ind.—Turner v. Simpson*, 12 Ind. 413. *Ia.—Rees v. Witzenburg*, 112 Iowa 30, 83 N. W. 787, where the consolidation was on the court's own motion, and afterwards parties agreed to try the cases together. *Pa.—Bemus v. Quiggle*, 7 Watts 362. *Tex.—Traders' Nat. Bank v. Fry*, 14 Tex. Civ. App. 403, 37 S. W. 672, where order was entered March, 1894, and acquiesced in until May, 1895—held that the party was deprived from objecting.

This is not so if the effect is to oust the jurisdiction of the court. *Gillin v. Canary*, 19 Misc. 594, 26 Civ. Proc. 230, 44 N. Y. Supp. 313.

35. *Union Pacific R. Co. v. Jones*, 49 Fed. 343, 1 C. C. A. 282; *Poston v. Williams*, 8 Tex. 281; *Traders Nat. Bank v. Fry*, 14 Tex. Civ. App. 403, 37 S. W. 672; *Mills v. Paul* (Tex. Civ. App.), 30 S. W. 242.

Law of Case.—An order of consolidation followed by reference to a master without appeal, becomes the law of the case. *Chandler v. Franklin*, 65 S. C. 544, 44 S. E. 70.

One not a party cannot be heard in this court to question the propriety of an order of consolidation when he was not a party to the litigation when such order was made and when he made no objection to said order in the circuit court, and when such order is not shown to be prejudicial to his rights. *Russell v. Chicago Trust & Sav. Bank*, 139 Ill. 538, 29 N. E. 37.

Delay in Making Motion.—"One seeking to set aside an order of consolidation made seven months before

. . . ought to show that it was made over his protest or present a reasonable excuse for not then objecting." *Scott v. Farmers, etc. Bank* (Tex. Civ. App.), 66 S. W. 485.

Objection at a later term is ineffective. *Jones v. Jones*, 94 N. C. 111.

36. *Moore's Admr. v. Francis*, 17 Tex. 28.

37. *Cal.—Bangs v. Dunn*, 66 Cal. 72, 4 Pac. 963. *Fla.—Raulerson v. Rockner's Admr.*, 17 Fla. 809, where parties agreed. *Ill.—Russell v. Chicago Tr. & Sav. Bank*, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345. *N. C.—Jones v. Jones*, 94 N. C. 111. *Tex.—Moore's Admr. v. Francis*, 17 Tex. 28; *Mills v. Paul* (Tex. Civ. App.), 30 S. W. 242.

38. *U. S.—Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. ed. 706. *Ariz.—London, Paris, etc., Bank v. Abrams*, 6 Ariz. 87, 53 Pac. 588, where plaintiffs in an action intervened in another. *Ga.—Hatcher v. National Bank*, 79 Ga. 542, 5 S. E. 109. *S. C.—Scott & Co. v. Brown*, 1 Nott & McC. 417; *Worthy v. Chalk*, 10 Rich. L. 141. *S. D.—Aultman Co. v. Ferguson*, 8 S. D. 458, 66 N. W. 1081, without regard to any stipulation. *Tex.—Davis v. Dallas Nat. Bank* (Tex. Civ. App.), 26 S. W. 222. *Va.—M'Raes v. Boast*, 3 Rand. 481. *W. Va.—Wyatt v. Thompson*, 10 W. Va. 645. *Wis.—Blesch v. Chicago & N. W. R. Co.*, 44 Wis. 593.

Presumption as to Ruling Below. If the record on appeal does not show the nature of the cause which the lower court refused to consolidate with the case before the court, "the presumption is that the court below with the record in that case before it ruled

discretion will be interfered with upon appeal, only where the ends of justice demand it;³⁹ as where there is a plain case of an abuse of discretion.⁴⁰ And there will not be a reversal unless some injury be

correctly" in not consolidating. *Webb v. Trescony*, 78 Cal. 621, 18 Pac. 796.

Remedy Not Lost by Failure To Move to Consolidate.—Though consolidation would be proper a remedy will not be lost in one case by failure to move its consolidation with another inasmuch as consolidation is effected on an order of court alone, upon application of a party, or by agreement, and even when applied for, the order is discretionary. *Jones v. Witousek*, 114 Iowa 14, 86 N. W. 59.

Questions To Be Tried Must Be the Same.—"A motion to consolidate is addressed to the discretion of the court, and ought not to be granted unless it appears from the moving papers that the questions to be tried are substantially the same in both suits," and a mere statement that they are the same is not sufficient but the nature of the actions, defenses, etc., must be disclosed so that the court may judge whether the question could be disposed of at one trial. *Crane v. Koehler*, 6 Abb. Pr. (N. Y.) 328n.

Not a Final Order.—*Mitchell v. Smith*, 2 Md. 271.

See 2 Stand. Proc. 162, *et seq.*

39. *Witherlee v. Ocean Ins. Co.*, 24 Pick. (Mass.) 67; *State v. Hannibal & St. J. R. Co.*, 89 Mo. 571, 1 S. W. 133.

On Appeal From Justice's Court to Circuit Court.—Where six cases of libel in the nature of a proceeding in admiralty were appealed from the justice of the peace to the circuit court and there a motion to consolidate was refused, it was held that a refusal to consolidate the several causes was not an error which is susceptible of revision, though doubtless the consolidation ought to have been made by the circuit court in order to save expenses. *Monroe & Tardy v. Brady*, 7 Ala. 59.

40. *U. S.—Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. ed. 706; *Toledo, etc. R. Co. v. Continental Trust Co.*, 95 Fed. 497. *Ala.*—*Powell v. Gray*, 1 Ala. 77. *Ariz.*—*London, P. & S. Bank v. Abrams*, 6 Ariz. 87, 53 Pac. 588. *Ark.*—*St. Louis, etc. R. Co. v. Broomfield*, 83 Ark. 288, 104 S. W. 133 (holding that "it is

only for the purpose of correcting an abuse of discretion in consolidating cases that the rulings of the trial court are reviewable"); *Meehan v. Watson*, 65 Ark. 216, 47 S. W. 109; *Lindsay v. Wayland*, 17 Ark. 385. *Conn.*—*Tracy v. New York, etc. R. Co.*, 82 Conn. 1, 72 Atl. 156. *D. C.*—*Welch v. Lynch*, 30 App. Cas. 122. *Ga.*—*Georgia R. & Bkg. Co. v. Gardner*, 118 Ga. 723, 45 S. E. 600; *Hatcher v. National Bank*, 79 Ga. 542, 5 S. E. 109; *Lewis v. Daniel*, 45 Ga. 124. *Ill.*—*Miles v. Danforth*, 37 Ill. 156. *Ind.*—*Grant v. Davis*, 5 Ind. App. 116, 31 N. E. 587. *Ia.*—*Keller v. Harrison*, 139 Iowa 383, 116 N. W. 327; *Jones v. Witousek*, 114 Iowa 14, 86 N. W. 59. *Kan.*—*McCullough v. Hayde Contracting Co.*, 82 Kan. 734, 109 Pac. 176; *Wichita, etc. R. Co. v. Hart*, 7 Kan. App. 550, 51 Pac. 933. *Mass.*—*Sullivan v. Fugazzi*, 193 Mass. 518, 79 N. E. 775; *Burt v. Wigglesworth*, 117 Mass. 302 (where the parties were held to an agreement to try certain cases together); *Springfield v. Sleeper*, 115 Mass. 587; *Kimball v. Thompson*, 4 Cush. 441, 50 Am. Dec. 799; *Witherlee v. Ocean Ins. Co.*, 24 Pick. 67. *Mich.*—*Wisner v. Mabley's Estate*, 70 Mich. 271, 38 N. W. 262; *Harris v. Sweetland*, 48 Mich. 110, 11 N. W. 830. *Mo.*—*Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726; *State v. Hannibal & St. J. R. Co.*, 89 Mo. 571, 1 S. W. 133. *N. J.*—*Den v. Kimble*, 9 N. J. L. 335. *N. M.*—*Lincoln-Lucky, etc. Co. v. Hendry*, 9 N. M. 149, 50 Pac. 330. *N. Y.*—*Argyle Co. v. Griffith*, 128 App. Div. 262, 112 N. Y. Supp. 773; *Waiontha Knitting Co. v. Hecht & Campe*, 58 Misc. 350, 111 N. Y. Supp. 10; *Perkins v. Merchants' Lithographing Co.*, 21 Misc. 516, 47 N. Y. Supp. 712. *N. C.*—*Sumner v. Staton*, 151 N. C. 198, 65 S. E. 902; *Person v. State Bank*, 11 N. C. 294. *Ohio.*—*Taylor v. Standard Brick Companies*, 66 Ohio St. 360, 64 N. E. 428. *S. C.*—*Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562 ("not an arbitrary or a capricious discretion, but a legal discretion"); *Worthy v. Chalk*, 10 Rich. 141; *Planters' & M. Bank v. Cowing*, 2 Nott & McC. 438. *S. D.*—*Aultman Co. v. Ferguson*, 8 S. D.

shown to have resulted thereby,⁴¹ or unless the cases are not such as the statute allows to be consolidated, and the court has exceeded its authority in consolidating.⁴²

458, 66 N. W. 1081. **Tex.**—Young v. Gray, 65 Tex. 99; Harle v. Langdon's Heirs, 60 Tex. 550; Raymond v. Cook, 31 Tex. 374; Hallam v. Moore (Tex. Civ. App.), 126 S. W. 908; McCormick v. Jester, 53 Tex. Civ. App. 306, 115 S. W. 278 (actions contesting an election); Bolden v. Hughes, 48 Tex. Civ. App. 496, 107 S. W. 91 (citing Rev. St. 1895, art. 1454); Scott v. Farmers, etc. Bank (Tex. Civ. App.), 66 S. W. 485; Spencer v. James, 10 Tex. Civ. App. 327, 31 S. W. 540, 43 S. W. 556; Johnston v. Luling Mfg. Co. (Tex. Civ. App.), 24 S. W. 998; Davis v. Dallas Nat. Bank (Tex. Civ. App.), 26 S. W. 222 (even though appellate court disagree with court below); Texas, etc. R. Co. v. Hays, 2 Wills. Civ. Cas. §390; Morris v. Wood, 1 White & W. Civ. Cas. §1311. **Va.**—M'Rae v. Boast, 3 Rand. 481. **Wash.**—Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397. **W. Va.**—Castle v. Castle, 71 S. E. 385; McKittrick v. McKittrick, 43 W. Va. 117, 27 S. E. 303; Wyatt v. Thompson, 10 W. Va. 645; Beach v. Woodyard, 5 W. Va. 231. **Wis.**—Allen v. McRae, 122 Wis. 246, 100 N. W. 12; Lauterbach v. Netzo, 111 Wis. 326, 87 N. W. 229; Blesch v. Chicago, etc. R. Co., 44 Wis. 593.

⁴¹ **Ill.**—Russell v. Chicago Tr. & Sav. Bank, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345; Woodburn v. Woodburn, 23 Ill. App. 289. **N. Y.**—Gray Lithograph Co. v. Schulman, 84 N. Y. Supp. 503; *In re Shipman's Estate*, 82 Hun 108, 31 N. Y. Supp. 571; *In re Hodgman's Estate*, 10 N. Y. Supp. 491. **Tex.**—Leslie v. Elliott, 26 Tex. Civ. App. 578, 64 S. W. 1037.

In *Miller v. McLaughlin*, 141 Mich. 433, 104 N. W. 780, 12 Det. Leg. N. 504, where there was a consolidation of suits by a trustee to enforce securities, the court said: "It is next urged that by the consolidation Mrs. Jebb is deprived of the right to file a cross-bill against her co-defendant Moran, to compel him to contribute towards the payment of such portion of the indebtedness as was satisfied by the sale of her individual property, put up as collateral for the joint obliga-

tion of Mrs. Jebb and Mr. Moran through the trust agreement. If she is now deprived of that right in these chancery suits, she still may maintain a suit at law to recover the amount due from Mr. Moran. Mrs. Jebb might have appeared in either of the two suits and filed a cross-bill. She did not choose to do so, and we think now she is not entitled to have the decree reversed. Even upon the order of consolidation she might have asked leave to interpose a cross-bill for the protection of her rights as against Moran, and the court would undoubtedly have granted it. A court of chancery determines and settles the rights of all the parties to a transaction of this character, in order to avoid a multiplicity of suits. We think it is Mrs. Jebb's own fault that she has not put herself in the position which entitles her now to this remedy."

When the object of consolidation is simply to save costs, no error can be assigned for refusal to consolidate actions, unless it be shown that additional costs were thereby incurred. *Brigel v. Creed*, 65 Ohio St. 40, 60 N. E. 991.

⁴² So as to setting aside an order of consolidation. *Young v. Gray*, 65 Tex. 99.

⁴³ *Ortman v. Union Pac. R. Co.*, 32 Kan. 419, 4 Pac. 858.

Separate Appeals.—"We are asked to consider the evidence in the record on appeal in the case of *Gordon Hardware Co. v. San Francisco & S. R. R. Co.*, post, p. 620, because that case and the one at bar were consolidated, by order of the court below, upon consent of counsel for the respective parties; but this we cannot do. The plaintiff in each case was defeated in the court below, and each one moved separately for a new trial, the grounds of which were peculiar to the respective cases; separate bills of exceptions were prepared and filed, separate appeals were taken, and each case was presented in this case on its own record." *Harmon v. San Francisco & S. F. R. Co.*, 86 Cal. 617, 25 Pac. 124.

CONSPIRACY

By CHARLES W. FOURL,
Of the California Bar.

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I. THE CRIME.—A. WHAT IT IS.—A conspiracy is a combination of two or more persons by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.¹

B. HOW PROSECUTED.—Since conspiracy to defraud the United States is punishable by imprisonment in the penitentiary, it is an infamous offense and can only be prosecuted by indictment.² But in the absence of a constitutional or statutory provision to the contrary, a conspiracy may be prosecuted by information, as conspiracy at common law is a misdemeanor.³

C. ALLEGATIONS AS TO THE AGREEMENT.—In accordance with the general rule an indictment or information for conspiracy must set

1. *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419. And see the following cases: U. S.—*National Fire Proofing Co. v. Masons, etc.*, Assn., 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148; *United States v. Moore*, 173 Fed. 122; *Goldfield, etc., Co. v. Goldfield, etc., Union*, 159 Fed. 500. Conn.—*State v. Rowley*, 12 Conn. 101. Del.—*State v. Effler*, 78 Atl. 411. Ga.—*Brown v. Jacobs, etc., Co.*, 115 Ga. 429, 41 S. E. 553; *Stevens v. State*, 8 Ga. App. 217, 68 S. E. 874; Ill.—*Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. Kan.—*Atchison, etc., R. Co. v. Brown*, 80 Kan. 312, 102 Pac. 459, 133 Am. St. Rep. 213, 23 L. R. A. (N. S.) 247. La.—*State v. Slutz*, 106 La. 182, 30 So. 298. Me.—*State v. Mayberry*, 48 Me. 218. Md.—*Garland v. State*, 112 Md. 83, 75 Atl. 631; *Lanasa v. State*, 109 Md. 602, 71 Atl. 1058. Mass.—*Com. v. Hunt*, 4 Metc. 111, 38 Am. Dec. 346. Mich.—*Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321. Mo.—*State v. Dalton & Fay*, 134 Mo. App. 517, 114 S. W. 1132. N. Y.—*Newton v. Erickson*, 126 N. Y. Supp. 949. Okla.—*Wilson v. State*, 115 Pac. 819; *Wishart v. State*, 115 Pac. 797. Pa.—*Com. v. Richardson*, 229 Pa. 609, 79 Atl. 222, *affirming* 42 Pa. Super. 337. S. C.—*State v. Davis*, 70 S. E. 811. Tenn.—*Owens v. State*, 16 Lea 1. Eng.—*Rex v. Seward*, 1 Ad. & El. 706, 28 E. C. L. 185; *Jones' Case*, 4 B. & Ad. 345, 24 E. C. L. 71.

The word conspiracy at common law was formerly used almost exclusively of an agreement of two or more persons falsely to indict one, or to procure him to be indicted of felony. *Callan v. Wilson*, 127 U. S. 540, 556, 8 Sup. Ct. 1301, 32 L. ed. 222.

Existence of conspiracy is for the jury. *Marrash v. United States*, 168 Fed. 225, 93 C. C. A. 511.

Sufficiency of Circumstances for Jury. *People v. Moran*, 144 Cal. 48, 77 Pac. 777.

An instruction assuming it is improper. *Poe v. Stockton*, 39 Mo. App. 550.

That circumstantial evidence is the usual method of proof is not a proper instruction. *O'Donnell v. People*, 110 Ill. App. 250, *affirmed*, *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842.

For matters of evidence see the title "Conspiracy" in the ENCYCLOPÆDIA OF EVIDENCE.

2. *United States v. London*, 176 Fed. 976.

3. *State v. Dyer*, 67 Vt. 690, 32 Atl. 814, under a general statute providing for prosecutions by information where punishment is not capital, or imprisonment for more than seven years.

See generally the title "**Indictment and Information.**"

Indictment or Action of Debt for Fine Allowed.—Where one section of a statute provides that any corporation becoming a member of a combination to fix prices, shall be liable to indictment, and another section provides for the punishment of violators thereof by fine, and still another section provides that the recovery of the fines imposed for a violation of the statute "may" be recovered by an action of debt in the name of the people, the word "may" is used in a permissive sense, and the state has the right to prosecute by indictment or may bring an action of debt to recover the fine imposed for a violation of the statute. *Chicago, etc., Co. v. People*, 214 Ill. 421, 73 N. E. 770.

forth the essential elements of the offense with sufficient clearness and particularity to enable the accused to understand the nature of the charge against him, to prepare intelligently to meet it, and to plead the result, whether as conviction or acquittal, in bar of another prosecution for the same offense.⁴

4. U. S.—*Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. ed. 698; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 538; *Jones v. United States*, 179 Fed. 584, 593, 103 C. C. A. 142; *Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; *Miller v. United States*, 133 Fed. 337, 341, 66 C. C. A. 399; *McKenna v. United States*, 127 Fed. 88, 62 C. C. A. 88; *Haynes v. United States*, 101 Fed. 817, 42 C. C. A. 34; *United States v. Burkett*, 150 Fed. 208; *United States v. Greene*, 115 Fed. 343; *United States v. Taffe*, 86 Fed. 113; *United States v. Adler*, 49 Fed. 736; *United States v. Walsh*, 5 Dill. 58, 28 Fed. Cas. No. 16,636. Ky. *Lane v. Com.*, 134 Ky. 519, 121 S. W. 486; *Com. v. Ward*, 92 Ky. 158, 17 S. W. 283. Me.—*State v. Roberts*, 34 Me. 320. Mass.—*Com. v. Hunt*, 4 Metc. 111, 125, 38 Am. Dec. 346. Mich.—*Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321. N. H.—*State v. Parker*, 43 N. H. 83. N. C.—*State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760. Vt.—*State v. Keach*, 40 Vt. 113.

Abbreviations of technical words to be explained. *United States v. Reichert*, 32 Fed. 142, 147.

"No offense is so easily charged and so difficult to be met unless the defendants are fully informed of the facts upon which the state will rely to sustain the indictment. While technical objections to indictments are not to be sustained, substantive and substantial facts should be alleged. General and undefined charges of crime, especially those involving mental conditions and attitudes, should not be encouraged. They are not, in harmony with the genius of a free people, living under a written constitution. We can see no good reason why an exception to the general rules of criminal pleading should be made in favor

of this crime." *State v. Van Pelt*, *supra*.

Technical Accuracy Not Required. No useless, impracticable standards which may embarrass rather than aid the administration of justice, should be required. Averments of essential elements plain and intelligible to common understanding are sufficient without regard to their technical accuracy. *Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353.

Facts and Overt Acts Must Be Specifically Set Out.—All facts necessary to constitute the conspiracy must be averred and the overt act where necessary must be averred with all the particularity required in criminal pleadings. *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720.

Time, Place, Nor Circumstance Not Given.—Charging a conspiracy to defraud, "A. & Co., and divers other creditors by removing and secreting divers goods, etc., of defendants, the quantities and qualities of which were unknown, of the value of \$5000, is insufficient," as neither time, place nor circumstance is given. *Hartmann v. Com.*, 5 Pa. 60.

See, *infra*, II, A, 3.

Falsely Inserting Names in Census Schedule.—All the particular names falsely inserted in the census schedule by the census enumerator need not be set out—charging a few is sufficient. *United States v. Stevens*, 44 Fed. 132, 141.

Accounts and Vouchers Not Sufficiently Specified.—Charging conspiracy to defraud the United States in certifying that certain false and fraudulent accounts and vouchers for material furnished for use in the construction of the said custom house and post-office, and for labor performed on said building were true and correct, is too general and indefinite, since it fails to show what accounts and vouchers are referred to so as to enable the defendant to prepare his

Since the gist of the crime is the unlawful combination or conspiracy,⁵ it is essential that the indictment shall set forth the unlawful conspiracy or combination of minds sufficiently.⁶

defense. *United States v. Walsh*, 5 Dill. 58, 28 Fed. Cas. No. 16,636.

Procuring Illegal Voting—Bounds of District Need Not Be Set Out.—*State v. Nugent*, 77 N. J. L. 84, 71 Atl. 485.

Use of Term "Imported"—Conspiracy To Defraud United States by Smuggling.—Counts of an indictment alleging a conspiracy to defraud the United States of merchandise to be imported into the United States without invoicing or entering the same, and without paying the duties then and there accruing upon said merchandise so imported, is not open to the objection that the word "imported" does not include the entry into and passage through the custom house and that the goods may, before being entered and invoiced, pass outside the United States without paying duty, and that, therefore, it does not allege an offense, especially where it is further alleged that they were to be imported "without paying the duties then and there accruing." *United States v. White*, 171 Fed. 775.

5. **U. S.**—*Bannon v. United States*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. ed. 494; *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. ed. 545; *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. ed. 698; *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539; *Ware v. United States*, 154 Fed. 577, 84 C. C. A. 503. **Ala.**—*Thompson v. State*, 106 Ala. 67, 17 So. 512. **Conn.**—*State v. Thompson*, 69 Conn. 720, 38 Atl. 868. **Ga.**—*Brown v. Jacobs, etc., Co.*, 115 Ga. 429, 41 S. E. 553. **Ia.**—*State v. Grant*, 86 Iowa 216, 53 N. W. 120. **La.**—*State v. Slutz*, 106 La. 182, 30 So. 298. **Md.**—*Garland v. State*, 112 Md. 83, 75 Atl. 631; *State v. Buchanan*, 5 Har. & J. 317, 9 Am. Dec. 534. **Mass.**—*Com. v. Hunt*, 4 Metc. 111, 38 Am. Dec. 346; *Com. v. Warren*, 6 Mass. 74; *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54. **Mich.**—*People v. Saunders*, 25 Mich. 119. **N. H.**—*State v. Burnham*, 15 N. H. 396. **N. J.**—*State v. Rickey*, 9 N. J. L. 293. **N. Y.**—*People v. Shelden*, 139 N. Y. 251, 34 N. E. 785, 36 Am.

St. Rep. 690, 23 L. R. A. 221; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122. **Pa.**—*Com. v. Bartilson*, 85 Pa. 482. **Tex.**—*Bailey v. State*, 42 Tex. Crim. 289, 59 S. W. 900. **Vt.**—*State v. Noyes*, 25 Vt. 415.

6. **U. S.**—*Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. ed. 667; *Miller v. United States*, 133 Fed. 337, 342, 66 C. C. A. 399; *United States v. Adler*, 49 Fed. 736. **Ky.**—*Com. v. Morton*, 140 Ky. 628, 131 S. W. 506; *Taylor v. Com.*, 28 Ky. L. Rep. 819, 90 S. W. 581. **La.**—*State v. Slutz*, 106 La. 182, 30 So. 298. **Mich.**—*People v. Richards*, 1 Mich. 217, 51 Am. Dec. 75. **R. I.**—*State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817. **S. C.**—*State v. Jackson*, 7 S. C. 283, 25 Am. Rep. 476.

The use of the words or phrases "combine, confederate, agree together," or "agree between and among themselves" in connection with the word "conspire," while usual and proper, are not necessary (*Wright v. United States*, 108 Fed. 805, 48 C. C. A. 37); nor is the word "wilfully" or the word "unlawfully" required (*State v. McCoy*, 61 W. Va. 258, 57 S. E. 294).

Particularity of Criminal Pleadings. When the conspiracy is one to commit an offense clearly defined by statute (as are all United States offences) no high degree of particularity is required in describing the offense; it must appear that an offense against the United States has been committed, but the conspiracy must be set forth with all the particularity of criminal pleadings, because protected by constitutional safeguards. *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720.

Allegations of Conspiracy.—The following have been held to allege the conspiracy sufficiently. **U. S.**—*Wright v. United States*, 108 Fed. 805, 48 C. C. A. 37 ("did conspire"); *United States v. White*, 171 Fed. 775 ("conspired"); *United States v. Green*, 136 Fed. 618 ("B. & G. unlawfully did conspire, combine, confederate and agree together to defraud the United

Malevolence.—It must also appear from the face of the indictment that the combination was wilful and corrupt.⁷

The duration of the unlawful agreement need not be alleged as that is not the essence of the offense.⁸

Accomplishment.—There is no necessity for alleging that the unlawful agreement was actually carried out.⁹

States, that is to say, G. then and there did promise and agree with the said B.''). **Ark.**—*Bundy v. State*, 130 S. W. 522, ("did conspire and agree together.") **Colo.**—*Lipschitz v. People*, 25 Colo. 261, 53 Pac. 11, ("feloniously, wilfully and maliciously did conspire.") **Ill.**—*People v. Smith*, 144 Ill. App. 129, *affirmed*, 239 Ill. 91, 87 N. E. 885; *Chicago, etc., Co. v. People*, 114 Ill. App. 75, *affirmed*, 214 Ill. 421, 73 N. E. 770 (conspiracy was entered into "unlawfully, fraudulently, maliciously and wickedly"). **Mo.**—*State v. Berry*, 21 Mo. 504, ("did unlawfully assemble together and mutually agree.") **N. J.** *State v. Nugent*, 77 N. J. L. 84, 71 Atl. 485 ("unlawfully did confederate, conspire and bind themselves by agreement"); *Johnson v. State*, 26 N. J. L. 313 ("falsely combined"). **Va.**—*State v. McCoy*, 61 W. Va. 258, 57 S. E. 294, ("combine, conspire and confederate together.") **Eng.**—*Rex v. Gill*, 2 B. & Ald. 204, (unlawfully did conspire and combine together).

The rule does not apply to an object which may never have been accomplished, and which is not the gist of the offense charged, although an essential ingredient thereof. *Hazen v. Com.*, 23 Pa. 355, 364. And see, **U. S.** *Mays v. United States*, 179 Fed. 610, particular description of lands not required because they had not been acquired. **Md.**—*Lanasa v. State*, 109 Md. 602, 71 Atl. 1058. **Tex.**—*Brown v. State*, 2 Tex. App. 115.

7. *Madden v. State*, 57 N. J. L. 324, 30 Atl. 541; *Woods v. State*, 47 N. J. L. 461, 1 Atl. 509.

In the absence of a general charge of a corrupt combination to cheat, it is essential that the facts contained in the statement of its agreement and its character, as exhibited by the scheme by which it was to be carried into execution, should show a corrupt purpose. *Madden v. State*, 57 N. J. L. 324, 30 Atl. 541.

But if the purposes of the combination are set out so that it appears

that the design was to defraud certain persons, the mere failure to use the word "corrupt" in charging the combination would not be material. *Wood v. State*, 47 N. J. L. 461, 1 Atl. 509. This case was an indictment for conspiracy against a board of county freeholders having control of the county funds for unlawfully voting for, ordering and directing the payment of certain money to a third party, but not alleging the confederacy to have been corrupt, and the purposes and acts set forth not showing a corrupt purpose and not alleging such third person was not entitled to the money. This was insufficient. *Wood v. State*, 47 N. J. L. 461, 1 Atl. 509.

The corrupt motive may be made to appear by the indictment in two ways—one, in charging that the object of the conspiracy is to accomplish an unlawful act. In such case the intent is made to appear by the charge of a combination to do the unlawful or fraudulent act. The other way is by charging a combination to do a lawful act, or an act innocent in itself, by unlawful means. In such case the intent or corrupt motive must appear through the allegations of the means employed to effect the object of the conspiracy. *United States v. Moore*, 173 Fed. 122, 132.

8. *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817.

9. **Ind.**—*State v. Bruner*, 135 Ind. 419, 35 N. E. 22. **Mass.**—*Com. v. Hunt*, 4 Metc. 111, 38 Am. Dec. 346; *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54. **Vt.** *State v. Keach*, 40 Vt. 113; *State v. Noves*, 25 Vt. 415.

Reason of Rule.—Necessity for Proving Execution When Averred.—The gist of the offense in a charge of conspiracy consists in the act of conspiring together to accomplish some unlawful purpose, or to accomplish some object not in itself criminal by unlawful means; and therefore, it is not necessary to charge the execution of the unlawful agreement. The conspiracy is

Pecuniary Reward.—It need not be alleged that the conspirators received or were to receive pecuniary advantage from the conspiracy.¹⁰

No More Specific Than the Agreement.—It is well settled that the indictment need be no more specific than was the agreement of the conspirators,¹¹ for the conspirators may not have had in mind any specific property to be obtained,¹² or any specific person or persons to be injured or defrauded.¹³

the complete criminal act, or the thing which constitutes the crime; and, therefore, if the execution of the unlawful purpose is averred, it is by way of aggravation, and proof of it is not necessary to a conviction. *State v. Keach*, 40 Vt. 113.

Arkansas.—Alleging Non-Commission of Felony.—In Arkansas, if the offense charged is conspiracy to commit a felony, it has been held necessary to allege that the felony was not committed, as under the Arkansas statute (*Mansfield's Digest*, §1822), if the felony has been committed, the parties cannot be indicted for the conspiracy. *Elsay v. State*, 47 Ark. 572, 2 S. W. 337, conspiracy to utter and publish for true forged county warrants.

Conspiracy To Corrupt Jury.—Capacity To Carry Into Execution.—An indictment charging a conspiracy "to summon or cause to be summoned, certain persons as jurors to try a certain cause," need not show that any of the parties named in the indictment had the capacity to carry the alleged purpose into execution. The offense is complete without the summoning, if the jurors had been approached by the parties named in the indictment. *Galagher v. People*, 211 Ill. 158, 71 N. E. 842.

10. U. S.—*United States v. Bradford*, 148 Fed. 413, 423; *United States v. Newton*, 52 Fed. 275; *United States v. Allen*, 24 Fed. Cas. No. 14,432. R. I.—*State v. Bacon*, 27 R. I. 252, 61 Atl. 653. Eng.—*Reg. v. Esdaile*, 1 Post. & F. 213.

Variance as to Parties To Be Benefited.—Though the indictment charges that the conspiracy was entered into for the benefit of all the defendants named, and the evidence shows that only a part of the defendants were to participate in the benefits, it is sufficient. The essence of the offense is the conspiracy for the unlawful purpose. The particular persons who were to be

benefited by the conspiracy is not a material issue. *Olson v. United States*, 133 Fed. 849, 854, 67 C. C. A. 21.

11. U. S.—*Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. ed. 545; *Mays v. United States*, 179 Fed. 610 (description of lands not required). D. C.—*Hyde v. United States*, 27 App. Cas. 362; *Lorenz v. United States*, 24 App. Cas. 367. Md.—*Garland v. State*, 112 Md. 83, 75 Atl. 631, 634 (alleging means of obstructing justice unnecessary as the unlawful agreement may not have gone that far).

12. *Lanasa v. State*, 109 Md. 602, 71 Atl. 1058.

It is not essential to the completion of the crime that any particular property should be destroyed; it is therefore not required that the object of the unexecuted conspiracy should be set out with great particularity and certainty in the indictment because only such facts need be stated as shall fairly and reasonably inform the accused of the offense with which he is charged. To require more in such a case would be to put an unnecessary burden upon the state, and make it impossible in many cases to secure the conviction of the guilty. *Lanasa v. State*, 109 Md. 602, 71 Atl. 1058, 1061.

It is immaterial that the precise piece or pieces of land to be acquired should have been agreed upon by the alleged conspirators at the time of the formation of such conspiracy, nor is it essential that the identity of the persons to be suborned or the particular time and place of the subornation be alleged. *Dwinnell v. United States*, 186 Fed. 754, 758.

13. See *infra*, I, H.

An indictment for conspiracy to defraud the United States of certain public lands by suborning certain persons need not name the persons to be suborned nor the particular time and place of such subornation. *Dwinnell v. United States*, 186 Fed. 754.

The Conspirators.—An indictment need not allege the names of all the conspirators, or charge that their names are unknown, unless a statute requires such facts to be stated.¹⁴ It is usual, however, to charge the names of the other conspirators as unknown, and this is sufficient though the names were known to the grand jury and might have been set forth.¹⁵ An indictment containing a true averment that the names of the other conspirators are to the grand jury unknown has always been held sufficient.¹⁶

14. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600, 7 L. R. A. (N. S.) 669. *Contra*, *Sullivan v. People*, 108 Ill. App. 323.

Proof That All Parties Charged Are Conspirators Unnecessary.—If the indictment sets forth the names of the conspirators and charges a conspiracy with several others, it is sufficient to prove conspiracy with any of such others; all need not be proved to have been co-conspirators. *Eacock v. State*, 169 Ind. 488, 82 N. E. 1039; *Woodworth v. State*, 20 Tex. App. 375.

15. **U. S.**—*Jones v. United States*, 179 Fed. 584, 103 C. C. A. 142, indictment fully set out his connection but did not name him as conspirator. *Cal. People v. Sacramento, etc. Assn.*, 12 Cal. App. 471, 483, 107 Pac. 712. **Ill.**—*People v. Smith*, 239 Ill. 91, 87 N. E. 885, *affirming* 144 Ill. App. 129. But see *Sullivan v. People*, 108 Ill. App. 337. **N. Y.**—*People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122.

In *Martin v. State*, 115 Ga. 256, 41 S. E. 576, an indictment for riot, it is said that the failure to allege that the names of the other rioters were unknown, while it would render the indictment subject to special demurrer was no ground for a motion in arrest of judgment or for a new trial.

Parties Not Descriptive of Offense. The argument that where one of the parties to the conspiracy is described in the indictment as being "unknown," when in fact he was known to the grand jury, "proceeds upon the hypothesis that the persons who enter into a conspiracy so form a part of the offense as to be descriptive of the offense, and that a misdescription of the parties who are engaged in the conspiracy is fatal. The logic of this position is, if too many or too few are named in the indictment, there must be an acquittal of all. This cannot be the law. Clearly, if three persons are named in an indictment as conspirators, two may be

convicted and one acquitted, and, if two or more are named in the indictment, it would be no defense to prove that some one not named in the indictment was a party to the conspiracy. We are satisfied the great weight of authority is to the effect that the persons engaged in a conspiracy are not so far a part of the offense as to be said to be descriptive of the offense, and the fact that a conspirator is designated in the indictment as unknown, when he is known, to the grand jury, is not fatal to a conviction." *People v. Smith*, 239 Ill. 91, 107, 87 N. E. 885, 891, 892, *citing Jones v. United States*, 179 Fed. 584, 103 C. C. A. 142.

An information for a conspiracy in restraint of trade should allege the names of all the parties to the conspiracy known to the prosecuting officer. *State v. Dreany*, 65 Kan. 292, 69 Pac. 182. *Contra*, *People v. Sacramento, etc. Assn.*, 12 Cal. App. 471, 107 Pac. 712.

16. **U. S.**—*Wong Din v. United States*, 135 Fed. 702, 68 C. C. A. 340; *Miller v. United States*, 133 Fed. 337, 66 C. C. A. 399. **Cal.**—*People v. Sacramento, etc. Assn.*, 12 Cal. App. 471, 107 Pac. 712, 718. **Ill.**—*Cooke v. People*, 231 Ill. 9, 82 N. E. 863; *Sullivan v. People*, 108 Ill. App. 323. **Mass.** *Com. v. Hunt*, 4 Metc. 111, 38 Am. Dec. 346; *Com. v. Davis*, 9 Mass. 415. **N. Y.**—*People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122. **Pa.**—*Com. v. Edwards*, 135 Pa. 474, 19 Atl. 1064; *Com. v. Foering*, 4 Clark 29, 6 Pa. Law. J. 281.

Rebating—Railroads Need Not Be Named.—An indictment for conspiracy to induce shippers to accept rebates from railroads need not aver names of railroads where they were unknown to grand jury. *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477.

Landing Chinese Illegally.—An indictment charging a conspiracy to aid and abet the landing of Chinese, which

Loss or Injury.—It is not generally necessary to allege injury or loss to some person as a result of the conspiracy.¹⁷

D. ALLEGATIONS AS TO DATE OF CONSPIRING.—While the date of the formation of the conspiracy must be alleged,¹⁸ it need not be pleaded with exact accuracy,¹⁹ as any date within the period of limitations may be shown.²⁰ But it is essential that the indictment shall show that the offense is not barred by the statute of limitations.²¹

alleged that defendants conspired with divers other persons whose true names were unknown to aid and abet the landing in the United States of Chinese whose names were unknown from certain unknown vessels and from various ports and places in China to the grand jury unknown is not insufficient because failing to allege facts sufficient to constitute an offense against United States laws. *Wong Din v. United States*, 135 Fed. 702, 68 C. C. A. 340.

17. *Com. v. Fuller*, 132 Mass. 563; *State v. Straw*, 42 N. H. 393.

Conspiracy To Defraud United States.

It is not necessary to charge or prove an actual or property loss to make a case under Rev. St. §5440 for conspiracy to defraud the United States. *Haas v. Henkel*, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. ed. 569; *United States v. Keitel*, 211 U. S. 370, 394, 29 Sup. Ct. 123, 53 L. ed. 230, 243; *Hyde v. Shine*, 199 U. S. 62, 81, 25 Sup. Ct. 760, 50 L. ed. 90, 96; *McGregor v. United States*, 134 Fed. 187, 69 C. C. A. 477; *Curley v. United States*, 130 Fed. 1, 64 C. C. A. 369.

18. **U. S.**—*United States v. Soper*, 4 Cranch C. C. 623, 27 Fed. Cas. No. 16,353. **Ill.**—*People v. Smith*, 144 Ill. App. 129, *affirmed*, 239 Ill. 91, 87 N. E. 885. **N. Y.**—*People v. Willis*, 34 App. Div. 203, 54 N. Y. Supp. 642, *reversed*, 158 N. Y. 392, 53 N. E. 29.

19. **U. S.**—*Bradford v. United States*, 152 Fed. 617, *affirming* *United States v. Bradford*, 148 Fed. 413, allegation of date prior to commission of covert act sufficient. **Colo.**—*Imboden v. People*, 40 Colo. 142, 90 Pac. 608. **Ill.**—*People v. Smith*, 144 Ill. App. 129, *affirmed*, 239 Ill. 91, 87 N. E. 885.

While the allegation of time is not material, yet it is proper to be considered as indicating whether another conspiracy alleged to have been entered into on a different date is a separate and distinct offense. *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842, 846.

Alleging the "conspiracy to have

been entered into in or about the month of February, 1896," is sufficiently specific as to time. *People v. Willis*, 153 N. Y. 392, 53 N. E. 29.

Conspiracy To Conceal Property From Trustee in Bankruptcy.

The time of the offense is properly laid as of the date of the refusal of the bankrupts to turn over their property to the trustee where the conspiracy of the bankrupts to conceal property from the trustee was formed and carried into effect within thirty days of the filing of the petition in bankruptcy, and on demand the bankrupts refused to turn over the property to the trustee. *United States v. Stern*, 186 Fed. 854.

20. **U. S.**—*Bradford v. United States*, 152 Fed. 617, 81 C. C. A. 607, 12 L. R. A. (N. S.) 472, *affirming* *United States v. Bradford*, 148 Fed. 413; *United States v. Newton*, 52 Fed. 275, 284; *United States v. Goldberg*, 7 Biss. 175, 25 Fed. Cas. No. 15,223. **Colo.**—*Imboden v. People*, 40 Colo. 142, 90 Pac. 608. **Ill.**—*People v. Smith*, 144 Ill. App. 129, *affirmed*, 239 Ill. 91, 87 N. E. 885.

21. **U. S.**—*Ex parte Black*, 147 Fed. 832. **Colo.**—*Imboden v. People*, 40 Colo. 142, 90 Pac. 608. **Pa.**—*Com. v. Bartilson*, 85 Pa. 482, 487.

Though the indictment alleges the formation of a conspiracy beyond the statutory period, if it alleges its continuance down to presentment it is sufficient as against a plea of limitations. *United States v. Kissel*, 213 U. S. 801, 31 Sup. Ct. 124, 54 L. ed. 1168, *reversing* 173 Fed. 823; *United States v. Stern*, 186 Fed. 854. See annotation to *Ware v. United States* (154 Fed. 577) in 12 L. R. A. 1053.

Existence Rather Than Formation Essential.—The law as laid down in *Ware v. United States*, 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, holds that it is the existence of the conspiracy rather than its formation which is the material fact, and "the conscious participation by the defend-

E. ALLEGATIONS AS TO PLACE OF CONSPIRING.—To give the court jurisdiction of the offense, the place of the formation of the alleged conspiracy must be alleged,²² where jurisdiction is based on this fact,

ant within three years in an existing conspiracy makes it a crime within the purview of section 5440, without regard to the time when the unlawful combination was in fact formed. This case may be said to be an innovation in the law, but it is a well-reasoned and instructive case." See *United States v. Barber*, 157 Fed. 889.

Averting New Conspiracy.—In *Ex Parte Black*, 147 Fed. 832, it is said "if the illicit scheme is continued and new overt acts to carry it out occur within the statutory period, the pleader should charge a new conspiracy within the statutory period." And in *United States v. Barber*, 157 Fed. 889, it is said: "It is well settled that, where overt acts are continued after the original conspiracy has been barred, the jury is warranted in inferring therefrom the existence of a new conspiracy and the pleader is authorized upon such a state of facts to aver the existence of a new or renewed conspiracy; and in many cases similarly situated as in *United States v. Greene* (D. C.) 146 Fed. 889, and *Ware v. United States* (C. C. A.) 154 Fed. 578, the indictment contains an averment of a new conspiracy." See also *United States v. Kissel*, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. ed. 1168; *United States v. Stern*, 186 Fed. 854; *United States v. Eccles*, 181 Fed. 906. But in *United States v. Brace*, 149 Fed. 874, the court held that the clause, "was continuously in process of execution," was not equivalent to an averment of a new conspiracy to defraud, but simply in effect an allegation that the original conspiracy was never abandoned, and was in continuous operation thereafter, until the date of the last overt act set out.

Overt Acts as Showing Conspiracy Formed Beyond Statutory Period. Where an overt act in pursuance of the conspiracy is required by statute to make the conspiracy indictable, it has been held that the statute of limitations begins to run from the commission of the first overt act, and an indictment showing that more than the statutory period has elapsed since the commission of the first overt acts is

insufficient. *Ex parte Black*, 147 Fed. 832; *United States v. McCord*, 72 Fed. 159; *United States v. Owen*, 32 Fed. 534. This is true where the conspiracy contemplated but one overt act. But where the conspiracy contemplated various overt acts, and the consequent continuance of the conspiracy beyond the first overt acts, the indictment is not bad though more than the statutory period has elapsed since the commission of the first overt act, if other acts within the period of limitation are charged. *Jones v. United States*, 162 Fed. 417, 89 C. C. A. 303; *Bradford v. United States*, 152 Fed. 617, 81 C. C. A. 606; *United States v. Bradford*, 148 Fed. 413; *United States v. Greene*, 146 Fed. 803, 115 Fed. 343; *American Fire Ins. Co. v. State*, 75 Miss. 24, 22 So. 99.

In *Com. v. Bartilson*, 85 Pa. 482, it was held proper to quash a count charging a conspiracy formed beyond the statutory period and setting forth overt acts within such period, though they were alleged to be "in pursuance and renewal of the said conspiracy." It was said, however, that the second count charged conspiracy formed within the statutory period without setting out any overt acts.

22. U. S.—*United States v. Marx*, 122 Fed. 964; *United States v. Soper*, 4 Cranch C. C. 623, 27 Fed. Cas. No. 16,353. **Ill.**—*Gallagher v. People*, 211 Ill. 158, 71 N. E. 842, *affirming* 110 Ill. App. 250. **Kan.**—*State v. Dreany*, 65 Kan. 292, 69 Pac. 182. **N. J.**—*State v. Nugent*, 77 N. J. L. 84, 71 Atl. 485.

A charge that on a certain date the defendants, by name, of the Eastern District of Virginia, did in the City of Washington, in the District of Columbia, and in Norfolk, Virginia, in the Eastern District of Virginia, and within the jurisdiction of the court, conspire, is sufficient in that it cannot be ascertained with any degree of accuracy or certainty within what jurisdiction it is proposed to charge the crime to have been committed. *United States v. Marx*, 122 Fed. 964.

unless a statute dispenses with the necessity thereof.²³

F. CONSPIRACY TO ACCOMPLISH ILLEGAL PURPOSE. — 1. Such Purpose Must Be Fully Stated. — When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, the allegations must clearly state that purpose.²⁴ It is never enough that the purpose or

Conspiracy To Procure Illegal Voting. Charging that certain persons conspired to procure a certain unqualified person to vote in a certain election district in E county sufficiently charges conspiracy to commit a crime in E county. *State v. Nugent*, 77 N. J. L. 84, 71 Atl. 485.

Immaterial Variance as to County. If the indictment charges the conspiracy to have been formed in A county and the evidence shows the conspiracy to have been formed in B county, but the court has jurisdiction over both counties, the variance is immaterial. *United States v. Smith*, 27 Fed. Cas. No. 16,322.

23. *Com. v. Rogers*, 181 Mass. 184, 63 N. E. 421, illegal voting at a caucus.

24. **U. S.** — *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 538; *Wong Din v. United States*, 135 Fed. 702, 68 C. C. A. 340; *Conrad v. United States*, 127 Fed. 798, 62 C. C. A. 478; *United States v. Moore*, 173 Fed. 122; *United States v. Melfi*, 118 Fed. 899; *United States v. Taffe*, 86 Fed. 113; *In re Wolfe*, 27 Fed. 606; *United States v. DeGrieff*, 16 Blatchf. 20, 25 Fed. Cas. No. 14,936. **Colo.** — *Lipschitz v. People*, 25 Colo. 261, 53 Pac. 1111. **Ill.** — *Towne v. People*, 89 Ill. App. 258. **Ind.** — *Eacock v. State*, 169 Ind. 488, 82 N. E. 1039; *Miller v. State*, 79 Ind. 198; *State v. McKinstry*, 50 Ind. 465; *Landringham v. State*, 49 Ind. 186. **Ia.** *State v. Savoye*, 48 Iowa 562. **Me.** *State v. Hewett*, 31 Me. 396; *State v. Bartlett*, 30 Me. 132. **Md.** — *State v. Buchanan*, 5 Har. & J. 317, 9 Am. Dec. 534. **Mass.** — *Com. v. Barnes*, 132 Mass. 242; *Com. v. Eastman*, 1 Cush. 189, 51 Am. Dec. 596; *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 346. **Mich.** — *People v. Saunders*, 25 Mich. 119; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321. **N. J.** — *State v. Nugent*, 77 N. J. L. 84, 71 Atl. 485; *Wood v. State*, 47 N. J. L. 461, 1 Atl. 509. **N. Y.** — *Lambert*

v. People, 9 Cow. 578. **N. C.** — *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177; *State v. Trammell*, 24 N. C. 379. **R. I.** — *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817. **Vt.** — *State v. Duncan*, 78 Vt. 364, 63 Atl. 225, 112 Am. St. Rep. 922, 2 L. R. A. (N. S.) 1144. **Wis.** — *State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719.

Reason of Rule. — “The gist of a criminal conspiracy is the unlawful concurrence of many in a wicked scheme, and that the crime of conspiracy is complete without any act having been done to carry it into execution. This consideration renders it but the more important that the charge of conspiracy should clearly set forth the purpose and object of the combination, as in these are to be found almost the only marks of certainty by which the parties accused may know what is the accusation they are to defend.” *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760.

Constitutionality of Act Dispensing With Necessity for Alleging Felony Contemplated. — The proviso in the Felony Act of Indiana (Act of May 31st, 1861, 2 R. S. 1876, p. 451) dispensing with the necessity of specifying the particular felony which it was the purpose or object of the persons combining to commit, is unconstitutional, against natural right and void. *Miller v. State*, 79 Ind. 198; *Scudder v. State*, 62 Ind. 13, 15.

Not By Implication or Intendment. The object must be directly and positively alleged and cannot be charged by implication or intendment or reference. *United States v. Atlanta Journal Co.*, 185 Fed. 656; *United States v. Moore*, 173 Fed. 122, 125; *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817.

Illustrations. — The object of the conspiracy is sufficiently charged where the object was alleged to be “to willfully and maliciously injure and destroy the property of J. D.” (*Lanasa*

means are so described that they may or may not be unlawful.²⁵

But in stating the object of the conspiracy, the same certainty and strictness are not required as would be required in an indictment in which such matter was charged as a substantive crime. Certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is required. If the allegations in the indictment advise the defendants fairly what act is charged as the crime which was agreed to be committed, it is sufficient.²⁶

v. State, 109 Md. 602, 71 Atl. 1058), or to wilfully and corruptly obstruct the due administration of justice in a certain case in a certain court (*Garland v. State*, 112 Md. 83, 75 Atl. 631).

Interference With Business.—An indictment charging conspiracy to “prevent, hinder and deter” several persons therein named by violence, threats and intimidation from further engaging in and continuing in the business of manufacturing granite sufficiently alleges the object. *State v. Duncan*, 78 Vt. 364, 63 Atl. 225, 112 Am. St. Rep. 922, 2 L. R. A. (N. S.) 1144.

Conspiracy To Suborn Perjury—Public Lands.—*Williamson v. United States*, 207 U. S. 425, 449, 28 Sup. Ct. 163, 52 L. ed. 278.

Conspiracy to Attempt To Commit an Illegal Act.—An indictment is not open to the objection that it charges a conspiracy to attempt to commit an illegal act, and not a conspiracy to commit an illegal act though the pleader in one part of the indictment speaks of a conspiracy to do an illegal act “by attempting to entice,” etc., where, when he comes to the charge of the specific act, alleges in substance that the defendants conspired to take and entice the young women named, etc., in accordance with the statutory offense. *State v. Poder* (Iowa), 132 N. W. 962.

Forms.—See the following for forms of indictment: Conspiracy to interfere with business (*State v. Dalton & Fay*, 134 Mo. App. 517, 114 S. W. 1132), or to get certain person in compromising situation with female (*State v. Waymire*, 52 Ore. 281, 97 Pac. 46, 132 Am. St. Rep. 699, 21 L. R. A. (N. S.) 56), or to prevent persons from obtaining employment (*State v. Dyer*, 67 Vt. 690, 32 Atl. 814), or to prevent enforcement of federal decree (*United States v. Lancaster*, 44 Fed. 885, 10 L. R. A. 317), or to rob (*People v. Richards*, 67 Cal. 412, 7 Pac. 828, 56

Am. Rep. 716), or to murder and commit arson (*State v. Winner*, 17 Kan. 298), or to commit assault and battery (*Com. v. Putnam*, 29 Pa. 296), or to bribe school directors (*Shircliff v. State*, 96 Ind. 369), or to deprive a person of the right to vote by reason of color under state statutes (*United States v. Stone*, 183 Fed. 836).

Sufficiency of Charges of Extortion. *Com. v. Andrews*, 132 Mass. 263.

False Accusation of Crime—Innocence Need Not Be Averred.—*Johnson v. State*, 26 N. J. L. 313.

Obstructing Justice—Jurisdiction of Cause Need Not Be Averred.—*Gallagher v. People*, 211 Ill. 158, 71 N. E. 842, affirming 110 Ill. App. 250.

25. It must appear to the court that, if the facts alleged are proved as they are stated, without any additional fact or circumstance, there can be no doubt of the illegality of the conduct charged, nor of its criminality. *State v. Parker*, 43 N. H. 85.

Doubt as to Extent of Conspiracy Charged Resolved in Favor of Defendant.—Any ambiguity or doubt as to whether an indictment under the Timber and Stone Act charges a conspiracy to suborn perjury in respect to making final proofs, in addition to charging conspiracy to suborn perjury in making original application must be resolved in favor of accused. *Williamson v. United States*, 207 U. S. 425, 458, 28 Sup. Ct. 163, 52 L. ed. 278.

Obstructing Justice.—*Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419, 423.

26. **U. S.**—*Williamson v. United States*, 207 U. S. 425, 447, 28 Sup. Ct. 163, 52 L. ed. 278; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; *Van Gesper v. United States*, 153 Fed. 46, 82 C. C. A. 180; *Ching v. United States*, 118 Fed. 538, 55 C. C. A. 304; *United States v. Raley*, 173 Fed. 159; *United States v. Taffe*, 86 Fed. 113; *United*

Particular Description of Property Not Necessary.—The particular property, goods or chattels to obtain which, or the injury or the destruction of which, was the object of the conspiracy need not be particularly described.²⁷ But the ownership should be alleged to be in

States v. Wilson, 60 Fed. 890, 894; *United States v. Stevens*, 44 Fed. 132. D. C.—*Geist v. United States*, 26 App. Cas. 594. Ia.—*State v. Soper*, 118 Iowa 1, 91 N. W. 774. Md.—*Garland v. State*, 112 Md. 83, 75 Atl. 631. N. Y. *People v. Miles*, 192 N. Y. 541, 84 N. E. 1117, *affirming* 123 App. Div. 862, 108 N. Y. Supp. 510; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122. Vt. *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *State v. Keach*, 40 Vt. 113; *State v. Noyes*, 25 Vt. 415.

Minority Rule.—A few states hold that the crime which the accused is charged with conspiring to commit must be set forth in the indictment with the same particularity as though he were being prosecuted for that crime. *Eacock v. State*, 169 Ind. 488, 82 N. E. 1039; *Green v. State*, 157 Ind. 101, 60 N. E. 101; *Musgrave v. State*, 133 Ind. 297, 305, 32 N. E. 885; *Smith v. State*, 93 Ind. 67; *Scuddler v. State*, 62 Ind. 13 (burglary—"felonious" necessary); *State v. McKinstry*, 50 Ind. 465; *Landringham v. State*, 49 Ind. 186 (robbery—allegation of violence or putting in fear necessary). Com. v. *Ward*, 92 Ky. 158, 17 S. W. 283.

Specific Criminal Acts Should Be Identified.—The indictment should contain so much certainty as to not only designate the particular kind of offense conspired to be committed, but the specific criminal or unlawful act for which the defendants are to answer should be designated. *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

Elements of Perjury Need Not Be Set Forth.—An indictment alleging a conspiracy to suborn perjury need not with technical precision, state all the elements essential to the commission of the crimes of subornation of perjury and perjury. *Williamson v. State*, 207 U. S. 425, 447, 28 Sup. Ct. 163, 52 L. ed. 278.

Setting Forth Instruments and Papers at Large.—The tenor of an instrument is never alleged in conspiracy indictments to defraud the United States without payment of the duties imposed by law (*United States v. Grumberg*,

131 Fed. 137), nor need an indictment for conspiracy to prevent the enforcement of a decree set forth the decree (*United States v. Lancaster*, 44 Fed. 885, 895). But an indictment for conspiracy to intimidate, disturb, etc., by sending black hand letter should incorporate letter unless lost or destroyed, or in accused's possession or containing obscene matter. Com. v. *Morton*, 140 Ky. 628, 131 S. W. 506. But the person sending such letter need not be alleged to have had any particular reason for sending such letter. Com. v. *Morton*, *supra*.

27. Colo.—*Imboden v. People*, 40 Colo. 142, 90 Pac. 608, 616. Ind.—*Reinhold v. State*, 130 Ind. 467, 30 N. E. 308. Md.—*Lanasa v. State*, 109 Md. 602, 71 Atl. 1058; *State v. Dent*, 3 Gill. & J. 8. Mass.—Com. v. *Ward*, 1 Mass. 473. N. H.—*State v. Straw*, 42 N. H. 393. Pa.—*Rogers v. Com.*, 5 Serg. & R. 463; Com. v. *Goldsmith*, 12 Phila. 622 (certain named articles and "divers other goods" sufficient description).

If public lands were the object of the conspiracy, the public lands affected by the conspiracy need not be particularly described by tract or tracts (*Dealy v. United States*, 152 U. S. 339, 14 Sup. Ct. 680, 38 L. ed. 545; *Dwinell v. United States*, 186 Fed. 754; *United States v. McKinley*, 126 Fed. 242), especially where they had not been acquired and no further description was possible (*Mays v. United States*, 179 Fed. 610). But a mere description of them as public lands is sufficient, though the lands were not public lands, but lands to which the Indian title had not been extinguished. *United States v. Raley*, 173 Fed. 159. And it has even been held that where it was not expressly averred that the land to be acquired was public lands, it merely being alleged that the object of the conspiracy was to obtain certain lands of the United States and it was elsewhere stated in averring overt acts that the lands were public lands, it is sufficient. *Stearns v. United States*, 152 Fed. 900, 82 C. C. A. 48.

Reason of Rule.—It is not "necessary to the completion of the crime

another person than the conspirators under indictment.²⁸

2. Agreement To Commit a Common Law Crime.—If the alleged conspiracy be an unlawful agreement of two or more persons to do a criminal act, which is a well known and recognized offense at common law, so that by reference to it as such, and describing it by the term

that the conspirators should determine in advance what particular property should be injured or destroyed. To hold that the law cannot interpose and arrest by criminal procedure, the malicious purposes of the conspirators unless they had agreed upon the destruction of some particular property, would strip it of its most beneficial preventive powers, and leave the confederates at liberty to consummate their wicked purposes. The law is not so impotent and ineffective. As it is not essential to the completion of the offense that any particular property should be destroyed, it is therefore not required that the object of the unexecuted conspiracy should be set out with great particularity and certainty in the indictment, because only such facts need be stated as shall fairly and reasonably inform the accused of the offense with which he is charged. To require more in such a case would be to put an unnecessary burden upon the state, and make it impossible in many cases to secure the conviction of the guilty." *Lanasa v. State*, 109 Md. 602, 71 Atl. 1058.

Describing Money.—Where the indictment does not name the offense, but attempts to set forth the elements of the crime, describing the property to be embezzled as "certain moneys, bullicn, notes, bills, bonds, stocks, securities and personal property belonging to and in the possession of said bank, of the value of \$1,712,587.13," this is a sufficient description of the property. The statute makes it sufficient to describe the same simply as money without specifying any particular coin or bank note. *Imboden v. People*, 40 Colo. 142, 90 Pac. 608, 615.

The amount of money defendants conspired to rob the person of need not be proved as laid. *Thompson v. State*, 106 Ala. 67, 17 So. 512, 515.

Variance.—Though it is averred the object was to procure goods, proof of conspiracy to obtain goods and labor is not a variance. *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997.

Ownership of Dwelling.—It is not necessary to describe the property, but it is sufficient to charge it as the property or dwelling house of a person named. *Lanasa v. State*, 109 Md. 602, 71 Atl. 1058.

28. Mass.—*Com. v. Manley*, 12 Pick. 173. **Mich.**—*People v. Arnold*, 46 Mich. 268, 9 N. W. 406. **Eng.**—*Reg. v. Parker*, 3 Q. B. 292, 2 G. & D. 709, 6 Jur. 822, 11 L. J. M. C. 102, 43 E. C. L. 741; *Reg. v. Bullock*, Dears. C. C. 653, 25 L. J. M. C. 92.

Variance as to Ownership Fatal. Variance between the allegations and the proof as to the ownership of the goods which were the object of the conspiracy to cheat and defraud is fatal. *Lowell v. People*, 229 Ill. 227, 82 N. E. 226 (as charging ownership in wife and proof of husband's ownership is fatal); *Com. v. Manley*, 12 Pick. (Mass.) 173.

Charging ownership of seized smuggled goods to be in United States of America is sufficient, where goods were merely in hands of custom officers, the goods having been seized as smuggled goods. *United States v. Gardner*, 42 Fed. 839.

Ownership of Promissory Note.—An indictment alleging conspiracy to defraud a certain person of a promissory note must allege that the note was not the property of such person. *Com. v. Manley*, 12 Pick. (Mass.) 173.

If the indictment alleges ownership in one person and possession in another, both allegations must be proven. *Ward v. State* (Tex. Crim.), 21 S. W. 250.

Ownership of Premises.—Where the owner of the premises was alleged to be to the district attorney unknown, this is sufficient where nothing to the contrary appears. *Hamilton v. People*, 24 Colo. 301, 51 Pac. 425.

Aided by Overt Act.—Failure to allege that defendants conspired by their false pretenses to deprive another or persons of his or their money or property cannot be aided by an averment of an overt act that defendant obtained of a certain party by false pre-

by which it is familiarly known, the nature of the offense is clearly indicated, the charge of conspiracy to commit the offense, describing it in general terms, is sufficient.²⁹ But if the purpose is not designated by its common law name but it is attempted to state the ingredients of the crime, the indictment must contain every element necessary to constitute the offense, as fully, as if the indictment were for its perpetration.³⁰

3. Where Thing To Be Done Is a Statutory Offense.—If the object of the conspiracy is to do an act, which is an offense merely by statute, the intended purpose must in each case be set forth with so much detail as may be necessary to bring it within the description of the statutory offense.³¹ Therefore an indictment charging a con-

tenses, certain goods and property of such party. *People v. Arnold*, 46 Mich. 268, 9 N. W. 406, 408.

29. Ala.—*Thompson v. State*, 106 Ala. 67, 17 So. 512, 515. **Colo.**—*Lipschitz v. People*, 25 Colo. 261, 53 Pac. 1111, arson. **Ia.**—*State v. Clemenson*, 123 Iowa 524, 99 N. W. 139; *State v. Grant*, 86 Iowa 216, 53 N. W. 120. **Me.**—*State v. Ripley*, 31 Me. 386. **Md.**—*Garland v. State*, 112 Md. 83, 75 Atl. 631. **Mass.**—*Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596, 605. **Mich.**—*People v. Saunders*, 25 Mich. 119; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321. **N. H.**—*State v. Parker*, 43 N. H. 83. **N. Y.**—*People v. Rathbun*, 44 Misc. 88, 89 N. Y. Supp. 746. **Pa.**—*Hazen v. Com.*, 23 Pa. 355; *Com. v. Brown*, 23 Pa. Super. 470. **Wis.**—*State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719.

30. Imboden v. People, 40 Colo. 142, 90 Pac. 613, 614; *Lipschitz v. People*, 25 Colo. 261, 53 Pac. 1111.

Illustration.—Arson.—An indictment charging that defendants “feloniously, wilfully and maliciously did conspire, co-operate and agree together to burn and cause to be burned a certain residence building,” etc., is insufficient, as only the “wilful and malicious” burning constitutes arson, and the words “wilfully and maliciously” qualify the conspiracy and not the arson. *Lipschitz v. People*, 25 Colo. 261, 53 Pac. 1111.

31. U. S.—*United States v. Cruickshank*, 92 U. S. 542, 23 L. ed. 583; *Perrin v. United States*, 169 Fed. 17, 94 C. C. A. 385; *Alkon v. United States*, 163 Fed. 810, 90 C. C. A. 116; *United States v. Peuschel*, 116 Fed. 642; *United States v. Sanges*, 48 Fed. 78; *United States v. Watson*, 17 Fed. 145; *United States v. De Grief*, 10

Blatchf. 20, 25 Fed. Cas. No. 14,936. **Ill.**—*Maloney v. People*, 229 Ill. 593, 82 N. E. 389; *Cole v. People*, 84 Ill. 216. **Ind.**—*State v. McKinstry*, 50 Ind. 465; *Landringham v. State*, 49 Ind. 186. **Me.**—*State v. McClary*, 64 Me. 369. **Mass.**—*Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596. **N. H.**—*State v. Parker*, 43 N. H. 83. **N. J.**—*State v. Nugent*, 77 N. J. L. 157, 71 Atl. 481. **Pa.**—*Hazen v. Com.*, 23 Pa. 355; *Hartmann v. Com.*, 5 Pa. 60. **Wis.**—*State v. Huegin*, 110 Wis. 189, 85 N. W. 1046.

Offense Charged and Charge Under Videlicet Repugnant.—If there is a contradiction and repugnancy between the clause charging the particular act committed and the offense charged under the videlicet, and the latter is material and enters into the substance of the description of the offense, and is impossible or inconsistent with the premises, the indictment is insufficient. Thus if the charge is a crime against public morals under an act requiring that the conspirator's acts to be indictable must be of that character, and under the videlicet it is charged that the conspirators threatened to accuse a party of an infamous offense, the indictment is insufficient, as the latter is not an offense against public morals. *Maloney v. People*, 229 Ill. 593, 82 N. E. 389.

Procuring Unqualified Voters To Vote at Primary Election.—An indictment for conspiracy to secure unqualified voters to vote at a primary election, contrary to the primary election law, should define the political party in the language of the statute. An allegation that the election was held by the “Democratic Party” is insufficient. It should allege in conformity with the

spiracy to "commit an offense against the United States" must state an agreement to do acts, which if done would constitute a crime or offense against the United States.³²

statute that the primary election was held by a "party, which had at an election for members of the General Assembly next preceding the primary, polled for members of the General Assembly at least 5 per cent of the whole number of votes cast in the district in which, and for which, nominations were made." *State v. Nugent*, 77 N. J. L. 157, 71 Atl. 481.

Unlawfully Securing Lower Rate on Mail Matter.—Indictment for conspiracy to defraud by securing rate of one cent per pound on papers sent out for advertising purposes and free circulation instead of one cent per four ounces is insufficient unless it alleges that the papers unlawfully sent out were intended primarily for advertising purposes, or for free circulation, or for circulation at nominal rates in accordance with the terms of the statute. *United States v. Atlantic Journal Co.*, 185 Fed. 656.

Offense Punishable Under Several Statutes.—An indictment is not indefinite because alleging a conspiracy to procure "illegal voting" which might be illegal under one or more statutes specifying specific modes of illegal voting. *Com. v. Rogers*, 181 Mass. 184, 63 N. E. 421.

Disqualification May Be Alleged in General Terms.—An indictment for conspiracy to procure illegal voting need not allege how the persons conspired to be procured to vote illegally were disqualified to vote. The disqualification may be alleged in general terms. *Com. v. Rogers*, 181 Mass. 184, 63 N. E. 421.

Perverting the Administration of Election Laws.—*Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50.

32. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; *United States v. Green*, 136 Fed. 618, 650; *United States v. Gardner*, 42 Fed. 829.

Use of Mails.—An indictment for conspiracy to defraud by the use of the postoffice must allege a combination between the defendants to do the three things requisite to constitute the offense. *Stokes v. United States*, 157

U. S. 187, 15 Sup. Ct. 617, 39 L. ed. 667.

Interference With Rights Granted by Constitution.—**Specifying Particular Right.**—An indictment charging a conspiracy to injure, oppress, etc., certain parties named in the exercise of rights secured by the laws and constitution of the United States, but failing to state what particular right was intended to be affected by the conspirators, is fatally defective. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *McKenna v. United States*, 127 Fed. 88, 62 C. C. A. 88.

Illustrations:—

Right To Bear Arms.—Charging a conspiracy to hinder and prevent citizens in their right "of bearing arms for a lawful purpose" does not specify a right guaranteed by the constitution of the United States, and is insufficient. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

Deprivation of Life or Liberty Without Due Process.—Charging conspiracy to deprive certain persons "of their respective several lives and liberty of person without due process of law" does not set out an offense under United States laws. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

Equal Protection of Laws.—Likewise charging conspiracy to prevent certain citizens of the United States from enjoying equal protection of laws, does not charge an offense under the laws of the United States. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

Interference With Right To Vote.—Again charging a conspiracy to hinder and prevent defendants, being of African descent and colored, of their right to vote, does not charge an offense under the United States laws, no allegation being made that they were thus to be prevented by reason of their color. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588. See also *United States v. Lackey*, 99 Fed. 952.

Obtaining Allowances and Payment of Illegal Claims.—**Authority To Allow Must Be Alleged.**—To charge "obtaining of" allowances and payment of

Charging in Language of Statute. — Statutes in some states provide that it is sufficient to charge an offense in the language of the code.³³ Though even without such a statute, if conspiracy is made an offense when entered into for certain specified purposes, and the words of the statute fully, directly, and expressly, without any uncertainty and ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, it is sufficient to charge the offense in the language of the statute,³⁴ or in words of equivalent meaning,³⁵ though

fraudulent claim against United States, through certain persons is insufficient; the indictment must allege such persons had authority to approve or allow the claim. *United States v. Greene*, 115 Fed. 343; *United States v. Reichert*, 32 Fed. 142.

Judicial Knowledge of Authority To Allow Pension Claims.—But an indictment for conspiracy to defraud the United States by the bribery of a member of a board of surgeons to make a false claim to the pension board, need not allege that the pension board had authority to allow such claim, as the court will take judicial knowledge of the statutes creating this office as conferring this power. *United States v. Van Leuven*, 62 Fed. 62.

33. *Imboden v. People*, 40 Colo. 142, 163, 90 Pac. 608. See generally the title "Indictment and Information."

Charging Offense After Overt Acts Described.—Charging the offense in the language of the statute, and not fully stating its purposes and objects until after the overt acts are described is a defect of form rather than substance; it is non-prejudicial. *Tribolet v. United States*, 11 Ariz. 436, 95 Pac. 85, 16 L. R. A. (N. S.) 223.

34. *U. S.*—*Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; *Rupert v. United States*, 181 Fed. 87, 104 C. C. A. 255; *Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; *United States v. White*, 171 Fed. 775; *United States v. Martin*, 4 Cliff. 156, 26 Fed. Cas. No. 15,728 (unless statute contains words of compound signification). *Cal.* *People v. Sacramento, etc. Assn.*, 12 Cal. App. 471, 107 Pac. 712. *Ill.*—*People v. Smith*, 144 Ill. App. 129, *affirmed*, 239 Ill. 91, 87 N. E. 885. *Ia.*—*State v. Poder*, 132 N. W. 962; *State v. Soper*, 118 Iowa 1, 91 N. W. 774. *Ky.* *Sellers v. Com.*, 13 Bush 331; *Com. v.*

Bryant, 11 Ky. L. Rep. 426, 12 S. W. 276. *Me.*—*State v. Locklin*, 81 Me. 251, 16 Atl. 895. *N. J.*—*State v. Nugent*, 77 N. J. L. 84, 71 Atl. 485; *Moschell v. State*, 53 N. J. L. 438, 22 Atl. 50. *N. Y.*—*Elkin v. People*, 28 N. Y. 177. *Pa.*—*Hartmann v. Com.*, 5 Pa. 60. *Vt.*—*State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.

Use of Term "Offense of," or "Crime of," Unnecessary.—*People v. Lamb*, 153 Mich. 675, 117 N. W. 539, *extortion*.

Incorporation.—Under the Illinois anti-trust act of 1891, the indictment need allege only that the defendant was incorporated, and need not allege that it was incorporated under the laws of Illinois or of any other state or country "for transacting or conducting any kind of business in this state," the object of the statute being "to prevent the formation of combinations to regulate and fix prices or to limit the amount of production in this state by corporations or by individuals doing business in this state, and that it is a matter of indifference whether such corporations are organized for transacting or conducting business in this state or not." *Chicago, W. & V. Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770, 777.

35. *U. S.*—*Lemon v. United States*, 164 Fed. 953, 90 C. C. A. 617; *United States v. Wilson*, 60 Fed. 890. *Ill.* *Cole v. People*, 84 Ill. 216. *Ia.*—*State v. Grant*, 86 Iowa 216, 53 N. W. 120. *La.*—*State v. Slutz*, 106 La. 182, 30 So. 298. *N. J.*—*State v. Nugent*, 77 N. J. L. 84, 71 Atl. 485. *N. Y.*—*People v. Goslin*, 67 App. Div. 16, 73 N. Y. Supp. 520, *affirmed*, 171 N. Y. 627, 63 N. E. 1120, statute allows use of equivalent expressions. *Pa.*—*Com. v. Brown*, 23 Pa. Super. 470. *S. C.* *State v. Davis*, 70 S. E. 811. *Vt.* *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.

Crime Defined in Other Statutes.

it need not negative exceptions found in the statute.³⁶ But if the statute uses general language descriptive of the offense and does not with definiteness cover all the elements of the offense, an indictment using the language of the statute is insufficient.³⁷ Such language must

A charge, framed in the language of the statute or in words of equivalent meaning, that the defendant conspired with certain other persons named to commit a crime specified therein, and elsewhere in other statutes denounced and defined is sufficiently intelligible to put him on his defense. *State v. Slutz*, 106 La. 182, 30 So. 298.

Confidence Game.—An indictment charging a conspiracy to perpetrate a confidence game is sufficient, the confidence game being a felony by statute. *People v. Bush*, 150 Ill. App. 48.

Use of Word "Burglarize."—An indictment for conspiracy to commit burglary using the term "burglarize" is sufficient as it is the equivalent of the words "commit burglary," as used in the statute. *State v. Slutz*, 106 La. 182, 30 So. 298.

³⁶. *United States v. Stone*, 135 Fed. 392 (exceptions in subsequent statutes).

Indictment for conspiracy to deprive citizen of liberty need not allege that the person deprived of liberty by defendants were not held in servitude as a punishment for crime. *Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353. See the title "Indictment and Information."

³⁷. *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. ed. 588; *Haynes v. United States*, 101 Fed. 817, 42 C. C. A. 34; *United States v. Marx*, 122 Fed. 964; *Towne v. People*, 89 Ill. App. 258.

Sufficient if Words of Statute Particularize Offense.—Whether in any case it is enough that the indictment is merely framed in the words of the statute must depend upon whether the words of the statute so far particularize the offense as by their use alone to notify the accused of the precise offense charged upon him. *Towne v. People*, 89 Ill. App. 258, 277. See generally the title "Indictment and Information."

Offense Defined in Generic Terms. Where the definition of the offense, whether it be at common-law or by

statute, includes generic terms, the indictment is not sufficient where it charges the offense in the same generic terms, but it must descend to particulars. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Greene*, 115 Fed. 348; *United States v. Taffe*, 86 Fed. 113, 115; *Com. v. Ward*, 92 Ky. 158, 17 S. W. 283.

Thus if the term "fraudulent" is used, it is insufficient as it is generic, and though the terms of the statute are used, it must descend to particulars. *United States v. Greene*, *supra*.

Corruptly Influencing Petit Jury.

Generic Terms.—An "averment that defendants conspired to commit the offense of corruptly endeavoring to influence a petit jury of the United States in the circuit court of the United States for the district of Oregon does not describe an offense. It states a mere conclusion of the pleader. Nothing is added to the generic terms by which such crime is described, except the statement that the jury was a petit jury, and was in the circuit court of the United States for the district of Oregon. The acts which were intended in this crime, and which are necessary to its commission, are not set forth. There is no particularity of time, or of individuals to be corrupted on the jury, or of the cause to be affected, or of the means to be employed, or of other facts and circumstances by which the defendant may be apprised of the case he is required to meet, and by which he may so indemnify it as to be able to avail himself of any judgment rendered therein in bar of other prosecutions for the same cause. If, as stated by Mr. Justice Clifford in *United States v. Cruikshank*, 'a vague and indefinite description of a material ingredient of the offense is such a failure of compliance with the rules of pleading in framing an indictment that the indictment must be held bad on demurrer or in arrest of judgment,' by the stronger reason no judgment of conviction should be pronounced where the indictment is without any description of the offense intended by the conspiracy with which

be accompanied with such a statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description with which he is charged.³³

4. Necessity for Alleging Knowledge or Intent. — If knowledge³⁴

the defendants are charged." *United States v. Taffe*, 86 Fed. 113.

Following Language of Anti-Trust Act.—An indictment following the language of the statute in the Sherman Anti-Trust law (Act of July 2, 1890) is not sufficient, as the act does not undertake to define what constitutes a contract, combination or conspiracy in restraint of trade, and recourse must be had to the common-law for the proper definition of the general terms, and to ascertain whether the acts charged come within the statute. *United States v. Patterson*, 55 Fed. 605; *In re Greene*, 52 Fed. 104, 111.

38. *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *McKenna v. United States*, 127 Fed. 88, 62 C. C. A. 88; *United States v. Taffe*, 86 Fed. 113; *In re Benson*, 58 Fed. 96; *United States v. Patterson*, 55 Fed. 605 (Anti-Trust Act); *In re Wolf*, 27 Fed. 606.

Alleging Specific Acts.—If the language of the statute does not describe the acts constituting the offense but covers in general provisions, any special injury to the business, etc., of another which the conspirators unlawfully conspired to do, the specific acts or special injury which was the object of the conspiracy charged must be alleged in the indictment. *Towne v. People*, 89 Ill. App. 258, 277.

Reason of Rule.—"When the fact which is made by the statute an essential element of the crime is a collective or general one, it is necessary to specify the particular thing intended to be charged. This for several reasons: (1) To enable the court to see whether the particular fact is of the character intended by the general language of the statute—this is the province and duty of the court, and cannot be passed over by the conclusion of the pleader; (2) to apprise the respondent of the particular fact intended to be charged, in order that he may come prepared to meet it, and not be compelled to array a defense to all manner of charges which might be comprehended in the general

words of the statute; and (3) that it may be known what the judgment covers, and to what extent it is a bar to further prosecution." *McKenna v. United States*, 127 Fed. 88, 62 C. C. A. 88, citing *Cruikshank v. United States*, 92 U. S. 542, 23 L. ed. 588.

Such particulars are matters of form and their omission is not aided or cured by verdict. *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

39. *Bradford v. United States*, 152 Fed. 616, 81 C. C. A. 606, 148 Fed. 413; *Conrad v. United States*, 127 Fed. 798, 62 C. C. A. 478; *United States v. Comstock*, 162 Fed. 415; *United States v. Peuschel*, 116 Fed. 642 (if knowledge that public lands contained minerals was essential at time of formation of conspiracy in order to make act criminal, it must be so charged).

Conspiracy To Obstruct Mail Train. An indictment for conspiracy to obstruct a mail train must allege that the conspirators knew that the train they conspired to obstruct carried the mail. *Salla v. United States*, 104 Fed. 544, 44 C. C. A. 26.

Knowingly Using False Invoice To Defraud.—Charging the defendants intended to defraud the United States of duties by the use of a false invoice, that in its nature would tend to effect the fraud, sufficiently charges that he knew the nature of the instrument and its capacity for effecting the fraud. *United States v. Rosenthal*, 126 Fed. 766, 771.

Indictment charging conspiracy to obstruct or impede justice in a court must allege knowledge or notice that justice was being administered in such court. *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419.

An indictment for conspiracy to conceal property from a trustee in bankruptcy is not sufficient where it does not use the statutory words "knowingly and fraudulently," or other words equivalent thereto, in connection with the words setting forth the offense. *United States v. Comstock*, 162 Fed. 415.

or intent is an essential element of an offense as charged in a statute, such knowledge or intent must be averred,⁴⁰ either in the language of the statute or in equivalent language,⁴¹ directly and positively, and not merely by inference or by way of recital.⁴² And the lack of such

Agent's Knowledge.—Under a statute making any person who as a principal, or agent, etc., knowingly carries out any of the stipulations, etc., of the conspirators liable, it must be alleged, in order to convict the person of being an agent of the conspiracy as described in the statute, that the person named was an agent and that he knew of the conspiracy. *Hathaway v. State*, 36 Tex. Crim. 261, 36 S. W. 465.

Indictment for conspiracy to commit adultery by married woman must charge knowledge of conspirators that the woman was married. *Ford v. United States*, 12 Ariz. 23, 94 Pac. 1102.

For the Jury.—*United States v. Noblom*, 27 Fed. Cas. No. 15,896.

40. **U. S.**—*United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Green*, 136 Fed. 618. **Ill.**—*Long v. People*, 109 Ill. App. 197. **Me.**—*State v. Clary*, 64 Me. 369. **Neb.** *Dutcher v. State*, 16 Neb. 30, 19 N. W. 612.

Intent when unnecessarily alleged may be rejected as surplusage. *People v. Poindexter*, 243 Ill. 68, 30 N. E. 261.

Under a statute making it criminal to conspire together with fraudulent or malicious intent to do an illegal act, an indictment alleging defendant unlawfully, fraudulently, maliciously, wrongfully, and wickedly conspired and agreed to do an illegal act sufficiently charges the conspiracy to have been formed with fraudulent or malicious intent. *Chicago, etc. Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770.

Manner of Charging the Intent.—"It is not necessary to repeat with every verb the words 'wilfully, fraudulently, and corruptly.' One assertion of intent may be so made as to cover a joint specification of unlawful acts. Nor is there any exclusive force in any particular word indicative of intent, such as 'corrupt,' 'fraudulent,' etc." It should be alleged that the agreement between the alleged conspirators was entered into with a corrupt or fraudulent intent. *Browne v.*

United States, 145 Fed. 1, 76 C. C. A. 31.

Intent To Use Mails To Defraud.

An averment that a scheme to defraud was "to be affected" by opening correspondence, etc., by means of post-office of the United States, sufficiently alleges an intention to use the mails to defraud. *Miller v. United States*, 133 Fed. 337, 346, 66 C. C. A. 399.

Fraudulent Intent.—Charging the doing of an act "to the end that" the Government should be hoodwinked into collecting less amounts of duty than are legally due sufficiently charges fraudulent intent. *Browne v. United States*, 145 Fed. 1, 6, 76 C. C. A. 31.

For the Jury.—*People v. Dyer*, 79 Mich. 480, 44 N. W. 937; *People v. Petheram*, 64 Mich. 252, 31 N. W. 188; *People v. Flack*, 125 N. Y. 324, 26 N. E. 267, 11 L. R. A. 807, reversing 57 Hun 83, 10 N. Y. Supp. 475.

41. *Chicago, etc. Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770; *State v. Grant*, 86 Iowa 216, 53 N. W. 120.

"Intent To Obtain" Instead of "To Obtain."—*State v. Grant, supra*.

Statutory Word "Designedly."—An indictment charging a conspiracy to obtain property by false pretenses is not defective because not using the statutory words "designedly, and by false pretenses," where it is charged that defendants conspired "for the unlawful, malicious, and felonious purpose and fraudulent and malicious intent and purpose to obtain," as the meaning of the word "intent and purpose" as used in the indictment is the same as design. *State v. Grant*, 86 Iowa 216, 53 N. W. 120.

42. *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Green*, 136 Fed. 618, 658; *United States v. Peuschel*, 116 Fed. 642.

Knowledge of Mineral Deposits.

Where an indictment is for defrauding the United States of public lands containing valuable mineral deposits, the fact of such deposits must be alleged directly and positively, and an allegation that defendant then and

averments cannot be cured by reference to such allegations in other parts of the indictment.⁴³ But if the act set forth in the indictment is in its nature unlawful, knowledge of its wrongful character will be presumed, and therefore need not be alleged.⁴⁴ Likewise the criminal intent in doing such an act need not be alleged, as the criminal intent appears *prima facie* in the statement of the act itself.⁴⁵

5. Alleging Method of Accomplishing Result.—If the agreement or combination be to do an act unlawful either at common law or by statute, the means by which the conspiracy was to be accomplished need not be set forth,⁴⁶ but it will be sufficient to state the conspiracy

there well knew that the land contained valuable mineral deposits is not a sufficient averment. *United States v. Peuschel*, 116 Fed. 642.

43. *Conrad v. United States*, 127 Fed. 798, 62 C. C. A. 478; *Hathaway v. State*, 36 Tex. Crim. 261, 36 S. W. 465.

Conspiracy To Burn Residence.—An indictment charging that defendants "feloniously, wilfully and maliciously" did conspire to burn a certain residence is fatally defective as the word feloniously, wilfully and maliciously characterizes the conspiracy and not the burning. *Lipschitz v. People*, 25 Colo. 261, 53 Pac. 1111.

Using Term "Knowingly" in Connection With Conspiracy Insufficient. In an indictment alleging that the defendants "knowingly, unlawfully and feloniously conspired" to commit an offense against the United States, these words "knowingly, etc.," in connection with the conspiracy cannot supply the necessity for alleging that defendants conspired "knowingly and wilfully" as required by statute. *Conrad v. United States*, 127 Fed. 793, 62 C. C. A. 478. Though in *United States v. Mitchell*, 141 Fed. 666, it is held that the use of such terms in connection with the conspiracy must be held to characterize the acts charged as having been done in furtherance of the conspiracy.

44. *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.

It is otherwise when it becomes wrongful by the presence of accidental or fortuitous features not ordinarily attendant upon it. *State v. Stewart*, *supra*.

Wilfulness need not be alleged where the facts alleged necessarily import

same. *Nickell v. United States*, 161 Fed. 702, 88 C. C. A. 562; *VanGesner v. United States*, 153 Fed. 46, 82 C. C. A. 180; *United States v. Howard*, 132 Fed. 325, 350, 351.

45. U. S.—*United States v. Stone*, 135 Fed. 392; *Scott v. United States*, 130 Fed. 429 (making false entries in books of National Bank); *United States v. De Haro*, 25 Fed. Cas. No. 14,938. Ill.—*Chicago, etc. Co. v. People*, 114 Ill. App. 75, *affirmed*, 214 Ill. 421, 73 N. E. 770. Pa.—*Com. v. Goldsmith*, 12 Phila. 622.

Necessity for Alleging Intent to Affect Federal Election.—In an indictment in a United States court for conspiracy to induce the officers who have the safekeeping and delivery of the returns to the board of canvassers, to omit such duty that the documents might come into the hands of improper persons, "it is not necessary to allege or prove that it was the intention of these conspirators to affect the election of the member of Congress who was voted for at that place, the returns of which were in the same poll books, tally sheets, and certificates with those for state officers." *In re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. ed. 274.

46. U. S.—*Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. ed. 465; *Benson v. United States*, 169 Fed. 31, 94 C. C. A. 393; *Perrin v. United States*, 169 Fed. 17, 94 C. C. A. 385; *United States v. Gardner*, 42 Fed. 829; *United States v. Gordon*, 22 Fed. 250; *United States v. Dennee*, 3 Woods 47, 25 Fed. Cas. No. 14,948. Ariz.—*Tribolet v. United States*, 11 Ariz. 436, 95 Pac. 85. Colo.—*Imboden v. People*, 40 Colo. 142, 90 Pac. 608. Ill.—*People v. Nall*, 242 Ill. 284,

89 N. E. 1012; *People v. Smith*, 239 Ill. 91, 87 N. E. 835; Chicago, etc. Co. v. *People*, 214 Ill. 421, 440, 73 N. E. 770, *affirming* 114 Ill. App. 75; *Thomas v. People*, 113 Ill. 531. **IA.**—*State v. Eno*, 131 Iowa 619, 109 N. W. 119; *State v. Grant*, 86 Iowa 216, 53 N. W. 120; *State v. Ormistor*, 66 Iowa 143, 23 N. W. 370; *State v. Potter*, 28 Iowa 554; *State v. Jones*, 13 Iowa 269. **ME.**—*State v. Mayberry*, 48 Me. 218; *State v. Ripley*, 31 Me. 386; *State v. Bartlett*, 30 Me. 132. **MD.**—*Garland v. State*, 112 Md. 83, 75 Atl. 631 (obstructing justice); *State v. Buchanan*, 5 Har. & J. 317, 9 Am. Dec. 534. **MASS.**—*Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596. **MICH.**—*People v. Butler*, 111 Mich. 483, 69 N. W. 734; *People v. Petherham*, 64 Mich. 252, 31 N. W. 188. **N. H.**—*State v. Parker*, 43 N. H. 83; *State v. Burnham*, 15 N. H. 403. **N. J.**—*Johnson v. State*, 26 N. J. L. 313. **N. Y.**—*Lambert v. People*, 9 Cow. 577; *March v. People*, 7 Barb. 391; *Warshauer v. Webb*, 9 N. Y. St. 529. **N. C.**—*State v. Howard*, 129 N. C. 584, 40 S. E. 71; *State v. Brady*, 107 N. C. 822, 12 S. E. 325. **PA.**—*Hazen v. Com.*, 23 Pa. 355; *Twitchell v. Com.*, 9 Pa. 211; *Com. v. McKisson*, 8 Serg. & R. 420, 11 Am. Dec. 630; *Com. v. Haun*, 27 Pa. Super. 33; *Com. v. Wilson*, 1 Chest. Co. 538. **R. I.**—*State v. East Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817; *State v. Bacon*, 27 R. I. 252, 61 Atl. 653. **S. C.**—*State v. Cardoza*, 11 S. C. 195, 235; *State v. Dewitt*, 2 Hill 282, 27 Am. Dec. 371. **VT.**—*State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; *State v. Keach*, 40 Vt. 113; *State v. Noyes*, 25 Vt. 415. **VA.**—*Crump's Case*, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895. **WASH.**—*State v. Erickson*, 54 Wash. 472, 103 Pac. 796; *State v. Messner*, 43 Wash. 206, 86 Pac. 636 (obtaining mortgage with false pretenses). **WIS.**—*State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719. **ENG.**—*Reg. v. Rowlands*, 17 Ad. & El. (N. S.) 671, 79 E. C. L. 670; *Sydserff v. Reg.*, 11 Q. B. 245, 63 E. C. L. 245; *Reg. v. King*, 7 Q. B. 782, 53 E. C. L. 780; *Rex v. Gill*, 2 Barn. & Ald. 204, 106 Eng. Reprint 341.

Conspiracy To Cheat and Defraud.

Since in many states it is not necessarily an indictable offense to "cheat and defraud" another out of his property, some frauds making the parties

liable to a civil action only, it is not sufficient to charge the object of the conspiracy as being "to cheat and defraud," but the particular means or false pretenses to be employed must be set forth, so as to show that they are criminal. **IA.**—*State v. Grant*, 86 Iowa 216, 53 N. W. 120; *State v. Jones*, 13 Iowa 269. **ME.**—*State v. Mayberry*, 48 Me. 218; *State v. Roberts*, 34 Me. 320; *State v. Ripley*, 31 Me. 386. **MA.**—*State v. Buchanan*, 5 Har. & J. 317, 9 Am. Dec. 534. **MASS.**—*Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997; *Com. v. Shedd*, 7 Cush. 514; *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596. **MICH.**—*People v. Barkelow*, 37 Mich. 455; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321. But see *People v. Arnold*, 46 Mich. 268, 9 N. W. 406; *People v. Clark*, 10 Mich. 310; *People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75. **MONT.**—*Territory v. Carland*, 6 Mont. 14, 9 Pac. 578. **N. H.**—*State v. Parker*, 43 N. H. 83. **N. Y.**—*People v. Eckford*, 7 Cow. 535; *March v. People*, 7 Barb. 391; *People v. Rathbun*, 44 Misc. 88, 89 N. Y. Supp. 746. **VT.**—*State v. Keach*, 40 Vt. 113.

Though in other states, where the terms "to cheat and defraud" import an offense, it is unnecessary to set forth the means to be employed. **COLO.**—*Moore v. People*, 31 Colo. 336, 73 Pac. 30. **ILL.**—*People v. Nall*, 242 Ill. 284, 89 N. E. 1012; *People v. Smith*, 239 Ill. 91, 87 N. E. 835. **MD.**—*State v. Buchanan*, 5 Har. & J. 317, 9 Am. Dec. 534. **N. J.**—*State v. Young*, 37 N. J. L. 184. **N. C.**—*State v. Howard*, 129 N. C. 584, 40 S. E. 71; *State v. Brady*, 107 N. C. 822, 12 S. E. 325. **PA.**—*Com. v. McKisson*, 8 Serg. & R. 420, 11 Am. Dec. 630. **R. I.**—*State v. Bacon*, 27 R. I. 252, 61 Atl. 653. **WASH.**—*State v. Messner*, 43 Wash. 206, 86 Pac. 636. **WIS.**—*State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719. **ENG.**—*Reg. v. Gompertz*, 9 Q. B. 824, 58 E. C. L. 823.

Where the means must be set out, an appropriate form is: "Did unlawfully conspire, combine and agree together falsely and fraudulently to cheat and defraud the said C. D. of a large sum of money, viz., the sum of £—, under the false and fraudulent pretenses that," etc. (stating the false pretenses). *Com. v. Wallace*, 18 Gray (Mass.) 221, *citing* 2 Archb. Crim. Pl. (Waterman's ed.).

and its purpose⁴⁷ without alleging that the means by which the

Conspiracy To Defraud United States.—Under Rev. St., §5440, the means of affecting the object of the conspiracy do not constitute an element of the offense and need not be set forth in the indictment, as the statute makes it a distinct offense to defraud the United States (*Benson v. United States*, 169 Fed. 31, 94 C. C. A. 399; *Perrin v. United States*, 169 Fed. 17, 94 C. C. A. 385; *Gantt v. United States*, 108 Fed. 61, 47 C. C. A. 210; *United States v. Benson*, 70 Fed. 591, 17 C. C. A. 293; *United States v. Mays*, 179 Fed. 610; *United States v. Gordon*, 22 Fed. 250; *United States v. Dustin*, 2 Bond 332, 25 Fed. Cas. No. 15,011; *United States v. Dennis*, 1 Bond 103, 25 Fed. Cas. No. 14,949. See also *Dealy v. United States*, 152 U. S. 539, 544, 14 Sup. Ct. 680, 38 L. ed. 545; *Pettibone v. United States*, 148 U. S. 197, 203, 13 Sup. Ct. 542, 37 L. ed. 419; *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. ed. 588), though other cases hold that the means to be used to defraud must be alleged, as that it was by smuggling, or by forged or false invoices, but the details of the plan need not be set out (*United States v. Grunberg*, 131 Fed. 137), though it is said they must be set forth with sufficient particularity to put defendant upon notice of the charge he will have to defend, but in what respect land affidavits were false was not required (*United States v. Raley*, 173 Fed. 159).

Making False Affidavits To Procure Public Lands.—Details of Oath Need Not Be Set Forth.—An indictment for conspiracy to defraud the United States out of public lands by procuring persons to make false and fraudulent applications and affidavits for the purchase thereof, which were in reality for defendants themselves, need not allege the details of the administration of the oath, by whom administered, or that he was qualified to perform the service, and it need not show in what respect the affidavits were false or fraudulent. *United States v. Raley*, 173 Fed. 159, 164.

The following have been held to allege the means to defraud sufficiently: "By means of false, feigned, illegal and fictitious entries under the homestead laws of the United States." The

term "entries" under the homestead laws means the complete transfer of title. *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. ed. 545; *Bradford v. United States*, 152 Fed. 617, 81 C. C. A. 607; *United States v. Cunningham*, 129 Fed. 833.

"By procuring persons to make false affidavit for the purchase of said lands for the account of the defendants, and by procuring such persons to make contracts prior to such purchase, whereby the title would inure to the benefit of the defendants, and by procuring such persons to make false proofs of residence upon and cultivation of such lands." *United States v. Raley*, 173 Fed. 159.

Under the New York statute requiring the indictment to name the crime with which the defendant is charged, or insert a brief description thereof in the indictment, it is sufficient to charge the object of the conspiracy to have been "to cheat and defraud." *People v. Rathbun*, 44 Misc. 88, 89 N. Y. Supp. 746; *Scholtz Case*, 5 City Hall Rec. 112. But see *March v. People*, 7 Barb. (N. Y.) 391.

47. **U. S.**—*United States v. Raley*, 173 Fed. 159; *United States v. Moore*, 173 Fed. 122. **Id.**—*State v. Potter*, 28 Iowa 554, 556. **Md.**—*Garland v. State*, 112 Md. 83, 75 Atl. 631; *State v. Buchanan*, 5 Har. & J. 317, 9 Am. Dec. 534.

Form.—"And the jurors for the Commonwealth of Massachusetts, on their aforesaid oath, do further present, that defendants [naming them], all of said ———, wickedly devising and intending to cheat and defraud one ———, on the ——— day of ———, in the year aforesaid, at said ———, did unlawfully conspire, confederate, combine and agree together, falsely, knowingly, designedly and fraudulently, to cheat and defraud the said ——— out of a large quantity of goods, wares and merchandise, and one vessel called the ———, of the property of him, said ———, that is to say: [describing the goods]; by means of the false and fraudulent pretences thereafter to be made to said ——— by him, said ———," [detailing the statements to be made]. *Com. v. Fuller*, 132 Mass. 563. See also *State v. Keach*, 40 Vt. 113. Fraudulently inducing approval

unlawful conspiracy was to be effected were unlawful or criminal also.⁴⁸

G. ALLEGATIONS WHERE MEANS CONTEMPLATED MAKE AGREEMENT UNLAWFUL.—If the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out.⁴⁹ It will not

of defective life-preservers (*United States v. Stone*, 135 Fed. 392), or by placing fictitious names on the census schedule (*United States v. Stevens*, 44 Fed. 132), or by presenting false claim of death to insurance company (*Musgrave v. State*, 133 Ind. 297, 32 N. E. 885), or by sale of land not owned (*State v. Mayberry*, 48 Me. 218).

48. *Miller v. United States*, 133 Fed. 337, 66 C. C. A. 399; *Chicago, etc. Co. v. People*, 214 Ill. 421, 73 N. E. 770.

49. **U. S.**—*Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419, 422; *United States v. Cruikshank*, 92 U. S. 541, 23 L. ed. 588; *United States v. Gardner*, 42 Fed. 829; *United States v. Dustin*, 2 Bond 332, 25 Fed. Cas. No. 15,011. **Ill.**—*Cole v. People*, 84 Ill. 216, 219; *Smith v. People*, 25 Ill. 9. **Ia.**—*State v. Eno*, 131 Iowa 619, 109 N. W. 119; *State v. Harris*, 38 Iowa 242; *State v. Stevens*, 30 Iowa 391, 397; *State v. Potter*, 28 Iowa 554. **Me.**—*State v. Roberts*, 34 Me. 320, description as "false pretenses" insufficient. **Mass.**—*Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997; *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596; *Com. v. Hunt*, 4 Metc. 111, 38 Am. Dec. 346. **Mich.**—*People v. Petheram*, 64 Mich. 252, 31 N. W. 188; *People v. Clark*, 10 Mich. 310; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321. **Mont.**—*Territory v. Carland*, 6 Mont. 14, 9 Pac. 578. **N. H.**—*State v. Parker*, 43 N. H. 83; *State v. Burnham*, 15 N. H. 396. **N. Y.**—*Lambert v. People*, 9 Cow. 578, reversing 7 Cow. 166. **N. C.**—*State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760. **Pa.**—*Hartman v. Com.*, 5 Pa. 60. **R. I.**—*State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 132 Am. St. Rep. 817. **Vt.**—*State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; *State v. Keach*, 40 Vt. 113. **Wis.**—*State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719. **Eng.**—*Rex v. Seward*, 1 Ad. & El. 706, 3 L. J. M. C. 103, 3 N. & M. 557, 28 E. C. L. 185, 110 Eng. Reprint 1377; *Rex v. Jones*, 4 B. & Ad. 345, 24

E. C. L. 71, 1 N. & M. 78, 110 Eng. Reprint 485.

In such a case the means constitute the object of the conspiracy to such an extent that they should be set out as fully as the nature of the case will permit. *United States v. Milner*, 36 Fed. 890; *Garland v. State*, 112 Md. 83, 75 Atl. 631. See *infra*, II, B, 7.

Where Means Are Not Necessarily Criminal.—Where all the means set out may fall outside of any legal definition of a crime, and if they may be of such a nature as under particular circumstances to create a crime, it must be shown just what they are in order that the court on reading the information can ascertain what crime they create. *People v. Barkelow*, 37 Mich. 455; *State v. Parker*, 43 N. H. 83.

Alleging Means To Be Corrupt.—If it be charged a certain person confederated to do a lawful act by unlawful or criminal means, the indictment must allege that the means were attended with a corrupt motive. *United States v. Moore*, 173 Fed. 122, 123.

Means Need Not Show Corrupt Intent After Allegation of Corrupt Intent.—But after a general allegation of a corrupt intent, it is not necessary that the statement of the means by which the conspiracy was to be executed should also show it. *State (Madden) v. State*, 57 N. J. L. 324, 30 Atl. 541.

Corrupt Agreement With Government Officer.—Necessity for Averting Secret Interest Was Given To Influence Conduct.—Where the conspiracy consists in a corrupt agreement by which an officer of the United States is, in substance, to have a secret interest in a contract as to the fulfilling of which by the contractors that officer was to be the judge, it becomes unnecessary to aver that the interest was given him or the money paid to him, to influence his official conduct upon the very contract in question," nor is it "necessary in such a case as this (of an alleged unlawful and corrupt con-

be sufficient to allege in general terms, however strong, that the means to be used, where their criminal or unlawful character is relied upon, were malicious or fraudulent, or unlawful or criminal; but those means must be stated in such terms that the court may see that they are unlawful at common law, or by virtue of some statute.⁵⁰

H. NECESSITY FOR NAMING VICTIM.—If the nature of the conspiracy is such as to define the particular persons against whom it is directed, or if, from the commission of overt acts, the conspirators have actually accomplished their purpose, so that the names of the victims are ascertainable by the pleader, the names of such parties should be set out,⁵¹ though it has been held sufficient to charge that the names of such persons were to the grand jury unknown.⁵²

tract) to allege in the indictment which of the various ways the Government might be defrauded, was in the minds of the conspirators, or that they all were." *Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. ed. 465, citing *Dealy v. United States*, 152 U. S. 539, 543, 38 L. ed. 545, 546, 14 Sup. Ct. 680.

50. *U. S.*—*United States v. Green*, 115 Fed. 343; *United States v. Gardner*, 42 Fed. 829, 831. *Ill.*—*Maloney v. People*, 229 Ill. 593, 82 N. E. 389. *Ind.*—*State v. Potter*, 28 Iowa 554, preventing the grand jury "from finding and presenting bills of indictment" for violation of law, with money or other unlawful means "is not sufficient." *Mass.* *Com. v. Hunt*, 4 Metc. 111, 38 Am. Dec. 339. *N. H.*—*State v. Parker*, 43 N. H. 83. *N. Y.*—*Lambert v. People*, 9 Cow. 577. *N. C.*—*State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760.

Facts Must Be Set Forth.—*State v. Potter*, 28 Iowa 554.

51. *McKee v. State*, 111 Ind. 378, 12 N. W. 510; *People v. Arnold*, 46 Mich. 268, 9 N. W. 406.

Such form of allegation has been held sufficient in the following cases: *Mass.* *Com. v. Rogers*, 181 Mass. 184, 63 N. E. 421. *Mich.*—*People v. Gilman*, 121 Mich. 187, 80 N. W. 4, 80 Am. St. Rep. 490, 46 L. R. A. 218. *Wash.*—*State v. Hillman*, 42 Wash. 615, 85 Pac. 63.

Conspiracy To Assault Several Persons.—**Proof of Conspiracy To Assault One.**—If the indictment charges a conspiracy to assault several persons including person assaulted, it is not a fatal variance to prove conspiracy to assault person assaulted only. *Shields v. People*, 132 Ill. App. 109.

An indictment charging a conspiracy

to extort money must allege from whom the money was to be extorted. *Com. v. Andrews*, 132 Mass. 263.

Conspiracy To Defraud Several Persons.—**Variance.**—In an indictment for conspiracy to use the mails to defraud, no doubt it is necessary to aver and prove a fraudulent purpose. But where the indictment charges the sending of individual letters to parties named in the indictment, "an averment in general terms of an intent to defraud these parties does not necessarily import that the conspiracy contemplated a joint defrauding of the whole number named. This might be the case where two or more parties were in business together or jointly interested in property which it was the aim of the conspiracy to obtain. And the charge of a purpose to so defraud them, even with the relaxation of criminal pleading, which now obtains, would doubtless have to be proved as laid." *Marrin v. United States*, 167 Fed. 951, 93 C. C. A. 351.

Naming Negro Voters To Be Intimidated.—An indictment is not bad because it fails to set forth the names of the negro voters whom the defendants are alleged to have intended to injure, or to state that their names are to the grand jury unknown. *United States v. Stone*, 188 Fed. 836, citing *Williamson v. United States*, 207 U. S. 449, 28 Sup. Ct. 163, 52 L. ed. 278.

52. *U. S.*—*Miller v. United States*, 133 Fed. 337, 66 C. C. A. 399. *Ill.* *People v. Smith*, 239 Ill. 91, 87 N. E. 885, affirming, 144 Ill. App. 129. *Mich.* *People v. Arnold*, 46 Mich. 268, 9 N. W. 406.

Failure To Repeat Words "To the Grand Jury Unknown."—Giving the names of several person injured, followed by the words "and divers other

If the conspiracy has not been directed against a particular person or persons, it is sufficient if the indictment charges a conspiracy against a particular class of people or the public generally.⁵³

I. ALLEGATION OF OVERT ACT ORDINARILY UNNECESSARY.—At common law it was not necessary to aver an overt act since the crime was complete without it.⁵⁴ If, however, as is frequently the case, an overt

persons of said county," without repeating the words "to the Grand Jury unknown," but afterwards alleging the injury to the people named "and other persons to this Grand Jury unknown" is not such a defect as would tend to prejudice defendant. *State v. Grant*, 86 Iowa 216, 53 N. W. 120.

Indictment Showing on Face That Persons Known Were Defrauded.—"It is not a valid objection to an indictment which charges the accused with conspiring to devise a scheme to defraud persons unknown that it shows upon its face that they were also guilty of the offense—with which the indictment does not charge them—of conspiring to defraud persons known to the grand jury." *Miller v. United States*, 133 Fed. 337, 66 C. C. A. 399.

53. Ill.—*People v. Smith*, 239 Ill. 91, 87 N. E. 885; *Lowell v. People*, 229 Ill. 227, 82 N. E. 226; *Johnson v. People*, 124 Ill. App. 213. **Ind.**—*People v. McKee*, 111 Ind. 378, 12 N. E. 510, divers citizens of R. county and the public generally. **Mass.**—*Com. v. Harley*, 7 Metc. 506; *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54 (to cheat by sale of spurious indigo such persons as should become purchasers). **Mich.**—*People v. Arnold*, 46 Mich. 268, 9 N. W. 406. **N. Y.**—*People v. Wiechers*, 94 App. Div. 19, 87 N. Y. Supp. 897; *In re Malone*, 2 City Hall Rec. 22. **Pa.** *Clary v. Com.* 4 Pa. 210 ("citizens of this commonwealth and others"); *Collins v. Com.*, 3 Serg. & R. 220 ("divers citizens of Pennsylvania"). **Eng.**—*Reg. v. Peck*, 9 Ad. & El. 686, 36 E. C. L. 240; *Rex v. De Berenger*, 3 Maule & S. 67, 105 Eng. Reprint 536.

Reason of Rule.—It is necessary to permit this general form of pleading or some of the worst and most mischievous conspiracies would escape punishment altogether, from the obvious impossibility of making the indictment specific when the purpose to defraud is general. *People v. Arnold*, 46 Mich. 268, 9 N. W. 406.

Charging Intent To Defraud Public.

Proof of Intent To Defraud Certain Individual.—If a charge is of a conspiracy to defraud the public generally, proof of an intent to defraud a particular person will constitute a fatal variance. (*Lowell v. People*, 229 Ill. 227, 82 N. E. 226), or if the charge is of an intent to defraud A, proof of intent to defraud the public generally is a fatal variance (*Com. v. Harley*, 7 Metc. (Mass.) 506).

54. U. S.—*Bannon v. United States*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. ed. 494; *Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353; *United States v. Patten*, 187 Fed. 664 (Anti-Trust Law, July 2, 1890); *United States v. Gardner*, 42 Fed. 829; *United States v. Watson*, 17 Fed. 145; *United States v. Walsh*, 5 Dill. 58, 28 Fed. Cas. No. 16,636. **Cal.**—*People v. Sacramento, etc., Assn.*, 12 Cal. App. 471, 107 Pac. 712. **Conn.**—*State v. Gannon*, 75 Conn. 206, 52 Atl. 727; *State v. Bradley*, 48 Conn. 535. **Ill.**—*Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. **Ia.**—*State v. Poder*, 132 N. W. 962; *State v. Loser*, 132 Iowa 419, 104 N. W. 337; *State v. King*, 104 Iowa 727, 74 N. W. 691; *State v. Grant*, 86 Iowa 216, 53 N. W. 120; *State v. Ormiston*, 66 Iowa 143, 23 N. W. 370. **Ky.**—*Com. v. Ward*, 92 Ky. 158, 17 S. W. 283. **Me.**—*State v. Ripley*, 31 Me. 386. **Md.**—*State v. Buchanan*, 5 Har. & J. 317, 9 Am. Dec. 534. **Mass.**—*Com. v. Fuller*, 132 Mass. 563; *Com. v. Warren*, 6 Mass. 74; *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54. **Mich.**—*People v. Dyer*, 79 Mich. 480, 44 N. W. 937; *People v. Petherham*, 64 Mich. 252, 31 N. W. 188; *People v. Arnold*, 46 Mich. 268, 9 N. W. 406; *People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75. **Minn.**—*State v. Pulle*, 12 Minn. 164. **Mo.**—*State v. Noll*, 79 Mo. App. 243. **Mont.**—*Territory v. Carland*, 6 Mont. 14, 9 Pac. 578. **N. H.** *State v. Straw*, 42 N. H. 393. **N. Y.**—*People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 36 Am. St. Rep. 690; *People v. Chase*, 16 Barb. 495; *Lambert v.*

act of one or more of the conspirators is set out,⁵⁵ this does not vitiate the indictment,⁵⁶ even though there be uncertainty or informality in the allegations.⁵⁷

J. OTHERWISE UNDER STATUTE.—Where a statute makes an overt act necessary to complete the offense, the indictment or information must set forth in apt language an overt act in pursuance of such conspiracy,⁵⁸ every ingredient must be accurately and clearly ex-

People, 9 Cow. 577; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122. **N. C.** *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760. **Ohio.** *State v. Ice Delivery Co.*, 17 Ohio Dec. 515. **Pa.**—*Com. v. McHale*, 97 Pa. 397, 39 Am. Rep. 808; *Heine v. Com.*, 91 Pa. 145; *Com. v. Bartelson*, 85 Pa. 482; *Hazen v. Com.* 23 Pa. 355, 363; *Com. v. Haun*, 27 Pa. Super. 33. **B. I.** *State v. Bacon*, 27 R. I. 252, 61 Atl. 653. **Vt.**—*State v. Keach*, 40 Vt. 113; *State v. Noyes*, 25 Vt. 415. **Eng.**—*Sydserrf v. Reg.*, 11 Q. B. 245, 12 Jur. 418, 63 E. C. L. 245; *Reg. v. Gompertz*, 9 Q. B. 824, 58 E. C. L. 823; *Rex v. Hamilton*, 7 Car. & P. 448; *Rex v. Gill*, 2 Barn. & Ald. 204, 106 Eng. Reprint 341; *Rex v. Spragg*, 2 Burr. 993, 97 Eng. Reprint 852; *Rex v. Rispal*, 3 Burr. 1320, 97 Eng. Reprint 852; *Reg. v. Turvy*, Holt 364, 90 Eng. Reprint 1101; *Stark Cr. Pl.* 170, 171. **Can.**—*Rex v. Hutchinson*, 11 Brit. Col. 24.

“At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy, and indictments therefor were of such general description that it was customary to require the prosecutor to furnish the defendant with the particulars of his charges. *Rex v. Gill*, 2 B. & Ald. 204; *Rex v. Hamilton*, 7 Cars. & P. 448; *United States v. Walsh*, 5 Dill. 58. But this general form of indictment has not met with the approval of the courts in this country, and in most of the states an overt act must be alleged.” *Bannon v. United States*, 156 U. S. 464, 39 L. ed. 494.

Anti-Trust Act.—Need Not Allege Overt Acts.—The Anti-Trust Act of July 2, 1890, does not provide, as in the general conspiracy statute, that overt acts are necessary to complete the offense. Therefore, counts containing no averments of overt acts are not for that reason insufficient. *United States v. Patten*, 187 Fed. 664.

55. **U. S.**—*United States v. Gard-*

ner, 42 Fed. 829. **la.**—*State v. Loser*, 132 Iowa 419, 104 N. W. 337. **N. Y.** *People v. Mather*, 4 Wend. 229, 264, 21 Am. Dec. 122. **Eng.**—*Rex v. Gill*, 2 Barn. & Ald. 204, 106 Eng. Reprint 341; *Rex v. Rispal*, 3 Burr. 1320, 97 Eng. Reprint 852; *Rex v. Spragg*, 2 Burr. 993, 97 Eng. Reprint 669.

56. **U. S.**—*Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353. **Cal.** *People v. Sacramento, etc., Assn.*, 12 Cal. App. 471, 107 Pac. 712. **Conn.**—*State v. Gannon*, 75 Conn. 206, 52 Atl. 727; *State v. Bradley*, 48 Conn. 535. **Hawaii.**—*Territory v. Johnson*, 16 Hawaii 743. **la.**—*State v. Grant*, 86 Iowa 216, 53 N. W. 120; *State v. Ormiston*, 66 Iowa 143, 23 N. W. 370. **Ky.**—*Com. v. Ward*, 92 Ky. 158, 17 S. W. 283. **Me.** *State v. Mayberry*, 48 Me. 218. **Mass.** *Com. v. Shedd*, 7 Cush. 514; *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596; *Com. v. Hunt*, 4 Metc. 111, 38 Am. Dec. 339. **Mich.**—*People v. Arnold*, 46 Mich. 268, 9 N. W. 406. **Pa.**—*Collins v. Com.*, 3 Serg. & R. 220. **Vt.**—*State v. Keach*, 40 Vt. 113; *State v. Noyes*, 25 Vt. 415.

Particularity With Which Alleged Does Not Vitate Indictment.—The particularity with which the overt act is set forth cannot vitiate the indictment, if the conspiracy of itself be sufficient. *United States v. Stamopoulos*, 164 Fed. 524.

57. **Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Com. v. Davis*, 9 Mass. 415; *Com. v. Tibbetts*, 2 Mass. 536; *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54.**

58. **U. S.**—*Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; *United States v. McClarty*, 191 Fed. 518; *United States v. Atlantic Journal Co.*, 185 Fed. 656; *Arnold v. Well*, 157 Fed. 429; *United States v. Burkett*, 150 Fed. 208; *Ex parte Black*, 147 Fed. 832; *United States v. Newton*, 52 Fed. 275; *United States v. Reichert*, 32 Fed. 142; *United States v. Dustin*, 2 Bond 332, 25 Fed. Cas. No. 15,011; *United States v. Boyden*, 1

pressed, no material fact embraced in the definition being left to intendment.⁵⁹

Low. 266, 24 Fed. Cas. No. 14,632. **Cal.** *People v. Daniels*, 105 Cal. 262, 38 Pac. 720. **Dak.**—*United States v. Carpenter*, 6 Dak. 294, 50 N. W. 123. **Me.** *State v. Clary*, 64 Me. 369. **Mo.**—*State v. Dalton*, 134 Mo. App. 517, 114 S. W. 1132. **N. J.**—*State v. Barr*, 40 Atl. 772; *Wood v. State*, 47 N. J. L. 461, 1 Atl. 509; *State v. Hickling*, 41 N. J. L. 208, 32 Am. Rep. 198. **N. Y.**—*People v. Goslin*, 171 N. Y. 627, 63 N. E. 1120; *People v. Willis*, 158 N. Y. 392, 53 N. E. 29, *reversing* 4 Misc. 537, 54 N. Y. Supp. 129; *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 36 Am. St. Rep. 690; *Elkins v. People*, 28 N. Y. 177; *People v. Chase*, 16 Barb. 495; *People v. Miles*, 123 App. Div. 862, 108 N. Y. Supp. 510, *affirmed*, 192 N. Y. 541, 84 N. E. 1117; *People v. Coney Isl. Club*, 68 Misc. 302, 123 N. Y. Supp. 669.

Conspiracy To Defraud United States. An indictment for conspiracy under Rev. St., §5440, making it criminal to conspire to defraud the United States where any of the parties to the agreement does any act "to effect the object of the conspiracy," must allege some overt act on the part of the defendants. *Bannon v. United States*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. ed. 494; *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. ed. 545; *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419, 422; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; *United States v. Benson*, 70 Fed. 591, 17 C. C. A. 293, 44 U. S. App. 219; *United States v. Richards*, 149 Fed. 443; *Ex parte Black*, 147 Fed. 832; *United States v. Reichert*, 32 Fed. 142; *United States v. Walsh*, 5 Dill. 58, 28 Fed. Cas. No. 16,636; *United States v. Blunt*, 24 Fed. Cas. No. 14,615.

"The statute in question changes the common law only in requiring an overt act to be alleged and proved." *Bannon v. United States*, *supra*.

Under Rev. St., Art. 5508 (U. S. Comp. St., 1901, pr. 3712), no overt act need be pleaded for conspiracy to injure, oppress, etc., any citizen in the free exercise or enjoyment of any right or privilege secured by constitution and laws of United States, but under Rev. St., Art. 5440, conspiracy to defraud

the United States, an overt act must be pleaded. *Smith v. United States*, 157 Fed. 721, 85 C. C. A. 353.

For the Jury.—*Marrash v. United States*, 168 Fed. 225, 93 C. C. A. 511.

Requirement of Overt Act Provides Locus Poenitentiae Only.—The offense does not consist in the conspiracy and the overt acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an overt act (Rev. St., §5440) to complete the offense of conspiracy to defraud the United States merely affords a *locus poenitentiae*, so that, before the act done, either one or all the parties may abandon their design, and thus avoid the penalty prescribed by the statute. *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. ed. 90; *United States v. Britton*, 108 U. S. 199, 204, 2 Sup. Ct. 698, 27 L. ed. 531, *per* Mr. Justice Woods.

Larceny as Overt Act in Pursuance of Conspiracy.—*United States v. Gardner*, 42 Fed. 829.

Charging aiding and abetting in false registration of a disqualified person sufficiently charges an overt act in execution of conspiracy to have such disqualified person fraudulently vote at primary election. *State v. Nugent*, 77 N. J. L. 84, 71 Atl. 485.

Conspiracy To Smuggle Chinese Into United States.—Provisioning of Vessel as Overt Act.—*Daly v. United States*, 170 Fed. 321, 95 C. C. A. 107.

Violation of National Banking Laws. *Prettyman v. United States*, 180 Fed. 30, 103 C. C. A. 384.

"In pursuance thereof" sufficient, though statute uses words "to effect object of conspiracy." *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. ed. 545; *United States v. Boyden*, 1 Low. 266, 24 Fed. Cas. No. 14,632.

59. *United States v. Atlantic Journal Co.*, 185 Fed. 656.

Particularity in Charging Overt Acts. An indictment against officers of a national bank and others for aiding and abetting the wilful misapplication of funds of a national bank by means of one of the parties drawing and accepting a draft set out, presenting it to the bank, obtaining credit for the amount for an insolvent hosiery company, in which one defendant was interested,

All the acts used to accomplish the object of the conspiracy need not be set out,⁶⁰ nor need it be alleged that the overt act accomplished its object,⁶¹ or how it would tend to effect the object of the conspiracy.⁶²

sufficiently charges an act in pursuance of the conspiracy to effect the object thereof, and specifies what the act was. Greater particularity than this is not necessary under §5440. It need not be averred that there was some infirmity connected with the draft, nor that the credit obtained thereon was used, nor that the draft was not paid when matured, nor that the bank lost anything by giving credit thereon. *Prettyman v. United States*, 180 Fed. 30, 42, 103 C. C. A. 384.

Agreement Not Sufficiently Described. An allegation that defendants entered into an agreement, which was corrupt and with a bad intent, does not sufficiently describe the act done to effect the object of the conspiracy. The agreement is not sufficiently described. It is not charged as written or oral, active or passive, and is left unknown as to matter and persons, and time and place. *United States v. Milner*, 36 Fed. 890.

60. *United States v. Burkett*, 150 Fed. 208; *Madden v. State*, 57 N. J. L. 324, 30 Atl. 541; *State v. Young*, 37 N. J. L. 184.

An indictment charging several overt acts at several dates is objectionable for duplicity (*United States v. Biggs*, 157 Fed. 264), but not where the conspiracy contemplates a series of acts for its accomplishment (*United States v. Eccles*, 181 Fed. 906), or is a continuing conspiracy (*United States v. Greene*, 115 Fed. 343, 349).

61. **U. S.**—*United States v. Stamatopoulos*, 164 Fed. 524; *United States v. Burkett*, 150 Fed. 208; *United States v. Bradford*, 148 Fed. 413; *United States v. McKinley*, 126 Fed. 242; *United States v. Greene*, 115 Fed. 343; *United States v. Newton*, 48 Fed. 218. **Ind.** *State v. Bruner*, 135 Ind. 419, 35 N. E. 22; *Sharcliff v. State*, 96 Ind. 369; *Miller v. State*, 79 Ind. 198. **Ky.**—*Com. v. Bryant*, 11 Ky. L. Rep. 426, 12 S. W. 276. **N. H.**—*State v. Straw*, 42 N. H. 393. **Vt.**—*State v. Noyes*, 25 Vt. 415.

It is enough if under any circumstances unless interrupted, the conspiracy might have accomplished its unlaw-

ful purpose. *United States v. Burkett*, 150 Fed. 208, 213.

Such an averment does not destroy the indictment. *United States v. Scott*, 165 Fed. 172, 91 C. C. A. 206.

Complete Execution Need Not Be Shown.—The statutes requiring an overt act in pursuance of the conspiracy do not require a complete execution of the conspiracy, and the indictment, therefore, need not show a complete performance of the conspiracy. *State v. Hickling*, 41 N. J. L. 208, 32 Am. Rep. 198. See also *Madden v. State*, 57 N. J. L. 324, 30 Atl. 541.

Indictment showing object incapable of consummation is subject to demurrer. *United States v. Burkett*, 150 Fed. 208.

62. *United States v. Green*, 136 Fed. 618; *United States v. Benson*, 70 Fed. 591, 17 C. C. A. 293, 44 U. S. App. 219; *United States v. Sanche*, 7 Fed. 715; *United States v. Donau*, 11 Blatchf. 168, 25 Fed. Cas. No. 14,983; *United States v. Boyden*, 1 Low. 266, 24 Fed. Cas. No. 14,632.

Particularity With Which Act Must Be Set Forth.—"It is sufficient, if the act be so described as to apprise the defendant what act is intended to be given in evidence as tending to show that the unlawful agreement was put in operation, without its being made to appear to the court, upon the face of the indictment, that the act mentioned is necessarily calculated to effect the object of the unlawful combination charged. It is not the case of an attempt to commit crime. The crime is committed when the combination is made, and the act of one of the conspirators is not required by the statute to show the intent. That is inferred from the unlawful act of combining to defraud, or to commit an offense, but the object of requiring proof of some act in furtherance of the unlawful agreement is, to show that the unlawful combination became a living, active combination." *United States v. Donau*, 11 Blatchf. 168, 25 Fed. Cas. No. 14,983.

Act Incapable of Effecting Conspiracy.—When it is clear from the face of the indictment that the overt act

The time of commission of the overt act ought to be set out, so that the court may see that it post-dates the conspiracy, and that it is not a part of it.⁶³

Though the place of commission of the overt act should be averred so as to identify the act,⁶⁴ the act need not be alleged to have been performed within the jurisdiction of the court, if the conspiracy was formed within the jurisdiction.⁶⁵

Allegation as to Actor.—An indictment need not charge overt acts by all the defendants, but is sufficient if it charges an overt act by any one of the conspirators.⁶⁶

An insufficient averment of the conspiracy cannot be aided by averment of acts done by one or more of the conspirators in furtherance of the conspiracy,⁶⁷ though there may be a reference thereto to ascertain

charged could not by any possibility have been done to effect the object of the conspiracy, the indictment is demurrable. *United States v. Biggs*, 157 Fed. 264.

63. *United States v. Milner*, 36 Fed. 890.

But a variance between the time charged in the indictment and the evidence is not fatal. *United States v. Graff*, 14 Blatchf. 381, 26 Fed. Cas. No. 15,244.

The time is sufficiently alleged, where the date of the conspiracy is alleged and the overt act is alleged as being "according to and in pursuance of" the conspiracy. *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. ed. 545.

Averments as to Time of Commission Rejected as Surplusage.—An information is not "insufficient because the dates upon which the acts of the alleged conspirators committed in the prosecution of such conspiracy occurred are not definitely stated and fixed in the information. . . . They constitute mere probative facts, since the gist of the crime of conspiracy is in its formation for an unlawful purpose, and, therefore, the averments of the information with reference to the times at which such acts were committed may be treated as surplusage." *People v. Sacramento, etc., Assn.*, 12 Cal. App. 471, 107 Pac. 712.

Date of Execution of Conspiracy.—An indictment is not defective for failure to state the date when the alleged trespass, the object of the conspiracy, was committed. *State v. Davies*, 80 Mo. App. 239.

64. *United States v. Milner*, 36 Fed. 890.

65. **Performance of the overt act in the United States need not be alleged** where the conspiracy is alleged to have been entered into in the United States. *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. ed. 545.

66. *Bannon v. United States*, 156 U. S. 464, 15 Sup. Ct. 680, 39 L. ed. 494; *United States v. Benson*, 70 Fed. 591, 17 C. C. A. 293, 44 U. S. App. 219; *United States v. Greene*, 115 Fed. 343; *United States v. Donau*, 11 Blatchf. 168, 25 Fed. Cas. No. 14,983.

False entries in national bank made by co-conspirator not bank official. *Scott v. United States*, 130 Fed. 429, 64 C. C. A. 631.

67. **U. S.**—*Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. ed. 698; *Dwinnell v. United States (C. C. A.)*, 186 Fed. 754; *McConkey v. United States*, 171 Fed. 829, 96 C. C. A. 501; *Stearns v. United States*, 152 Fed. 900, 82 C. C. A. 48; *Conrad v. United States*, 127 Fed. 798, 62 C. C. A. 478; *McKenna v. United States*, 127 Fed. 88, 62 C. C. A. 88; *United States v. Milner*, 36 Fed. 890. **Ariz.**—*Turner v. Turner*, 4 Ariz. 290, 37 Pac. 368. **D. C.**—*Hyde v. United States*, 27 App. Cas. 375; *Tyner v. United States*, 23 App. Cas. 324. **Mass.**—*Com. v. Wallace*, 16 Gray 221; *Com. v. Shedd*, 7 Cush. 514; *Com. v. Hunt*, 4 Metc. 111, 38 Am. Dec. 346. **Mich.**—*People v. Arnold*, 46 Mich. 268, 9 N. W. 406. **N. Y.**—*People v. Willis*, 24 Misc. 537. 54 N. Y. Supp. 129, *affirmed*, 158 N. Y. 392, 53 N. E. 29; *People v. Buckner*, 15 N. Y. Supp. 529. **Vt.**—*State v. Keach*, 40 Vt. 113. **Eng.**—*Reg. v. Rex*, 7 Ad.

the sense in which terms are used in charging the conspiracy.⁶⁸

K. CHARGING IN SEVERAL COUNTS AND AS TO SEVERAL INDIVIDUALS AND OFFENSES.—In accordance with the general rule, the pleader may set forth the offense in all the various ways necessary to meet the possible phases of the evidence that may appear at the trial.⁶⁹ And one good count will support a general verdict.⁷⁰ Likewise if more than one unlawful act is to be accomplished by the same conspiracy, the facts relating to each act may be set forth in separate counts.⁷¹ It will be assumed that it was the intention to charge one offense if all the counts are manifestly based on one and the same transaction.⁷²

Though it has been held that each count should set forth an express

& El. (N. S.) 782, Dav. & Mer. 741, 8 Jur. 662, 53 E. C. L. 78.

Ownership of Property Not Alleged. People v. Arnold, 46 Mich. 268, 9 N. W. 406.

Qualifying Epithets Not Aiding Imperfect Averment.—"An indictment for conspiracy, which does not directly aver facts sufficient to constitute the offense, is not aided by matter which precedes or follows the direct averments; nor by qualifying epithets (as 'unlawful, deceitful, pernicious,' etc.) attached to the facts averred." Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346. See also State v. Van Pelt, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760.

Limitation of Rule.—This rule has been held not to apply where no overt acts need be alleged, and that averments of overt acts might be referred to the charge of conspiracy and the whole indictment considered in determining the offense charged. Smith v. United States, 157 Fed. 721.

68. Dealy v. United States, 152 U. S. 539, 545, 14 Sup. Ct. 680, 38 L. ed. 545; Stearns v. United States, 152 Fed. 900, 82 C. C. A. 48; United States v. Biggs, 157 Fed. 264, 273.

69. U. S.—McGregor v. United States, 134 Fed. 187, 69 C. C. A. 477; Lehman v. United States, 127 Fed. 41, 61 C. C. A. 577. Ia.—State v. Caine, 134 Iowa 147, 111 N. W. 443; State v. Kennedy, 63 Iowa 197, 18 N. W. 885 (code provision). N. Y.—People v. Goslin, 67 App. Div. 16, 73 N. Y. Supp. 520. N. C.—State v. Howard, 129 N. C. 584, 40 S. E. 71. Va.—State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710. Can.—Reg. v. Bunting, 7 Ont. 524.

70. U. S.—Lehman v. United States, 127 Fed. 41, 61 C. C. A. 577; United States v. Munnemacher, 7 Biss. 111, 27 Fed. Cas. No. 15,902. Colo.—Imboden v. People, 40 Colo. 142, 90 Pac. 608, conviction on four counts and sentence on each running concurrently, if good for one count, is good. Ill. People v. Smith, 239 Ill. 91, 87 N. E. 885; Gallagher v. People, 211 Ill. 158, 81 N. E. 842; Ochs v. People, 124 Ill. 399, 16 N. E. 662. Me.—State v. Mayberry, 48 Me. 218. Mass.—Com. v. Nichols, 134 Mass. 531. N. J.—Johnson v. State, 26 N. J. L. 313. N. Y. People v. Goslin, 67 App. Div. 16, 73 N. Y. Supp. 520. N. C.—State v. Brady, 107 N. C. 822, 12 N. E. 325. Pa.—Hazen v. Com., 23 Pa. 355.

71. State v. Kennedy, 63 Iowa 197, 18 N. W. 885; State v. Wilson, 121 N. C. 650, 28 S. E. 416 (conspiracy to deceive both A and B by sham marriage joined in different counts). But see Johnson v. People, 124 Ill. App. 213, where election was required.

72. State v. Glidden, 55 Conn. 68, 8 Atl. 890, 892, 3 Am. St. Rep. 23.

But if the indictment contains several counts and each count subsequent to the first refers to the first count for a precise description of the offense, but lays a different date for the formation of the conspiracy and the overt act, while this indicates that the conspiracies charged in separate counts are probably one and the same, on demurrer they will be considered as if each count alleged a distinct conspiracy entered into by the same persons in the same manner and by the same means and for the same purpose. Hyde v. United States, 27 App. Cas. (D. C.) 362, 372.

charge of conspiracy without reference to previous counts,⁷³ it seems to be the general rule that apt references to previous counts is permissible.⁷⁴

Counts charging a conspiracy and the commission of an offense in pursuance thereof, may be joined where the two offenses spring out of the same transaction and the same testimony is applicable to each,⁷⁵ unless a statute prohibits the joinder of more than one offense in the same indictment.⁷⁶ Likewise it is permissible under the United

73. *State v. Norton*, 23 N. J. L. 33, 48.

74. *United States v. Browne*, 145 Fed. 1, 76 C. C. A. 31; *United States v. Greene*, 115 Fed. 343, 351; *Hyde v. United States*, 27 App. Cas. (D. C.) 362; *Lorenz v. United States*, 24 App. Cas. (D. C.) 377.

"The counts charging overt acts and counts charging conspiracy are all to be construed together. It is not true, . . . in an indictment of this character, . . . that each count must be treated as a complete and separate indictment in itself. On the contrary, if counts, which, considered separately, would not be regarded as complete, are perfected by apt references therein to averments in another or in other counts, so that there is intelligible and definite information conveyed to the accused of the accusation against them, the constitutional requirement as to an indictment is met." *United States v. Greene*, 115 Fed. 343, 351.

Conspiracy Alleged in One Count Only.—Overt Acts in Other Counts.—*Browne v. United States*, 145 Fed. 1, 76 C. C. A. 31.

Necessity for Alleging Parts Referred to Are Incorporated in Subsequent Counts.—The subsequent counts when referring to averments in previous counts of the indictment need not add "which is hereby made a part of this count" (*Browne v. United States*, 145 Fed. 1, 76 C. C. A. 31), but is sufficient if it is sufficiently full to incorporate the matter going before with that in which the reference is made (*Hyde v. United States*, 27 App. Cas. [D. C.] 362).

75. *U. S. — McGregor v. United States*, 134 Fed. 187, 69 C. C. A. 477; *United States v. Lancaster*, 44 Fed. 885, 10 L. R. A. 317. **Ill.**—*Thomas v. People*, 113 Ill. 531. **Ia.**—*State v. Loser*, 132 Iowa 419, 104 N. W. 337, conspiracy to injure property and prop-

erty rights and obtaining money by false pretences. **Mass.**—*Com. v. Rogers*, 181 Mass. 184, 63 N. E. 421, conspiracy to procure illegal voting and aiding and abetting illegal voting.

Contra, *State v. Kennedy*, 63 Iowa 197, 18 N. W. 885, code prohibiting joinder of more than one offense.

Illustrations.—It has been held proper to join the following offenses: Conspiracy to obtain note by false pretenses and obtaining note. *People v. Summers*, 115 Mich. 537, 73 N. W. 818. Statutory offense of conspiracy to commit murder and common law offense of murder (*Combs v. Com.*, 15 Ky. L. Rep. 620, 25 S. W. 276), though murder and conspiracy to commit murder cannot be joined where the offenses spring out of separate and distinct transactions. An election should be required or the indictment quashed (*Betts v. State (Tex. Crim.)*, 133 S. W. 251).

Conspiracy to procure illegal voting, and charge of aiding and abetting in illegal voting. *Com. v. Rogers*, 181 Mass. 184, 63 N. E. 424.

Conspiracy to commit murder, and charge of murder where arising out of the same acts. *United States v. Lancaster*, 44 Fed. 885, 894, 10 L. R. A. 317 (statute provided for additional punishment for overt act in pursuance of conspiracy); *People v. Thorn*, 21 Misc. 130, 12 N. Y. Crim. 236, 47 N. Y. Supp. 46.

Conspiracy To Defraud.—Acceptance of Bribe.—Conspiracy to defraud the United States by officers of United States and acceptance of money from alleged co-conspirators for procuring contract in violation of another section, but all growing out of same conspiracy may properly be joined in different counts. *McGregor v. United States*, 134 Fed. 187, 69 C. C. A. 477.

76. *State v. Kennedy*, 63 Iowa 197, 18 N. W. 885.

States statutes to join separate counts for two or more distinct conspiracies.⁷⁷

Moreover an indictment⁷⁸ or information charging a conspiracy, involving the commission of two or more distinct offenses, is not objectionable for duplicity,⁷⁹ though the indictment charges the doing of several acts in pursuance of the conspiracy at different times and with different individuals.⁸⁰ Nor is an indictment rendered duplicitous by reason of reference in one count to other counts for the purpose of

77. *Chadwick v. United States*, 141 Fed. 225, 72 C. C. A. 343 (separate conspiracies for over certification of checks); *Hyde v. United States*, 27 App. Cas. (D. C.) 362 (conspiracies to defraud United States of lands).

Under Rev. St., 1901, p. 720, §§1024, 1025, this is permissible, but if the court sees that the defense may be seriously embarrassed it may require the prosecution to make an election. *Chadwick v. United States*, *supra*.

78. **U. S.**—*United States v. Eccles*, 181 Fed. 906. **Ia.**—*State v. Grant*, 86 Iowa 216, 53 N. W. 120; *State v. Kennedy*, 63 Iowa 197, 18 N. W. 885; *State v. Sterling*, 34 Iowa 443. **N. J.**—*State v. Nugent*, 77 N. J. L. 84, 71 Atl. 485; *Noyes v. State*, 41 N. J. L. 418. **N. Y.**—*People v. Everest*, 51 Hun 19, 3 N. Y. Supp. 612. **Pa.**—*Com. v. Quay*, 7 Pa. Dist. 723. **W. Va.**—*State v. Grove*, 61 W. Va. 697, 57 S. E. 296. **Wis.**—*State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

Where a conspiracy contemplates a series of acts, "such acts are not separate and distinct offenses, but merely a part of the substantive offense and more than one overt act may be charged the same count of an indictment without making it duplicitous." *United States v. Eccles*, 181 Fed. 906, *citing*, *Jones v. United States*, 162 Fed. 417, 89 C. C. A. 303; *Ware v. United States*, 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053; *Arnold v. Weil*, 157 Fed. 429.

Charging Conspiracy To Injure Business, Property and Property Rights.—An indictment is not bad for duplicity, or uncertain in its language, where it charges a conspiracy to injure the business property and rights in property of another or others, and also charges the overt act of cheating by false pretenses, the language of the statute under which the indictment was brought being disjunctive in character, thus al-

lowing the enumerated acts to be charged conjunctively. *State v. Loser*, 132 Iowa 419, 104 N. W. 337.

Means Involving Commission of Several Offenses.—An indictment alleging a conspiracy, but alleging various means agreed upon for the accomplishment of the offense, the means involving the commission of several offenses, charges but one offense, and in one form as provided in Code of Crim. Proc. (N. Y.) 278. *People v. Everest*, 51 Hun 19, 3 N. Y. Supp. 612, 20 N. Y. St. 456.

An indictment is not objectionable for duplicity as charging more than one offense, where it charges a conspiracy to "rob and steal" (*State v. Sterling*, 34 Iowa 443), to "accept and receive" rebates (*Thomas v. United States*, 156 Fed. 897, 908, 84 C. C. A. 477), to obtain signatures of several persons to several and distinct notes (*State v. Grant*, 86 Iowa 216, 53 N. W. 120), or "combination or conspiracy" in restraint of trade, as combination and conspiracy are synonymous (*Tribolet v. United States*, 11 Ariz. 436, 96 Pac. 85, 16 L. R. A. (N. S.) 223).

Charging Offenses in Alternative.—An averment that a conspiracy was to prevent M. "from obtaining work or employment or continuing in his said work and employment" does not charge offenses in the alternative, it being alleged that M. was in the employment of the corporation when the conspiracy was formed—obtaining employment and continuing employment are here synonymous terms. *State v. Dyer*, 67 Vt. 690, 32 Atl. 814.

79. *Hamilton v. People*, 24 Colo. 301, 51 Pac. 425, two or more different burglaries.

80. *United States v. Eccles*, 181 Fed. 906; *State v. Grant*, 86 Iowa 216, 53 N. W. 120.

Charging several acts in pursuance of the conspiracy does not charge several crimes. *People v. Rathburn*, 44 Misc. 88, 89 N. Y. Supp. 746.

giving details of the offense charged,⁸¹ or because it charges a conspiracy to commit an offense, and the commission of the offense, no conviction being sought for the commission of the crime.⁸² And if a continuing conspiracy is charged and it is further charged that at a later date it was made to apply to certain works it is not objectionable for duplicity.⁸³

L. IMMATERIAL AND UNNECESSARY ALLEGATIONS.—If the allegations of the indictment are otherwise sufficient, the addition of an

81. *United States v. Patten*, 187 Fed. 664, 673.

82. **U. S.**—*United States v. Greene*, 115 Fed. 343. **Conn.**—*State v. Gannon*, 75 Conn. 206, 52 Atl. 727; *State v. Bradley*, 48 Conn. 535, 549. **Ia.**—*State v. Grant*, 86 Iowa 216, 53 N. W. 120; *State v. Ormiston*, 66 Iowa 143, 23 N. W. 370 (conspiracy to injure and assault and felonious assault properly joined). But see *contra*, *State v. Kennedy*, 63 Iowa 197, 18 N. W. 885, explained in *State v. Ormiston*, 66 Iowa 143, 23 N. W. 370, on the ground that there was a charge of burning insured goods not charged simply as an overt act of the conspiracy. **Ky.**—*Lisle v. Com.*, 82 Ky. 250. **Mich.**—*State v. Summers*, 115 Mich. 537, 73 N. W. 818. **Ore.**—*State v. Waymire*, 52 Ore. 281, 97 Pac. 46, 132 Am. St. Rep. 699, 21 L. R. A. (N. S.) 56.

Conspiracy in Restraint of Trade.—A count charging the making of a contract in restraint of trade, and further charging a conspiracy in restraint of trade is not objectionable for duplicity. The indictment will be construed "as alleging the contract to have been made as one of the steps by which the combination was brought about, and as an overt act in furtherance of the conspiracy." *Tribolet v. United States*, 11 Ariz. 436, 95 Pac. 85, 16 L. R. A. (N. S.) 223.

Iowa.—If the indictment "should be so drawn as to show a design to claim a conviction for the injury committed, though the evidence should fail to sustain the charge of conspiracy, such indictment manifestly could not be sustained, unless the offense could be regarded as a compound offense." *State v. Ormiston*, 66 Iowa 143, 23 N. W. 370.

83. A count is not duplicitous because charging a conspiracy in 1891 and another in 1897, where it recites that the fraudulent scheme was first devised, concocted and put in operation

in 1891, and has been continuously in operation, and charges a conspiracy at the later date made to apply to certain works in pursuance of which overt acts were committed. *United States v. Greene*, 115 Fed. 343.

Charging Continuous Conspiracy.—An allegation that the "defendants during all the times between May 25, 1902, and the commission of the last overt act therein set forth continued to conspire together to defraud the United States of the title to its public lands, in the manner and by the means agreed on between them on May 25, 1902, is not equivalent to a charge that the defendants subsequently to that date entered into a new conspiracy for the purpose of accomplishing their unlawful design to defraud the United States of certain of its public lands. It is simply, in effect, an allegation that the conspiracy formed on May 25, 1902, was never abandoned, but was in continuous operation thereafter until the date of the last overt act set out. The indictment, therefore, is to be construed as charging but one conspiracy; that such conspiracy was formed by the defendants on May 25, 1902, and numerous overt acts were thereafter committed by them for the purpose of effecting its object, the first of these acts on June 10, 1902, and the last on September 15, 1902; that from the date of its formation until the commission of the last overt act in pursuance thereof, the conspiracy so formed on May 25, 1902, was, in the language of the indictment, 'continuously in process of execution.'" *United States v. Brace*, 149 Fed. 874, 876.

Allegation of Continuous Conspiracy Must Be Denied Under General Issue. A conspiracy may have continuance in time and where "the indictment, consistently with the other facts, alleged that it did so continue to the date of filing, that allegation must be denied under the general issue and not by a

immaterial⁶⁴ or unnecessary averment may be rejected as surplusage.⁶⁵

M. BILL OF PARTICULARS.—Whether or not the state shall be compelled to furnish a bill of particulars in a specific case rests within the sound discretion of the trial court,⁶⁶ whose discretion will not be reviewed except in case of abuse;⁶⁷ but if it is not demanded, failure

special plea'' of the statute of limitations. *United States v. Kissel*, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. ed. 1169.

84. *Ind.*—*Musgrave v. State*, 133 Ind. 297, 32 N. E. 885. *Mo.*—*State v. Mayberry*, 48 Mo. 218. *Pa.*—*Clary v. Com.*, 4 Pa. 210. *Tex.*—*Woodsworth v. State*, 20 Tex. App. 375.

The conclusion "contrary to the form of the statute" in a common law indictment may be rejected as surplusage. *N. H.*—*State v. Straw*, 42 N. H. 393. *Pa.*—*Com. v. Richardson*, 229 Pa. 609, 79 Atl. 222. *R. I.*—*State v. Bacon*, 27 R. I. 252, 61 Atl. 653.

85. *U. S.*—*United States v. Bradford*, 148 Fed. 413, 424, *affirmed*, 152 Fed. 617 (unnecessary averments of knowledge); *United States v. Smith*, 2 Bond 323, 27 Fed. Cas. No. 16,322. *N. H.*—*State v. Hadley*, 54 N. H. 224. *N. Y.*—*Elkin v. People*, 24 How. Pr. 272. *S. C.*—*State v. Ameker*, 73 S. C. 330, 53 S. E. 484.

Charging Conspiracy in Language of Statute and in Particular Way.—"When a complaint charges the offense of conspiracy in the language of the statute, and a conspiracy to carry out the particular purpose of such conspiracy in a particular way is also charged, accompanied by a statement of overt acts pursuant to the conspiracy, the latter part may be rejected as surplusage in construing the complaint, but the two charges of conspiracy may be read together as charging a conspiracy of the nature indicated by the particular allegations as regards the methods adopted for effecting the criminal purpose." *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

The "intent to defraud a foreign bank" may be rejected as surplusage where the intent to defraud the people of the commonwealth and a foreign bank is charged. *Clary v. Com.*, 4 Pa. 210.

86. *Colo.*—*Imboden v. People*, 40 Colo. 142, 166, 90 Pac. 608. *Ill.*—*People v. Nell*, 242 Ill. 284, 89 N. E. 1012; *Gallagher v. People*, 211 Ill. 153, 71 N. E. 842; *McDonald v. People*, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep.

547. *N. C.*—*State v. Howard*, 129 N. C. 584, 40 S. E. 71; *State v. Brady*, 107 N. C. 822, 12 S. E. 325. *Pa.*—*Com. v. Quern*, 16 Pa. Super. 588; *Com. v. Wilson*, 1 Chest. Co. 538.

If the bill is insufficient, the court will always require a fuller statement of particulars to be furnished. Such applications should be made in time so as not to delay trial. If too long delayed the court will refuse the application. *State v. Brady*, 107 N. C. 822, 12 S. E. 325.

No Overt Act Alleged.—If an indictment for conspiracy is general and does not allege an overt act, a specification of particulars is generally ordered. *Reg. v. Rycroft*, 6 Cox C. C. (Eng.) 76. But its refusal was held not reversible error in *Sullivan v. People*, 108 Ill. App. 328.

Conspiracy To Obtain Goods by False Pretenses Charged in General Terms.—If the charge of conspiracy to obtain goods by false pretenses is made in general terms, the court upon request will order a specification of particulars. *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997; *Reg. v. Kenrick*, 5 Q. B. 49, 61, 48 E. C. L. 48; *Rex v. Hamilton*, 7 Car. & P. (Eng.) 448; *Reg. v. Brown*, 8 Cox C. C. (Eng.) 69.

87. *Colo.*—*Imboden v. People*, 40 Colo. 142, 90 Pac. 608. *Ill.*—*Gallagher v. People*, 211 Ill. 153, 71 N. E. 842; *Sullivan v. People*, 108 Ill. App. 328. *Md.*—*Lanasa v. State*, 109 Md. 602, 71 Atl. 1058.

Discretion Properly Exercised.—If the indictment contained several counts and sentence was concurrent and for the same term on each count, if one of the counts gave the details of the facts and circumstances by means of which the conspiracy was to be consummated, the refusal to grant a bill of particulars was a proper exercise of discretion. *Imboden v. People*, 40 Colo. 142, 90 Pac. 612.

Cheating by Means of Confidence Game.—Error To Refuse Bill.—Where an indictment charges a conspiracy to obtain money and cheat and defraud

to order it will not be deemed error.⁸⁸ The court will only require that a bill of particulars be furnished when it is made to appear that the defendants can not properly prepare their defense without such bill of particulars.⁸⁹

N. DEFENDANTS.—While the convenient and usual course is to join in one indictment all the conspirators who are within reach at the same time, still this is not absolutely necessary,⁹⁰ as an indictment⁹¹

by means of confidence game, and in other counts a conspiracy to obtain money by false pretenses, within the nature of the confidence game, nor the details of the conspiracy and false pretenses being set forth, nor the money specifically described, it is improper to refuse a bill of particulars. *Gilmore v. People*, 87 Ill. App. 128.

88. *Hamilton v. People*, 24 Colo. 301, 51 Pac. 425.

Right to Bill Does Not Deprive Defendant of Right to Quash.—*State v. Van Pelt*, 138 N. C. 633, 49 S. E. 177, 68 L. R. A. 760.

89. *People v. Nall*, 242 Ill. 284, 89 N. E. 1012; *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842.

Bill To Secure Description of Property To Be Obtained.—*Com. v. Wilson*, 1 Chest. Co. (Pa.) 538.

90. **U. S.**—*Cohen v. United States*, 157 Fed. 651, 85 C. C. A. 113, corporation not indicted. **Cal.**—*People v. Richards*, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716. **Ill.**—*People v. Nall*, 242 Ill. 284, 89 N. E. 1012, indictment may be brought against three persons named, though indictment recites that one of them is dead. **Ky.**—*International, etc. Co. v. Com.*, 137 Ky. 668, 126 S. W. 352. **La.**—*State v. Slutz*, 106 La. 182, 30 So. 298. **Pa.**—*Com. v. Demain*, 3 Clark 487.

Joinder of Parties to Distinct Conspiracies.—When certain persons combine to perform certain acts and some of them combine with others engaged in totally different acts, though all have a similar general purpose in view, it is error to join them in an indictment. *Wilson v. United States*, 190 Fed. 427, per Noyes, J.

Perpetrator of Overt Act Need Not Be Indicted.—Where the overt act is done in the state in which the indictment is found, the conspirators who only participated in the design may be tried and joined without joining in the indictment the perpetrator of the

overt act. *State v. Turner*, 119 N. C. 841, 25 S. E. 810, 37 L. R. A. 734.

Corporation as Conspirator.—The conspirators may be indicted jointly or severally, or if they combine under a corporate name, and the corporation executes the purpose of the conspiracy, then the corporation may be indicted, either alone or jointly with those or any of them entering into the conspiracy. *International, etc. Co. v. Com.*, 137 Ky. 668, 126 S. W. 354.

Referring to Other Conspirators as "Persons Unknown."—"Where conspiracy is charged, it is manifestly not necessary to make all the alleged conspirators defendants in order to maintain a prosecution against one. The gist of the offense is in the formation of the combination with others to do some unlawful act, and where the information, as here, charges a party with having entered into such a conspiracy with others, not made defendants, it is sufficient to refer to the latter in the accusatory pleading as 'persons unknown.'" *People v. Sacramento, etc. Assn.*, 12 Cal. App. 471, 107 Pac. 712.

Co-Conspirators Not Indicted.—A person may be indicted for conspiracy and convicted and sentenced although his co-conspirators have not been indicted, or has in some mode not inconsistent with guilt been released from liability under the indictment. *Bradshaw v. Territory*, 3 Wash. Ter. 265, 14 Pac. 594.

Indictment Alleging One Conspirator Dead.—If three persons are named as conspirators and it is stated that one is now dead, the indictment is sufficient though charging him as one of the conspirators, without proving that all three were conspirators. *People v. Nall*, 242 Ill. 284, 89 N. E. 1012.

91. **U. S.**—*Miller v. United States*, 3 Hughes 553, 28 Fed. Cas. No. 15,774. **La.**—*State v. Poder*, 132 N. W. 962. **La.** *State v. Slutz*, 106 La. 182, 30 So.

or information will lie against each conspirator separately,⁹² especially upon the death of one of the conspirators.⁹³ But a separate indictment must charge a conspiracy by two or more persons,⁹⁴ the usual form being to charge that the defendants conspired "with divers other persons to the grand jurors unknown."⁹⁵

Joinder of Public Officers and Private Citizens.—Public officers and private citizens may be jointly indicted under the same statute, without charging them as officers, for conspiracy to defraud the government,⁹⁶

298. **N. Y.**—*People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122. **Ore.**—*State v. Smith*, 55 Ore. 408, 106 Pac. 797. **Pa.** *Heine v. Com.*, 91 Pa. 145. **Wash.** *Bradshaw v. Territory*, 3 Wash. Ter. 265, 14 Pac. 594. **Eng.**—*Rex v. Nichols*, 13 East 412, 103 Eng. Reprint 429, 2 Str. 1227, 93 Eng. Reprint 1148; *Rex v. Oxford County*, 13 East 411, 103 Eng. Reprint 429. **Can.**—*Reg. v. Frawley*, 25 Ont. 431, 14 Can. L. T. 466.

Reason of Rule.—"It will not do to say that because two at least must be convicted of a conspiracy, and that one person who should be the only one convicted must be discharged; therefore, two at least must be joined in the indictment. But the same reason would forbid the severance at the trial, and deprive anyone of his right to be tried alone. If it be conceded that there may be a severance in trial of persons jointly indicted for conspiracy, it follows, as far as the reason just alluded to is concerned, that there may be a severance in the indictment. Some of the text writers say, arbitrarily, that indictments for conspiracy must be joint; but they give no reason, other than the one just stated, for their proposition, and it is difficult to find a reason. I do not think any sufficient reason exists." *United States v. Miller*, 3 Hughes 553, 26 Fed. Cas. No. 15,774.

At common law, it was necessary that at least two be joined in the writ of conspiracy. *Spies v. People*, 122 Ill. 1, 17 N. E. 898, 12 N. E. 865, 3 Am. St. Rep. 320; *Jones v. Baker*, 7 Cow. (N. Y.) 445.

92. **U. S.**—*United States v. Miller*, 3 Hughes 553, 26 Fed. Cas. No. 15,774. **Cal.**—*People v. Richards*, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716 (no need for allegation that co-conspirator is dead or out of jurisdiction); *People v. Sacramento*, etc. Assn., 12 Cal. App. 471, 107 Pac. 712. **Kan.**—*State v.*

Dreany, 65 Kan. 292, 69 Pac. 182. **Mo.** *State v. Sykes*, 191 Mo. 62, 89 S. W. 851. **N. Y.**—*People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122. **Ore.**—*State v. Smith*, 55 Ore. 408, 106 Pac. 797.

Naming the other conspirators, but not joining him does not vitiate indictment. *People v. Richards*, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716.

It is not necessary to join another in the information as a co-conspirator in order to prove the conspiracy between the defendant and such person. *State v. Sykes*, 191 Mo. 62, 89 S. W. 851.

93. **U. S.**—*United States v. Miller*, 3 Hughes 553, 26 Fed. Cas. No. 15,774. **Cal.**—*People v. Richards*, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716. **N. Y.** *People v. Oleott*, 2 Johns. Cas. 301, 1 Am. Dec. 168, one of three conspirators dead and another acquitted. **Eng.** *King v. Nicholls*, 2 Str. 1227, 93 Eng. Reprint 1148, 13 East 412 note, 103 Eng. Reprint 429.

94. **U. S.**—*United States v. Miller*, 3 Hughes 553, 26 Fed. Cas. No. 15,774. **Ill.**—*Sullivan v. People*, 108 Ill. App. 328. **Ky.**—*Taylor v. Com.*, 28 Ky. L. Rep. 819, 90 S. W. 581. **La.**—*State v. Slutz*, 106 La. 182, 30 So. 298.

95. *State v. Slutz*, 106 La. 182, 30 So. 298.

Reference to parties not joined with defendant as "parties unknown" is sufficient. *People v. Sacramento*, etc. Assn., 12 Cal. App. 471, 107 Pac. 712.

A charge that the defendant conspired with others, named in the indictment, is not open to the objection that it amounts to charging him with conspiring by himself, but implies that there was a common agreement and a common purpose. *State v. Slutz*, 106 La. 182, 30 So. 298.

96. *Grunberg v. United States*, 145 Fed. 81, 76 C. C. A. 51; *United States v. VanLeuven*, 62 Fed. 62; *United*

though they might have been indicted as public officers under another statute and been subject to greater punishment.⁹⁷

O. WHERE PROSECUTED.—The conspirators may be prosecuted where the agreement was made,⁹⁸ though the offense to be committed in pursuance of the conspiracy was to be committed without the jurisdiction,⁹⁹ or they may be prosecuted wherever an overt act in pursuance of the common design was done, without reference to where the conspiracy was formed.¹

States v. Boyden, 1 Low. 266, 24 Fed. Cas. No. 14,632.

Charging as Officers With Private Individuals.—In *United States v. McDonald*, 3 Dill. 543, 26 Fed. Cas. No. 15,670, it was held that public officers charged as such under Rev. St., art. 3169, prescribing greater punishment for officers defrauding the United States could not be joined with private individuals charged as such, under Rev. St. §5440. But in *Grunberg v. United States*, 145 Fed. 81, 85, 76 C. C. A. 51, it is said that this might be done and separate sentences given upon conviction, and that in joining private individuals under §5440 requiring an overt act, and public officers under §3169 not requiring an overt act, to complete the offense, the offense is the same, only the United States may be required to prove more than if they proceeded against the officers alone.

Dismissal as to Parties Improperly Joined.—Where public officials and individuals are improperly joined, some being charged as officials under one statute, and others as individuals under another statute in the indictment, the government may dismiss the charge as to the individuals and proceed against the public officials. *United States v. McDonald*, 3 Dill. 543, 26 Fed. Cas. No. 15,670.

97. *Grunberg v. United States*, 145 Fed. 81, 76 C. C. A. 51; *United States v. Boyden*, 1 Low. 266, 24 Fed. Cas. No. 14,632.

98. **U. S.**—*Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. ed. 90; *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. ed. 545; *In re Pahrser*, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. ed. 514; *Arnold v. Weil*, 157 Fed. 429. **Ala.**—*Thompson v. State*, 106 Ala. 67, 17 So. 516. **N. J.** *State v. Nugent*, 77 N. J. L. 84, 71 Atl. 485. **N. Y.**—*People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122. **N. C.**

State v. Turner, 119 N. C. 841, 25 S. E. 810, 37 L. R. A. 734. **Tex.**—*Ex parte Rogers*, 10 Tex. App. 655, 38 Am. Rep. 654. **Eng.**—*King v. Brisac*, 4 East 164, 102 Eng. Reprint 792, 7 R. R. 551; *Reg. v. Best*, 1 Salk. 174, 91 Eng. Reprint 160.

District of Columbia.—*Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. ed. 90.

99. **U. S.**—*Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. ed. 545; *United States v. Nablom*, 27 Fed. Cas. No. 15,896. **Ida.**—*State v. Loser*, 132 Iowa 419, 104 N. W. 337. **Pa.**—*Com. v. Corlies*, 8 Phila. 450.

Object To Be Performed in Another State or Country.—If the conspiracy was entered into in one state and one or more overt acts perpetrated there, the courts of that state have jurisdiction, although the act which was the subject of the conspiracy was to be performed in another state (**U. S.** *Dimond v. Shine*, 199 U. S. 88, 25 Sup. Ct. 766, 50 L. ed. 99; *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. ed. 90. **Ala.**—*Thompson v. State*, 106 Ala. 67, 17 So. 512. **N. J.**—*Noyes v. State*, 41 N. J. L. 418. **Tex.**—*Ex parte Rogers*, 10 Tex. App. 655, 38 Am. Rep. 654), or even in another country (*People v. Summerfield*, 48 Misc. 242, 96 N. Y. Supp. 502).

1. **U. S.**—*Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. ed. 90; *Robinson v. United States*, 172 Fed. 105, 96 C. C. A. 307; *United States v. Campbell*, 179 Fed. 762; *Arnold v. Weil*, 157 Fed. 429; *United States v. Newton*, 52 Fed. 275; *United States v. Rindskopf*, 6 Biss. 259, 27 Fed. Cas. No. 16,165; *United States v. Noblom*, 27 Fed. Cas. No. 15,896. **Ky.**—*International, etc. Co. v. Com.*, 124 Ky. 543, 99 S. W. 637, 639. **Md.**—*Bloomer v. State*, 48 Md. 521. **Mich.**—*People v. Arnold*, 46 Mich. 268, 9 N. W. 406. **N. J.**—*Noyes v. State*, 41 N. J. L. 418. **N. Y.**—*People v. Peckens*, 153 N. Y.

P. RIGHT TO SEPARATE TRIAL.—Persons indicted for conspiracy may be tried separately,² especially where but one of the parties jointly indicted appears at the time for trial and moves for a separate trial.³ Still, unless a statute so provides,⁴ persons jointly indicted for conspiracy are not entitled to a severance as a matter of right, but it rests within the sound discretion of the trial court,⁵ which will not

576, 47 N. E. 883; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *People v. Summerfield*, 48 Misc. 242, 96 N. Y. Supp. 502. N. C.—*State v. Turner*, 119 N. C. 841, 25 S. E. 810, 37 L. R. A. 734. Pa.—*Com. v. Bartilson*, 85 Pa. 489; *Com. v. Gillespie*, 7 Serg. & R. 469, 10 Am. Dec. 475; *Com. v. Spencer*, 6 Pa. Super. 256; *Com. v. Corlies*, 3 Brewst. 575. Tex.—*Raleigh v. Heidenheimer*, 60 Tex. 441; *Ex parte Rogers*, 10 Tex. App. 655, 38 Am. Rep. 654. Wis.—*Casper v. State*, 47 Wis. 535, 2 N. W. 1117.

Reason of Rule.—"If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of any express renewal of their agreement. The law considers that wherever they act, there they renew, or perhaps to speak more properly, they continue their agreement, and this agreement is renewed or continued as to all whenever any of them does an act in furtherance of the common design." *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122.

Removal to Another State for Trial. Where none of the conspirators were in the state of W. until after the consummation of the conspiracy, and it appears that none of the conspirators were ever in correspondence or had been in communication, either directly or indirectly with any one in the state of W. until after the consummation of the conspiracy, they could not be removed to the state of W. for trial. *Ireland v. Henkle*, 179 Fed. 993.

2. U. S.—*United States v. Miller*, 3 Hughes 553, 26 Fed. Cas. No. 15,774. Cal.—*People v. Richards*, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716. Ia. *State v. Poder*, 132 N. W. 962. Md. *State v. Buchanan*, 5 Har. & J. 317,

500, 9 Am. Dec. 534. N. Y.—*People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168. Pa.—*Heine v. Com.*, 91 Pa. 145. But see *Com. v. Manson*, 2 Ashm. 31, holding separate trials cannot be had. Tex.—*Watson v. State*, 22 Tex. App. 408, 3 S. W. 570. Wis.—*Casper v. State*, 47 Wis. 535, 2 N. W. 1117. Eng. *Queen v. Kendrick*, 5 Ad. & El. 49, 48 E. C. L. 48; *Rex v. Cooke*, 5 Barn. & Cres. 538, 11 E. C. L. 307; *Rex v. Scott*, 3 Burr. 1262, 97 Eng. Reprint 822; *Rex v. Nicholls*, 2 Str. 1227, 93 Eng. Reprint 1148, 13 East 412, 103 Eng. Reprint 429; *Rex v. Kinnersley*, 1 Str. 193, 93 Eng. Reprint 467; *Reg. v. Ahearne*, 6 Cox C. C. 6.

Death of one of the number requisite to constitute the offense does not prevent trial and conviction of the others. *King v. Nicholls*, 2 Str. 1227, 93 Eng. Reprint 1148. And see *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168, where one of three died and one was acquitted, and the other was convicted.

3. *State v. Buchanan*, 5 Har. & J. (Md.) 317, 500, 9 Am. Dec. 534; *Rex v. Kinnersley*, 1 Str. 193, 93 Eng. Reprint 467.

4. Cal.—*People v. Moran*, 144 Cal. 48, 77 Pac. 777. Colo.—*Davis v. People*, 22 Colo. 1, 43 Pac. 122, where evidence against one conspirator not admissible against other conspirators. Tex.—*Willey v. State*, 22 Tex. App. 408, 3 S. W. 570, upon request of either a matter of right. Wis.—*Casper v. State*, 47 Wis. 535, 2 N. W. 1117, providing for severance where change of venue granted as to some defendants only.

Applicability of statute providing for severance where evidence admissible against one is inadmissible against other. *Moore v. People*, 31 Colo. 336, 73 Pac. 30.

5. Ill.—*Spies v. People*, 122 Ill. 1, 17 N. E. 898, 12 N. E. 865, 3 Am. St. Rep. 320. Mont.—*State v. Davis*, 13 Mont. 384, 34 Pac. 182. Tenn.—*Wat-*

be revised unless it has been abused by the trial court.⁹

Q. FORM AND EFFECT OF VERDICT.—The jury ought to find either a special verdict, stating the facts at large and leaving the law to the court, or, by a general verdict, ought to affirm or negative the charge.⁷

If an indictment charges two distinct offenses, as, for example, murder and conspiracy to kill, and the case is submitted on the former count only, a verdict responsive thereto is in effect an acquittal of the latter.⁸

If the jury return a verdict of guilty on all counts but one and make no reference to that, and are then discharged, this is equivalent to a verdict of not guilty as to that count.⁹

If the statute under which the indictment is framed requires not merely a conspiracy but some act to carry it into effect, and the indictment has several counts, a verdict of not guilty as to any one count means only that the conspiracy and the overt act therein stated do not both exist, while a verdict of guilty upon another count finds both the conspiracy and the overt act named therein.¹⁰

If several persons are jointly indicted and tried for a conspiracy, the acquittal of all but two is proper.¹¹ But if two persons alone are indicted, the acquittal of one is an acquittal of the other, no other person known or unknown having been charged with conspiracy with

son v. State, 16 Lea 604. **Va.**—Jones v. Com., 31 Gratt. 836.

Severance To Secure Benefit of Co-Defendant's Testimony.—It is reversible error to refuse a severance where one defendant has been denied the benefit of certain testimony by such refusal, and where the court can see that probable injustice has been done the party by the refusal. *Watson v. State, supra.*

6. Haw.—Territory v. Johnson, 16 Hawaii 743. **Ill.**—Johnson v. People, 22 Ill. 314. **Mont.**—State v. Davis, 13 Mont. 384, 34 Pac. 182. **Tenn.**—Watson v. State, 16 Lea 614.

7. People v. Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168. See generally the title "Verdict."

One indicted for a conspiracy to cheat by false pretenses may not on the trial be convicted of a conspiracy to commit larceny. *State v. Loser, 132 Iowa 429, 104 N. W. 337.*

Insufficient Verdict.—Two were indicted for conspiracy to defraud a bank, and the jury found that there was an agreement between the two to obtain money from the bank, "but with intent to return it again." This was not a verdict upon which judgment could be given. *People v. Ol-*

cott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168.

Verdict Negating Execution of Conspiracy.—A verdict is good which finds the conspiracy, though it negatives the execution. *State v. Noyes, 25 Vt. 415.*

8. Betts v. State (Tex. Crim.), 133 S. W. 251.

9. Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. ed. 545.

10. Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. ed. 545.

11. Ill.—*People v. Smith, 239 Ill. 885, 87 N. E. 891; Looney v. People, 81 Ill. App. 370.* **N. Y.**—*People v. Miles, 123 App. Div. 862, 108 N. Y. Supp. 510, affirmed, 192 N. Y. 541, 84 N. E. 1117, no opinion.* **Pa.**—*Com. v. Valverdi, 218 Pa. 7, 66 Atl. 877.*

Though where several persons as A, B, and C are charged with conspiracy with divers other persons to the grand jury unknown, and there is evidence only as to A, B, and C, and A and B are acquitted, C cannot be convicted. *Reg. v. Thompson, 5 Cox C. C. (Eng.) 166.* And see *Bradshaw v. Territory, 3 Wash. Ter. 265, 14 Pac. 594.*

the persons indicted,¹² though it has been held that one conspirator may be indicted, tried, and sentenced though his co-conspirators have not been indicted or have, in some mode not inconsistent with guilt, been released from liability under the indictment.¹³ But if an indictment against two conspirators charges a conspiracy with other named persons or persons to the grand jury unknown, one may be acquitted and the other convicted.¹⁴

R. THE PENALTY.—Where common law offenses are recognized (and this is the case in nearly all the states), if no punishment is provided for conspiracy it may be punished as all other misdemeanors to which no other punishment was assigned, by fine and imprisonment.¹⁵

When the statute prescribes particular kinds or modes of punishment the court has no power to inflict any other. So if a statute authorizes imprisonment in the penitentiary, the court cannot impose hard labor in addition.¹⁶

The legislature may make a conspiracy to do an act punishable more severely than the doing of the act itself, whatever may be thought of the wisdom or propriety of such a course.¹⁷

Judgment should be rendered against each defendant severally and not against all jointly.¹⁸

12. **U. S.**—United States *v.* Hamilton, 22 Int. Rev. Rec. 106, 26 Fed. Cas. No. 15,288. **Ark.**—Cumnoek *v.* State, 87 Ark. 34, 112 S. W. 147. **Ill.**—Evans *v.* People, 90 Ill. 384. **N. Y.**—Jones *v.* Baker, 7 Cow. 445; People *v.* Miles, 123 App. Div. 862, 108 N. Y. Supp. 510, *affirmed*, 192 N. Y. 541, 84 N. E. 1117, no opinion. **N. C.**—State *v.* Tom, 13 N. C. 569. **Pa.**—Com. *v.* Irwin, 8 Phila. 380. **Va.**—Jones *v.* Com., 31 Gratt. 836.

13. Bradshaw *v.* Territory, 3 Wash. Ter. 265, 14 Pac. 594, mistrial followed by dismissal.

Nolle Prosequi as to One.—It has been held, however, that where two persons were jointly indicted for conspiracy entering a *nolle prosequi* as to one, operates as an acquittal as to the other. State *v.* Jackson, 7 S. C. 283, 24 Am. Rep. 476. But where more than two are jointly charged a *nolle prosequi* may be entered as to any number so long as two remain. Looney *v.* People, 81 Ill. App. 370.

14. **U. S.**—United States *v.* Rindskopf, 6 Biss. 259, 27 Fed. Cas. No. 16,165; United States *v.* Hamilton, 22 Int. Rev. Rec. 106, 26 Fed. Cas. No. 15,288. **Del.**—State *v.* Adams, 1 Houst. Cr. Cas. 361. **Ill.**—People *v.* Smith, 239 Ill. 91, 87 N. E. 885. **Pa.**—Com.

v. Edwards, 135 Pa. 474, 19 Atl. 1064 (acquittal of one does not affect plea of guilty of other); Com. *v.* Sanderson, 40 Pa. Super. 416. **S. C.**—State *v.* Jackson, 7 S. C. 283, 24 Am. Rep. 476.

15. **Ala.**—State *v.* Cawood, 2 Stew. 360. **Minn.**—State *v.* Pulle, 12 Minn. 164. **N. C.**—State *v.* Jackson, 82 N. C. 565.

Under a statute fixing penalties for offenses at common law it is punishable as a misdemeanor. State *v.* Thompson, 69 Conn. 720, 38 Atl. 868.

Place of Punishment Not Prescribed. Brooks *v.* People, 14 Colo. 413, 24 Pac. 553, *reversing* a sentence to the penitentiary.

16. *Ex parte* Harlan, 180 Fed. 119. 17. United States *v.* Stevenson, 215 U. S. 200, 30 Sup. Ct. 37, 54 L. ed. 157; Clune *v.* United States, 159 U. S. 590, 595, 16 Sup. Ct. 125, 40 L. ed. 269; Thomas *v.* United States, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720. But see Williams *v.* Com., 34 Pa. 178; Hartmann *v.* Com., 5 Pa. 60.

Not Excessive Punishment.—Shields *v.* People, 132 Ill. App. 109.

18. March *v.* People, 7 Barb. (N. Y.) 391.

If several are taken, prosecuted together, and tried separately, judgment may be pronounced against one before conviction of the others,¹⁹ though it has been held that in such a case judgment should be suspended until the number necessary to the crime have been convicted.²⁰

The judgment entry must conform to the verdict.²¹

S. NEW TRIAL. — Where several persons jointly indicted and tried for conspiracy are convicted and a new trial is granted to one, even though the grounds do not affect the others, a new trial will be granted to all.²² But where there is evidence to show that one of two indicted and convicted was involved with others, but no evidence to connect the other with the crime, the latter may have a new trial.²³

II. THE CIVIL INJURY. — A. FORM OF ACTION. — The common-law action of conspiracy is obsolete, and in lieu thereof an action on the case in the nature of a conspiracy has been substituted.²⁴ The

19. *Ind.*—Eacock v. State, 169 Ind. 488, 82 N. E. 1039. *Wash.*—Bradshaw v. Territory, 3 Wash. Ter. 265, 14 Pac. 594. *Eng.*—Rex v. Cooke, 5 Barn & Cres. 538, 11 E. C. L. 307; Rex v. Kinnersley, 1 Str. 193, 93 Eng. Reprint 467.

See also *People v. Richards*, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716; *Heine v. Com.*, 91 Pa. 145, 149.

All May Join in Error.—*Sumner v. Com.*, 3 Cush. (Mass.) 521.

Reversal may be as to one or all. *O'Donnell v. People*, 110 Ill. App. 250, affirmed, *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842.

20. *Casper v. State*, 47 Wis. 535, 2 N. W. 1117.

21. *Johnson v. State*, 3 Tex. Crim. 590, conspiracy to commit robbery while the charge was conspiracy to commit burglary.

"Conspiracy to defraud" does not call for reversal of a conviction of conspiracy to obtain property by false pretenses. *People v. Hartsig*, 249 Ill. 348, 94 N. E. 525.

22. *Com. v. McGowan*, 2 Pars. Eq. Cas. 341; *Reg. v. Gompertz*, 9 Q. B. 824, 2 Cox C. C. 145, 58 E. C. L. 823. And see *Dutcher v. State*, 16 Neb. 30, 19 N. W. 612 (holding that the motion is indivisible, and if it cannot be allowed as to all the parties it must be denied to all); *King v. Teal*, 11 East 307, 103 Eng. Reprint 1022; *King v. Askew*, 3 Maule & S. (Eng.) 9.

One may obtain a reversal of an order denying him a new trial without affecting the other. *Jones v. Com.*, 31 Gratt. (Va.) 836.

23. *Browne v. United States*, 145 Fed. 1, 7, 76 C. C. A. 31, affirming *United States v. Cohn*, 128 Fed. 615. In *United States v. Cohn*, the court cited the cases in the last note and said that they were not in point. The indictment should have been dismissed by the court as to Cohn. But see *Isaacs v. State*, 48 Miss. 234, holding that where there is no evidence against one of several parties jointly indicted, and the verdict and judgment is against all, it must be reversed as to all. There should have been a *nolle prosequi* or an acquittal as to such party against whom there was no evidence.

In *State v. Covington*, 4 Ala. 603, it was said that "each defendant must be allowed to present to the court any exception which the law recognizes," and it was held that a motion in arrest was proper when made by one of several found guilty though the others are not in court. See also *King v. De Berenger*, 3 Maule & S. (Eng.) 67, where the motion was entertained though overruled. "The failure to make objection would seem to indicate that a motion in arrest of judgment was not governed in this respect by the rule applied to a motion for a new trial."

24. U. S.—*Smith v. Rines*, 2 Sumn. 338, 22 Fed. Cas. No. 13,100. *Ind.*—*Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. 930. *Mass.*—*Parker v. Huntingdon*, 2 Gray 124; *Livermore v. Herschell*, 3 Pick. 33. *N. H.*—*Stevens v. Rowe*, 59 N. H. 578, 47 Am. Rep. 231. *N. Y.*—*Verplanck v. Van Buren*,

modern action, though called an action on the case in the nature of a conspiracy, is merely an action on the case, as the damage and not the conspiracy, is the gist of the action.²⁵ This action lies whenever plaintiff suffers damage by reason of the unlawful acts of defendants in pursuance of an agreement or combination for that purpose.²⁶

76 N. Y. 247, 259; *Jones v. Baker*, 7 Cow. 445. W. Va.—*Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

"By the rules of the common law, an action of conspiracy, or to use an equivalent expression, a writ of conspiracy, was never allowed but in two cases; one for conspiring to procure a man to be indicted for treason; the other for a conspiracy to prosecute a man for felony by which life was put in danger. And in these cases, the action was confined within very narrow limits, and would lie only when a party was acquitted by a verdict, such as would enable him to plead *autrefois acquit*, if again indicted for the same crime. 2 Selw. N. P. (11th ed.) 1062. This form of action has, however, become obsolete in those cases where it was allowed at common law, having been superseded by the action on the case in the nature of a conspiracy, which furnishes an adequate and more liberal remedy for malicious prosecutions of every nature and description." *Mass.*—*Parker v. Huntington*, 2 Gray 124. N. Y.—*Jones v. Baker*, 7 Cow. 445. *Eng.*—*Savile v. Roberts*, 1 Ld. Raym. 374, 91 Eng. Reprint 1147.

25. *Mass.*—*Parker v. Huntington*, 2 Gray 124. W. Va.—*Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459. Wis.—*Jones v. Monson*, 137 Wis. 478, 119 N. W. 179, 129 Am. St. Rep. 1082; *State ex rel. Durner v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

Although "the complaint seeks to establish a conspiracy, mere opprobrious epithets do not change, in any way, the nature of the action. The action is a civil and not a criminal one. Indeed, as was said by Lord Holt in the case of *Savil v. Roberts*, 1 Ld. Raym. 374, 'though in the old books such actions are called conspiracies, yet they are nothing in fact but actions on the case.'" *Sleeper v. Baker* (N. D.), 134 N. W. 716, 719. See also *Dowdell v. Carpy*, 129 Cal. 168, 61 Pac. 948; *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491.

No such action as a civil action for conspiracy now exists. It is nothing

more than an action on the case for the particular trespass with conspiracy thrown in as a matter of aggravation. N. J.—*Van Horn v. Van Horn*, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184. W. Va.—*Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459. Wis.—*Jones v. Monson*, 137 Wis. 478, 119 N. W. 179, 129 Am. St. Rep. 1082. *Eng.*—*Savile v. Roberts*, 1 Ld. Raym. 374, 91 Eng. Reprint 1147.

26. Cal.—*Herrin v. Hughes*, 25 Cal. 555. Ill.—*Doremus v. Hennessy*, 62 Ill. App. 391. Ind.—*Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. 930. Md.—*Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340. Mich.—*Schott v. Mabley*, 47 Mich. 572, 11 N. W. 390. Mo.—*Conran v. Fenn*, 140 S. W. 82. N. H.—*Stevens v. Rowe*, 59 N. H. 578, 47 Am. Rep. 231. N. J.—*Van Horn v. Van Horn*, 56 N. J. L. 318, 28 Atl. 669. N. Y.—*Von Au v. Magenheimer*, 126 App. Div. 257, 110 N. Y. Supp. 629; *Bayles v. Vanderveer*, 11 Misc. 207, 32 N. Y. Supp. 1117. N. C.—*Eason v. Petway*, 18 N. C. 44. Pa.—*Wildee v. McKee*, 111 Pa. 335, 2 Atl. 108, 56 Am. Rep. 271; *Mott v. Danforth*, 6 Watts 304, 31 Am. Dec. 468; *Griffith v. Ogle*, 1 Binn. 174. Wis.—*Jones v. Monson*, 137 Wis. 478, 119 N. W. 179, 129 Am. St. Rep. 1082.

Mere Conspiracy Not Subject of Civil Action.—A mere conspiracy without carrying out the purposes of the conspiracy or perpetrating some wrong, never was the ground for a civil action for it does not damage (*Dowdell v. Carpy*, 129 Cal. 168, 170, 61 Pac. 948 [criticizing *Dreaux v. Domec*, 18 Cal. 83]; *Davitt v. American B. Union*, 124 Cal. 99, 101, 56 Pac. 775; *Root v. Rose*, 6 N. D. 575, 72 N. W. 1022); and though such conspiracy be charged, the averment is immaterial and need not be proved (Cal.—*Dowdell v. Carpy*, 129 Cal. 168, 61 Pac. 948; *Davitt v. American B. Union*, 124 Cal. 99, 101, 56 Pac. 775; *Herron v. Hughes*, 25 Cal. 555, 560. N. Y.—*Hutchins v. Hutchins*, 7 Hill 104; *Buffalo Lub. Oil Co. v. Everest*, 30 Hun 586. *Eng.*—*Savile*

Under the Sherman anti-trust law the party injured in pursuance of a conspiracy or combination in restraint of trade may recover treble the damages sustained,²⁷ by an action in the federal courts, but not in the state courts.²⁸ Such damages can be recovered only by a direct action.²⁹

B. ALLEGATIONS OF COMPLAINT IN GENERAL.—If the action is “not a malicious prosecution for treason or for felony whereby life is endangered, it can in no sense be regarded as an action for conspiracy. It is simply an action on the case. The charge of conspiracy is mere surplusage, intended and used as matter of aggravation, and therefore not necessary to be alleged or proved. The gist of the action is not the conspiracy; but the damage done to the plaintiff by the acts of the defendants; and this is equally great, whether it be the result of a conspiracy, or of the act of a single individual. The insertion, in the declaration, of the averment, that the acts done were in pursuance of a conspiracy, does not change the nature of the action; it is nevertheless an action on the case, and is to be tried and determined upon the well-settled rules applicable to that form of action.”³⁰ It is essential, however, to allege the combination when

v. Roberts, 1 *Ld. Raym.* 374, 91 *Eng. Reprint* 1147).

“An actionable conspiracy exists only where there is an unwarrantable combination of two or more persons to do an unlawful thing.” *Manner v. Slater*, 148 *Cal.* 284, 286, 83 *Pac.* 35.

“The quality of the act, and the nature of the injury inflicted by it, must determine the question whether the action will lie.” *Sleeper v. Baker* (N. D.) 134, N. W. 713, 719 *citing* *Kimball v. Harman*, 34 *Md.* 407, 6 *Am. Rep.* 340; *Savile v. Roberts*, 1 *Ld. Raym.* 374, 91 *Eng. Reprint* 1147.

27. *Act of July 2, 1890*, ch. 647, 26 *St. at L.* 209; *National Fire Proofing Co. v. Mason Bldg. Assn.*, 169 *Fed.* 259, 94 *C. C. A.* 535; *Ware-Kramer Tob. Co. v. American Tob. Co.*, 180 *Fed.* 160.

A municipal corporation may recover for injuries received on its property by reason of acts prohibited by the law (*Atlanta v. Chattanooga*, etc. Co., 127 *Fed.* 28), though a party who was an organizer and stockholder in the unlawful trust corporation cannot bring an action for damages caused by the enforcement of the unlawful agreement to which he was a party (*Bishop v. American Pres. Co.*, 105 *Fed.* 845).

28. *Loewe v. Lawlor*, 130 *Fed.* 633, holding that pendency of action in state courts for the same cause is not plead-

able in abatement of action in a federal court.

29. *Connolly v. Union Sewer, etc. Co.*, 184 *U. S.* 540, 22 *Sup. Ct.* 431, 46 *L. ed.* 679, *affirming*, 99 *Fed.* 354, especially where the state statute does not allow unliquidated damages to be set off against a liquidated claim.

30. *Parker v. Huntington*, 2 *Gray* (Mass.) 124. And see the following cases: *U. S.*—*Davis v. Johnson*, 101 *Fed.* 952, 42 *C. C. A.* 111. *Cal.*—*Heron v. Hughes*, 25 *Cal.* 555. *Conn.*—*Austin v. Barrows*, 41 *Conn.* 287. *Dak.*—*Nelson County v. Northcote*, 6 *Dak.* 378, 43 *N. W.* 897, 6 *L. R. A.* 230. *Ga.*—*Woodruff v. Hughes*, 2 *Ga. App.* 361, 58 *S. E.* 551. *Ill.*—*Breitenberger v. Schmitd*, 38 *Ill. App.* 168; *Doremus v. Hennessy*, 62 *Ill. App.* 391. *Ind.*—*Booneville Nat. Bank v. Blakey*, 166 *Ind.* 427, 76 *N. E.* 529, 536; *Jackson v. Morgan* (Ind. App.), 94 *N. E.* 1021; *Severinghaus v. Beckman*, 9 *Ind. App.* 388, 36 *N. E.* 930. *Me.*—*Strout v. Packard*, 76 *Me.* 148, 49 *Am. Rep.* 601; *Garing v. Fraser*, 76 *Me.* 37. *Md.*—*Robertson v. Parks*, 76 *Md.* 118, 24 *Atl.* 411; *Kimball v. Harman*, 34 *Md.* 407, 6 *Am. Rep.* 340. *Mass.*—*Bilafsky v. Conveyancers' Title Ins. Co.*, 192 *Mass.* 504, 78 *N. E.* 534; *Boston v. Simmons*, 150 *Mass.* 461, 23 *N. E.* 210, 15 *Am. St. Rep.* 230, 6 *L. R. A.* 29; *Parker v. Huntington*, 2 *Gray* 124. *Miss.*—*Globe, etc. Co. v. Firemen, etc. Co.*,

the purpose to be accomplished is unlawful only because of such

52 So. 454. **Mo.**—Remmers v. Remmers, 217 Mo. 541, 117 S. W. 1117. **Neb.**—Booker v. Puryear, 27 Neb. 346, 43 N. W. 133; Mapstrick v. Ramge, 9 Neb. 390, 2 N. W. 739, 31 Am. Rep. 415. **N. J.**—Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669. **N. Y.** Von Au v. Magenheimer, 196 N. Y. 510, 89 N. E. 1114; Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376; Hutchins v. Hutchins, 7 Hill 104; Jones v. Baker, 7 Cow. 445; Cohen v. Fisher & Co., 135 App. Div. 238, 120 N. Y. Supp. 546. **Ore.**—Bingham v. Lipman, 40 Ore. 363, 67 Pac. 98. **Pa.**—Laverty v. Van Arsdale, 65 Pa. 507; Glass v. Stewart, 10 Serg. & R. 226. **Tex.** Delz v. Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755. **Vt.**—Sheple v. Page, 12 Vt. 519. **W. Va.**—Porter v. Mack, 50 W. Va. 581, 40 S. E. 459. **Wis.**—Jones v. Monson, 137 Wis. 478, 119 N. W. 179, 129 Am. St. Rep. 1032; White v. White, 132 Wis. 121, 111 N. W. 1116, 1119. **Eng.**—Savile v. Roberts, 1 Ld. Raym. 374, 91 Eng. Reprint 1147; Skinner v. Gunton, 1 Saund. 228.

See generally the title "**Case (The Action of Trespass on the).**"

"The writ of conspiracy, strictly speaking, was limited to conspiracy to procure another's indictment for treason or a capital felony. In such cases the conspiracy was essential to the maintenance of the action, and must be proved against two or more. Marsh v. Vauhan, 2 Cro. Eliz. 701. It became, however, quite common in actions of tort against several defendants to charge a conspiracy to do the wrong, thus making it what has generally been termed an action on the case in the nature of conspiracy. In such actions the conspiracy was not the gist of the action, and it was unnecessary to prove it, even if alleged. The gist of the action lay in the wrong done, and the damage consequent therefrom. For this reason it was competent to recover, without proof of the conspiracy, against all who participated in doing the wrong. The only effect of the allegation of conspiracy was in aggravation of the injury, and to enable the plaintiff to hold all those who shared in the conspiracy, even though they did not actually join in the commission of the tortious act." Sever-

inghaus v. Beckman, 9 Ind. App. 388, 36 N. E. 930. And see Parker v. Huntington, 2 Gray (Mass.) 124; Livermore v. Herschell, 3 Pick. (Mass.) 33; Stevens v. Rowe, 59 N. H. 578, 47 Am. Rep. 231.

"The true rules governing a case of this nature are: First, that it is an action on the case; second, that the conspiracy is matter of aggravation, and need not be proven, except to establish the guilty participation of more than one of the defendants; third, that the gravamen or grounds of action must be set forth with the same particularity as though the action were against a single defendant; fourth, it must show unlawful conduct on the part of defendants, or some one of them; fifth, judgment may be entered against a single defendant, though the conspiracy charged be not proven, but it cannot be entered against joint defendants without such proof. Matters that do not present a sufficient ground of action may be included in the declaration as matters of aggravation or proof of malice." Porter v. Mack, 50 W. Va. 581, 40 S. E. 459.

Allegation of Conspiracy Merely Allegation of Joint Act.—The allegation of the conspiracy is at most but an allegation that the acts alleged to have been done were done by the conspirators jointly (Bifalsky v. Conveyancers' Title Ins. Co., 192 Mass. 504, 78 N. E. 534), the purpose or means being unlawful (O'Callaghan v. Cronan, 121 Mass. 114). See also Ind.—Jenner v. Carson, 111 Ind. App. 522, 13 N. E. 44. **Md.**—Robertson v. Parks, 76 Md. 118, 24 Atl. 411. **Mass.**—New England, etc. R. Co. v. Reed, 95 N. E. 935. **Mich.** Schott v. Mabley, 47 Mich. 572, 11 N. W. 390. **Mo.**—Conran v. Fenn, 140 S. W. 82, 85. **N. Y.**—Buffalo, etc. Co. v. Everest, 30 Hun 586. **W. Va.**—Porter v. Mack, 50 W. Va. 581, 40 S. E. 459. **Wis.**—White v. White, 132 Wis. 121, 111 N. W. 1116, 1119.

"The action used in modern practice does not differ from the ordinary action on the case for special damages, further than it charges the acts complained of upon several instead of upon one." Stevens v. Rowe, 59 N. H. 578.

Allegation of Commission of Tort and Damage Sufficient.—"It is true, that

combination. The foundation of the action in such a case is the unlawful combination.³¹

Under the Sherman anti-trust law to recover treble damages the declaration must aver such a combination or conspiracy in restraint of trade as is prohibited by that law.³²

Allegations as to Damage.—Of course, since the damage is the foundation of the action,³³ the declaration or complaint must set forth

in an indictment for a criminal conspiracy, that being the gist of the charge, it would be necessary to charge, in terms, that the defendants combined, conspired, confederated and agreed with each other, etc.; but when two or more are sued in tort for an injury to another, it is only necessary to allege that they committed the wrong complained of, and that the plaintiff was damaged thereby." *Jenner v. Carson*, 111 Ind. 522, 13 N. E. 44.

Allegation of Conspiracy Equivalent to Allegation of Knowledge.—Though the conspiracy is not the gist of the action on the case, it is the equivalent of an allegation that things done were with the knowledge and procurement of each and all so engaged. *Nevin v. Gary*, 12 Cal. App. 1, 106 Pac. 422.

An amendment striking out the allegation of conspiracy made six years after commencement of the action does not change the character of the action. *Fillman v. Ryon*, 168 Pa. 484, 32 Atl. 89.

31. **U. S.**—*Evans v. Freeman*, 140 Fed. 419. **Ind.**—*Booneville Nat. Bank v. Blakey*, 166 Ind. 427, 450, 76 N. E. 529; *Jenner v. Carson*, 111 Ind. 522, 13 N. E. 44; *Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. 930. **Pa.**—*Ramdell v. Kalbfus*, 125 Pa. 123, 17 Atl. 238; *Collins v. Cronin*, 117 Pa. 35, 11 Atl. 869; *Cote v. Murphy*, 115 Pa. 420, 28 Atl. 190, 39 Am. St. Rep. 683, 23 L. R. A. 135. **Wis.**—*State v. Hough*, 110 Wis. 189, 85 N. W. 1046.

Insufficient Averment of Conspiracy To Join Distinct Causes.—A complaint is insufficient against F and several of his creditors receiving preferences, alleging that F entered into a conspiracy with each defendant to defraud all other of F's creditors, but not showing that the alleged conspiracy was on foot when F made the payments and transfers complained of, but merely that F made them in fulfillment of such fraudulent designs, and

seeking to recover the several payments made to each defendant. *Booneville Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529.

32. *Rice v. Standard Oil*, 134 Fed. 464. An indictment for conspiracy in restraint of trade under the Sherman anti-trust law (Act of July 2, 1890) must allege "a purpose to restrain trade as implied in the common law expression 'contract in restraint of trade' analogous to the word 'monopolize' in the second section of the act. . . . It must appear somewhere in the indictment that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market, and it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise." *United States v. Patterson*, 55 Fed. 605, 641.

See the title "Monopolies."

33. **U. S.**—*Adler v. Fenton*, 24 How. 407, 16 L. ed. 696. **Cal.**—*Dowdell v. Carpy*, 129 Cal. 168, 61 Pac. 948; *Bran-nock v. Monroe*, 65 Cal. 491, 4 Pac. 488. **Ind.**—*Jenner v. Carson*, 111 Ind. 522, 13 N. E. 44; *Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. 930. **Ia.**—*McHenry v. Smeer*, 56 Iowa 649, 10 N. W. 234. **Ky.**—*Hundley v. Louisville, etc. Co.*, 105 Ky. 162, 48 S. W. 429, 88 Am. St. Rep. 298, 63 L. R. A. 289. **Me.**—*Garing v. Fraser*, 76 Me. 37. **Md.**—*Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340. **Mass.**—*Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629. **Mich.**—*Bush v. Sprague*, 51 Mich. 41, 16 N. W. 222. **Mo.**—*Conran v. Fenn*, 140 S. W. 82; *Remmers v. Remmers*, 217 Mo. 541, 117 S. W. 1117. **Neb.**—*Commercial, etc. Co. v. Shoemaker*, 63 Neb. 173, 88 N. W. 156. **N. Y.**—*Hutchins v. Hutchins*, 7 Hill 104; *Von Au v. Magenheimer*, 126 App. Div. 257, 110 N. Y. Supp. 629. **Pa.**—*Fillman v. Ryon*, 168 Pa. 484, 32

facts showing that the conspiracy, or the acts done in pursuance thereof, produced some legal damage to the plaintiff as the proximate result. Conclusions are not enough.⁸⁴

Atl. 89. **Wis.**—Jones v. Monson, 137 Wis. 478, 119 N. W. 179, 129 Am. St. Rep. 1082; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840.

34. **U. S.**—Rice v. Standard Oil, 134 Fed. 464, Anti-Trust law. **Ind.**—Britton v. Young, 36 Ind. App. 622, 74 N. E. 905, 76 N. E. 327. **La.**—Levy v. Collins, 115 La. 204, 38 So. 966, 969. **Md.**—Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340. **Mass.**—Bowen v. Matheson, 14 Allen 499; Parker v. Huntington, 2 Gray 124, 127; Wellington v. Small, 3 Cush. 145, 50 Am. Dec. 719. **Mich.**—Schott v. Mabley, 47 Mich. 572, 11 N. W. 390. **Mo.**—Conran v. Fenn, 140 S. W. 82. **Neb.**—Commercial, etc., Co. v. Shoemaker, 63 Neb. 173, 88 N. W. 156. **N. H.**—Stevens v. Rowe, 59 N. H. 578, 47 Am. Rep. 231. **N. Y.**—Hutchins v. Hutchins, 7 Hill 104; Williams v. McClellan, 59 Misc. 620, 111 N. Y. Supp. 229; Silverman v. Doran, 23 Misc. 96, 51 N. Y. Supp. 731; Douglass v. Winslow, 20 Jones & S. 439. **Ohio.**—Toledo, etc. Ry. v. Toledo Cons. R., 10 Ohio C. C. 597. **Pa.**—Wildee v. McKee, 111 Pa. 335, 2 Atl. 108, 56 Am. Rep. 271; Laverty v. Van Arsedale, 65 Pa. 507. But see Griffith v. Ogle, 1 Binn. 172. **Tex.**—Kruegel v. Murphy (Tex. Civ. App.), 126 S. W. 343. **Eng.**—Cotterell v. Jones, 11 C. B. 713, 73 E. C. L. 712; Savile v. Roberts, 1 Ld. Raym. 374, 91 Eng. Reprint 1147.

May Be Supplied by Amendment. Stevens v. Rowe, 59 N. H. 578, 47 Am. Rep. 231.

That acts of defendant were unlawful is not enough. Schott v. Mabley, 47 Mich. 572, 11 N. W. 390.

Fraud.—Alleging defendants "in concert did, by connivance, conspiracy and combination, cheat and defraud the plaintiffs out of certain goods," etc., is insufficient. Cohn v. Goldman, 76 N. Y. 284, reversing 43 N. Y. Super. Ct. 436, disapproving Ynguanzo v. Salomon, 3 Daly (N. Y.) 153.

Alleging the use of threats as the means is not sufficient. The threats ought to be specified. West Virginia, etc. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

Preventing Trial.—An allegation that defendants by "divers false pretenses, subtle means and devices have prevented and defeated the trial of said cause" is insufficient. Schwab v. Mabley, 47 Mich. 572, 11 N. W. 390.

Preventing Issuance of Patent.—Complaint must show that the patent would have been issued but for the acts of the conspirators. Silverman v. Doran, 23 Misc. 96, 51 N. Y. Supp. 731.

Payment of Money Not Due.—A complaint for coercing payment of a sum falsely alleged to be owing must allege that the sum was not due. Schulten v. Bavarian Brg. Co., 96 Ky. 224, 28 S. W. 504.

Proceeds of Property Subject to Claim and in Hands of Court.—An allegation that defendants conspired to deprive A of his recourse against certain property on which he had a privilege, and that they, in pursuance of the conspiracy, brought certain fictitious suits and caused the property to be seized and sold and the proceeds to be bonded, states no cause of action, it being alleged that all the proceeds are still in court and liable to plaintiff's claim. Levy v. Collins, 115 La. 204, 38 So. 966.

Conspiracy To Prevent Employment. An averment that defendant railroad conspired and combined with other railroad companies to prevent plaintiff from obtaining employment and that the wrongful act had made it impossible for him to ever again get employment with other railroads is sufficient as these are mere conclusions of the pleader. There must also be an averment that plaintiff had sought and had been refused employment by reason of the alleged wrongful act. Hundley v. Louisville, etc. Co., 105 Ky. 162, 48 S. W. 429, 88 Am. St. Rep. 298, 63 L. R. A. 289. This case was followed in Amann v. United Booking Offices, 133 N. Y. Supp. 1076.

Facts Not Necessarily Implying Damage.—Where facts of the character that would not necessarily give rise to damages are stated, the petition must show that damages in the particular case have in fact resulted. It may not be necessary always to go

And since the acts of any one of the conspirators are the acts of

into the minutes, to state in detail all of the circumstances which would bear upon the question of damages, but there must be a direct averment of fact showing that damages did result, or some equivalent averment, in cases of that kind. *Toledo E. R. Co. v. Toledo Cons., etc. Co.*, 10 Ohio C. C. 597.

Conspiracy To Defraud of Property Rights.—A petition alleging that defendant conspired with another to defraud plaintiff of his property rights in certain property by aiding the other person in a fraudulent marriage ceremony is insufficient for not showing how plaintiff was defrauded. *Conran v. Fenn (Mo.)*, 140 S. W. 82.

Ownership of Property Damaged Must Be Alleged.—*Hutchins v. Hutchins*, 7 Hill (N. Y.) 104.

Refusing To Sell Goods.—Charging defendants as competitors in furtherance of a conspiracy to ruin plaintiff with making an agreement to refuse to sell their goods to any person dealing in plaintiff's goods, and alleging notice of such agreement sufficiently alleges the conspiracy and damage. *Dueber, etc. Mfg. Co. v. Howard Watch, etc. Co.*, 3 Misc. 582, 24 N. Y. Supp. 647.

Preventing Shipping of Grain.—An allegation that two certain shippers had been prevented from shipping a certain amount of grain through plaintiff's elevators by reason of the conspiracy is a sufficient allegation of damage. *Kellog v. Lehigh Val. R. Co.*, 61 App. Div. 35, 70 N. Y. Supp. 237.

Depriving of Customers.—An "allegation, that the effect of the illegal combination was to deprive plaintiff of its entire business in the kind of window glass which its customers chiefly require, and to deprive it of all its customers, whose names are given," and thereby plaintiff's business was destroyed and it rendered insolvent, sufficiently alleges damage. *Wheeler-Stenzel Co. v. National, etc. Assn.*, 152 Fed. 864, 875, 81 C. C. A. 658, 10 L. R. A. (N. S.) 972.

A petition against judges, lawyers and county clerk for conspiracy to defeat an action should set forth the specific acts showing plaintiff's right to recover damages, or that the judges, attorneys and clerks, did not have the right to do the act complained of.

Kruegel v. Murphy (Tex. Civ. App.), 126 S. W. 343, writ of error refused.

Accusing of Indictable Offense.—Damage Implied.—But damage need not be alleged where the law implies damage, as where it is alleged defendants "unlawfully and maliciously conspired to accuse plaintiff of an indictable offense," nor need it allege lack of proper cause for such accusation. *Griffith v. Ogle*, 1 Binn. (Pa.) 172. See also *Hood v. Palm*, 8 Pa. 237, conspiracy to defame.

Evidence.—This rule does not call for a statement of all evidentiary facts. *Park & Sons Co. v. Hubbard*, 30 App. Div. 517, 52 N. Y. Supp. 481, 483 (boycott); *Murray v. M'Garigle*, 69 Wis. 483, 34 N. W. 522, 529.

In *Park & Sons Co. v. Hubbard*, *supra*, an appeal from an order striking out part of complaint, Rumsey, J., said: "That case was an action in equity, in which the relief sought was not only an injunction against the boycott, but to restrain the defendants from taking steps to enforce the several rules by which the boycott was begun and carried into effect. It was thought that, because of the relief demanded, it was necessary that the court should be put in possession of each of the rules which had been established from time to time by the defendants by way of making the boycott more effectual, and to some extent of the manner in which these rules had been carried into effect, the idea being that, as an injunction against the rules themselves was asked for, the existence of the rules, and their nature and operation, were material facts to be stated in the complaint, that the court might understand the precise nature of the relief which was sought to be obtained. But in this case no considerations apply. All that is necessary to be alleged here is the organization of the plaintiff, the nature and extent of its business, the names of the defendants, and the facts showing their violation of the plaintiff's right, and the injury to the plaintiff which has resulted from those acts. If, in addition, there are other facts which show that the plaintiff has suffered damage in its business, in the nature of special damages, not necessarily resulting from the acts of the plaintiff, these facts

all, in legal contemplation, acts done by any of the conspirators may be stated to be done individually.³⁵

Special damages, which are the proximate but not the necessary result of the conspiracy must be specially alleged.³⁶

Allegations as to the Tort Committed.—It follows that a substantive wrong affording a cause to plaintiff for damages as a result of the alleged conspiracy must be set forth in the petition.³⁷ That is the

also should be alleged. So, if it is necessary to set out facts showing the motive of the defendants from which it can be argued that the plaintiff was entitled to punitive damages. Such facts also should be alleged."

Names of Customers Approached Need Not Be Alleged.—A complaint for conspiracy to injure defendant's business by false statements to plaintiff's customers is not bad because not alleging the names of the customers, as this specification may be had by a bill of particulars. *West Virginia, etc. Co. v. Standard Oil Co.*, 60 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804.

Alleging Acts Delaying Construction of Railroad.—Alleging that the defendants maliciously delayed the construction of a railroad for more than four months is an insufficient averment of damage. The acts causing the delay should be alleged. *Toledo E. R. Co. v. Toledo Cons. R. Co.*, 10 Ohio C. C. 597, 610.

Dismissing Petition for Failure to Make More Certain.—Where a complaint states a cause of action for general damages, nominal damages at least being recoverable, it is error for the court to dismiss the petition for failure to make the complaint more definite and certain as to the dates of the specific acts, and the names of the persons calling for plaintiff's phone and being connected with another phone and the names of customers whose trade was lost thereby. *Moore v. Linneman*, 143 Ky. 231, 136 S. W. 232.

35. *Mussina v. Clark*, 17 Abb. Pr. (N. Y.) 188, 193; *Tappan v. Powers*, 2 Hall (N. Y.) 277; *Sheple v. Page*, 12 Vt. 519, cited in *Booker v. Puyear*, 27 Neb. 346, 43 N. W. 133.

"If the declaration had averred that all the defendants used the fraudulent means of obtaining plaintiff's property which were charged against one, such an averment would be supported by proof that they were used

in pursuance of a plan concerted among them all." *Tappan v. Powers, supra.*

Acts Sufficiently Charged Upon Each Defendant.—An allegation that all the acts of defendants and each of them were done in pursuance of such conspiracy and purpose sufficiently charges each defendant with liability for the alleged acts of any of them. *O'Connor v. Jefferson*, 45 Minn. 162, 47 N. W. 538.

Conspiracy To Slander.—Charging Utterance Separately.—"In an action on the case in the nature of a conspiracy, the defendants may be charged with uttering the same words separately for the common purpose of carrying out a conspiracy to destroy the plaintiff's reputation and business, and if the conspiracy is established, they become equally liable for the resulting damages. The defendants have the right to be informed as to which of them uttered the words charged for the purpose of the defense. For judgment may be given against the guilty one, without regard to the conspiracy." *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

36. *Moore v. Linneman*, 143 Ky. 231, 136 S. W. 232; *Molony v. Dows*, 15 How. Pr. (N. Y.) 261; *Park & Sons Co. v. Hubbard*, 30 App. Div. 517, 52 N. Y. Supp. 481, 483; *Cohen v. Fisher & Co.*, 120 N. Y. Supp. 546. But see *Hood v. Palm*, 8 Pa. 237, holding that damage is presumed from publication of libel and special damages therefrom need not be alleged.

Punitive Damages.—If it is necessary to set out facts showing the defendant's motives, as a basis for punitive damages, such facts should be alleged. *Park & Sons Co. v. Hubbard, supra.*

37. **U. S.**—*Adler v. Fenton*, 24 How. 407, 16 L. ed. 696. **Cal.**—*Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491. **Ind.**—*Mendenhall v. Stewart*, 18 Ind. App. 262, 47 N. E. 943; *Severinghaus v. Beck-*

gravamen of the action, whether single or several, must be set out with

man, 9 Ind. App. 388, 36 N. E. 930. **Mich.**—Schott v. Mabley, 47 Mich. 572, 11 N. W. 390. **Mo.**—Conran v. Fenn, 140 S. W. 82, 85. **N. Y.**—Rourke v. Elk Drug Co., 75 App. Div. 145, 77 N. Y. Supp. 373. **W. Va.**—Porter v. Mack, 50 W. Va. 581, 40 S. E. 459.

California.—In an action for the malicious prosecution of a civil action, the gravamen of the action is the alleged malicious prosecution, and to support such action it must appear that the prosecution complained of was not only malicious but without probable cause, and that such prosecution has terminated. Dowdell v. Carpy, 129 Cal. 168, 171, 61 Pac. 948.

Defrauding Creditors.—An action on case for conspiracy is not the proper action for the fraud of defendant in combining with the plaintiff's debtor to hinder, delay or defraud creditors as the creditor suffers no injury peculiar to himself. Adler v. Fenton, 24 How. (U. S.) 407, 18 L. ed. 696. Hall v. Eaton, 25 Vt. 458.

But the rule is otherwise where plaintiff has acquired a specific lien on the debtor's property. **Mass.**—Lamb v. Stone, 11 Pick. 526; Adams v. Paige, 7 Pick. 550. **N. Y.**—Yates v. Joyce, 11 Johns. 550. **Eng.**—Smith v. Tonstall, Carth. 3, 90 Eng. Reprint 607.

False Letter of Credit.—Charging use of false letter of credit, and that another signed his name as witness to the false letter of credit and thus plaintiff was induced to sell such person goods, sufficiently alleges the tort. Mendenhall v. Stewart, 18 Ind. App. 262, 47 N. E. 943.

Inducing Desertion of Husband.—"Allegations to the effect that two or more persons, naming them, have maliciously combined to produce a separation between husband and wife, naming them, causing the former to desert the latter, she desiring performance of the marriage contract to continue, states a criminal conspiracy under section 4466a, St. 1898, and together with allegations to the effect that the purpose of the conspiracy has been consummated to the damage of the wife, and stating generally the means resorted to for that purpose, shows a good cause of action in face of a demurrer for insufficiency even though the allegations or some of them

may not be sufficiently definite to defeat a motion to make more definite and certain." White v. White, 132 Wis. 121, 111 N. W. 1116.

Conspiracy To Defraud.—"A declaration alleging that S., C., L., and L. (L. and L. having the same name, one of them being solvent and the other insolvent,) combined to defraud plaintiff by having insolvent L. execute a lease to S. and C., covering premises to which none of them had title, and then, by means of false representations, to sell the lease to plaintiff, making him believe it was executed by the solvent L., the declaration further alleging that the fraud was successfully accomplished, and the plaintiff thereby damaged, sets forth a cause of action against all the conspirators for the tort. Although the declaration does not expressly allege that the plaintiff was deceived by the fraudulent misrepresentations of the defendants, this was plainly implied, and the declaration is amendable so as to allege the fact expressly." Cheney v. Powell, 88 Ga. 629, 15 S. E. 750.

Alienation of Affections.—A complaint alleging the formation of a conspiracy to injure plaintiff by depriving him of the affections and society of his wife and charging defendants "did finally acquire, from bad and improper motives and malicious, false insinuations, such influence over plaintiff's said wife, and defendants used such influence to the extent that the love, affections and respect of plaintiff's said wife for plaintiff has been wholly alienated and destroyed" followed by allegations of the perpetration of specific malicious acts for the purpose of "forcing and driving plaintiff away from his said wife and child" and concluding with the charge "that by carrying out such malicious conspiracy . . . plaintiff has been wrongfully and maliciously deprived of his wife's affections, society, comfort and assistance" sufficiently alleges the execution of a conspiracy. Jones v. Monson, 137 Wis. 478, 119 N. W. 179, 129 Am. St. Rep. 1082. See also Randall v. Lonstorf, 126 Wis. 147, 105 N. W. 663, 3 L. R. A. (N. S.) 470.

And see the title "Alienating Affections."

For complaints held sufficient on de-

the same particularity as though the action were against a single defendant for the tort,⁸⁸ though the facts need not be set forth with

murrer, see: **Ky.**—Moon *v.* Linneman, 143 Ky. 231, 136 S. W. 232, conspiracy to injure business. **Minn.**—O'Connor *v.* Jefferson, 45 Minn. 162, 47 N. W. 538, conspiracy to procure to conspirators a conveyance of another's land. **N. C.**—Hackett *v.* McMillan, 112 N. C. 513, 17 S. E. 433, 21 L. R. A. 862, conspiracy to make infants plaintiffs to an action without proper authority so to do. **Tex.**—Sawyer *v.* Wieser, 37 Tex. Civ. App. 291, 84 S. W. 1101, conspiracy to defraud by unlawful attachment.

Klingel's Pharmacy v. Sharpe & Dohme, 104 Md. 218, 64 Atl. 1029, 7 L. R. A. (N. S.) 976, 980, was an action by a retail merchant against an association. The only question was one of pleading, and the declaration was held sufficient. It "distinctly charged that there is an unlawful conspiracy to exact and to maintain a maximum schedule of prices for drugs and druggists' supplies in restraint of trade; and it is with equal directness alleged that, because the plaintiff will not enter into that combination and conspiracy, no drugs or supplies have been or will be sold to it by the defendants, and that no other dealer in those articles is or will be allowed to sell to it without incurring the penalty of being blacklisted and boycotted as threatened by the defendants, which action of the defendants was not taken in the bona fide exercise of their right to sell or to refuse to sell to whom they pleased, but was taken with a malicious intent to injure and destroy the business of the plaintiff, whereby the plaintiff has been wholly deprived of the ability to purchase supplies, and has as a result been prevented from pursuing its lawful avocation."

For insufficient declaration for conspiracy among railroads to prevent employment to men leaving employ of railroads during strike by refusing a release or clearance card, see McDonald *v.* Illinois Cent. R. Co., 187 Ill. 529, 58 N. E. 463, 83 Ill. App. 463.

Form in manufacturer's suit against other manufacturers who, conspiring together, prevented, by threats and intimidation, customers of plaintiff from buying from him. Purington *v.* Hinch-

liff, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824.

Form in action against labor union by members boycotted. Schneider *v.* Local Union No. 60, 116 La. 270, 40 So. 700, 5 L. R. A. (N. S.) 891.

38. U. S.—See Adler *v.* Fenton, 24 How. 407, 16 L. ed. 696. **Ind.**—Severinghaus *v.* Beckman, 9 Ind. App. 388, 36 N. E. 930. **N. D.**—Sleeper *v.* Baker, 134 N. W. 716. **W. Va.**—Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

"The second salient fact averred in the *narr.* consists of a statement of the acts done in furtherance of the conspiracy. Those acts are twofold: First, a refusal by the defendants to sell to the plaintiff,—an act they would have the legal right to do if, when done, it were not done in the execution of and to carry into effect a criminal conspiracy in restraint of trade; and, secondly, coercion and intimidation practised by the defendants upon other vendors of like commodities, by means of threats to blacklist and to boycott such vendors, if they sold to the plaintiff any drugs or druggists' supplies, whereby they were deterred from selling those articles to the plaintiff, unless it joined in the association." **Klingel's Pharmacy v. Sharpe & Dohme**, 104 Md. 218, 64 Atl. 1029, 7 L. R. A. (N. S.) 976, 981.

"The declaration must, leaving out the conspiracy charged, make a good case against one of the defendants, and, if it is not good against one, it is not good against all. . . . The nature of an action cannot be changed by simply alleging a conspiracy, which need not be proven, except as mere matter of aggravation or to extend the liability therefor to other defendants." Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459. See also West Virginia Trans. Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804.

In an action on the case in the nature of a conspiracy for a malicious prosecution, the petition is insufficient if it fails to allege termination of the suit (U. S.—Davis *v.* Johnson, 101 Fed. 952. Ohio.—Toledo E. R. Co. *v.* Toledo Cons. R. Co., 10 Ohio C. C. 597. W. Va. Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459), or want of probable cause (Cal.—Dowdell *v.* Carpy, 129 Cal. 168,

all the particularity required in an indictment for the offense.³⁹

C. SEVERAL CAUSES OF ACTION.—In accordance with the general rule, an action against several defendants to recover damages resulting from a fraudulent conspiracy cannot be joined with another cause of action,⁴⁰ though the rule is otherwise where by statute several causes of action growing out of the same transaction may be joined.⁴¹ Several causes of action are not united where but one object is alleged, and various acts in pursuit of the conspiracy are set forth,⁴² though the acts are of different character, and were done at different times, and though some of them did not affect all of the defendants, and none of them benefited all defendants to the same degree or extent.⁴³

D. BILL OF PARTICULARS.—Whether a bill of particulars shall be given where the declaration or complaint is too general as to its averments concerning the conspiracy lies within the sound discretion of the trial court.⁴⁴

61 Pac. 948. Va.—*Kirtley v. Deck*, 2 Munf. 10, 5 Am. Dec. 445. W. Va. *Porter v. Mack*, *supra*).

Allegations as to Right, Title or Possession of Land.—In a civil action for conspiracy for ousting plaintiff from the possession of certain premises, it is not necessary to allege by what authority or title he is in possession, and where it is alleged he sought to re-possess himself thereof, the authority or title by which plaintiff sought to re-possess himself need not be alleged. And an allegation that "defendants, their agents and servants took possession of the premises and retained same," is sufficient without alleging that the defendants, their agents and servants had no authority to take possession. *Woodruff v. Hughes*, 2 Ga. App. 361, 58 S. E. 551, 554.

39. *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774; *White v. White*, 132 Wis. 121, 111 N. W. 1116.

The complaint is to be tested by those liberal rules whereby all facts reasonably inferable from those expressly alleged are to be regarded as sufficiently pleaded. *White v. White*, 132 Wis. 121, 111 N. W. 1116.

40. *Haskell County Bank v. Santa Fe Bank*, 51 Kan. 39, 32 Pac. 624 (not with cause to cancel certificate of deposit owned by one defendant); *Commercial Union Assur. Co. v. Shoemaker*, 63 Neb. 173, 88 N. W. 150 (not with action on contract).

41. In such a case there must be a separate statement. *Forsyth v. Edminston*, 11 How. Pr. (N. Y.) 408.

"There may be several grounds of action included in the same declarations; but, to be sufficient in character as such, they must be set out with the same particularity as though they were contained in separate declarations. In short, they must each furnish a sufficient ground for judgment against a single defendant." *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

42. U. S.—*Northern Pac. R. Co. v. Kindred*, 14 Fed. 77. Minn.—*Dewing v. Dewing*, 112 Minn. 316, 127 N. W. 1051; *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854. N. Y.—*Rourke v. Elk Drug Co.*, 75 App. Div. 145, 77 N. Y. Supp. 373, circulation of libelous matter, slander, threats and interferences with advertising alleged in pursuance of the conspiracy. Ore.—*Bingham v. Lipman*, 40 Ore. 363, 67 Pac. 98.

But matters that do not present a sufficient ground of action may be included in the declaration as matters of aggravation or proof of malice. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

Sherman Anti-Trust Law.—There may be a charge of an unlawful contract in restraint of trade in one count, with a count charging an unlawful combination or conspiracy in restraint of trade. *Rice v. Standard Oil*, 134 Fed. 464.

43. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

For petition alleging matters of deceit as inducement leading up to conspiracy and not improper joinder, see *Martens v. O'Connor*, 101 Wis. 18, 76 N. W. 774.

44. *Leigh v. Atwater*, 2 Abb. N. C. (N. Y.) 419; *Higenbotam v. Green*,

E. DEFENDANTS.—A corporation may be joined as defendant with individuals or with other corporations.⁴⁵ A partner of the plaintiff in matters affected by the conspiracy may be joined as a defendant.⁴⁶ In an action on the case in the nature of a conspiracy, the plaintiff may sue either one,⁴⁷ all,⁴⁸ or any number less than all.⁴⁹ If several

25 Hun (N. Y.) 214; *Dueber, etc., Co. v. Noyes*, 21 N. Y. Supp. 341.

Names and addresses of dealers refusing to buy watch cases because of defendant's threats (*Deuber, etc., Co. v. Noyes, supra*), or the names and addresses of customers whom defendants caused to solicit and threaten, and the particulars of the damages through loss of patronage (*Post, etc., Prtg. Co. v. Adams*, 55 Hun 35, 8 N. Y. Supp. 276), or the nature and facts of the alleged conspiracy, and how plaintiff was damaged by the acts complained of (*Potter v. United States Nat. Bank*, 22 N. Y. Supp. 453).

Names of agents ordered where the complaint alleges that false and fraudulent statements were made by defendant, "by and through its officers, agents and servants," to plaintiff or his fully authorized agent or agents." *Riker v. Erlanger*, 87 App. Div. 137, 84 N. Y. Supp. 69.

Improper Exercise of Discretion.—Where physicians being sued for conspiracy to confine plaintiff in an insane asylum, answered that they gave their opinion as physicians, formed from their personal acquaintance with plaintiff, from their professional examination and knowledge of plaintiff's health and mental condition, from frequent observation of plaintiff's actions, conduct and habits, and from information as to such actions, conduct and habits from members of plaintiff's family and others, which they believe to be true, it is an improper exercise of discretion to require defendant to file a bill of particulars of the "plaintiff's actions, conduct and habits" upon which defendants' opinions were based, together with the time and place, when and where the actions occurred, what such actions were, and when and where the observations referred to in the answer were made and what was observed. *Higenbotam v. Green*, 25 Hun (N. Y.) 214.

45. *Buffalo, etc., Co. v. Standard Oil Co.*, 106 N. Y. 669, 12 N. E. 825.

46. *Gaillard v. Cantini*, 76 Fed. 699,

22 C. C. A. 493; *Murray v. McGarigle*, 69 Wis. 483, 34 N. W. 522.

47. **U. S.**—*Motley, etc., Co. v. Detroit, etc., Co.*, 161 Fed. 389. **Md.**—*Kimball v. Harman*, 34 Md. 407, 410, 6 Am. Rep. 340. **Mass.**—*Gurney v. Tenney*, 197 Mass. 457, 84 N. E. 428. **N. Y.**—*Jones v. Baker*, 7 Cow. 445; *Forsyth v. Edminton*, 11 How. Pr. 408; *Rourke v. Elk Drug Co.*, 75 App. Div. 145, 77 N. Y. Supp. 373. **Eng.**—*Sairle v. Roberts*, 1 Raym. 374, 91 Eng. Reprint 1147; *Skinner v. Gunton*, 1 Saunders, 228, 85 Eng. Reprint 249.

Agent Conspiring With Others To Secure Principal's Land.—In an action against an agent to recover profits fraudulently made by conspiring with others to secure the title to his principal's land, the conspirators in whose names the agent made purchases are not necessary parties. *Northern Pac. R. Co. v. Kindred*, 14 Fed. 77, 81.

48. **U. S.**—*Smith v. Rines*, 2 Sumn, 338, 22 Fed. Cas. No. 13,100. **La.**—*Webb v. Drake*, 52 La. Ann. 290, 26 So. 791; *Kernan v. Humble*, 51 La. Ann. 389, 25 So. 431 (parties advising but not participating in consummation may be joined). **Miss.**—*Globe, etc. Ins. Co. v. Firemen's Fund Ins. Co.*, 52 So. 454, 29 L. R. A. (N. S.) 869, citing *Cooley*, Torts, 125; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755. **Can.**—*Copeland-Chatterton Co. v. Business Systems*, 11 Ont. L. R. 292, 7 Ont. W. R. 42, 72, though different defendants joined at different times.

49. **U. S.**—*Motley, etc., Co. v. Detroit, etc. Co.*, 161 Fed. 389. **Ga.**—*Cheney v. Powell*, 88 Ga. 629, 15 S. E. 750. **N. Y.**—*Jones v. Baker*, 7 Cow. 445; *Rourke v. Elk Drug Co.*, 75 App. Div. 145, 77 N. Y. Supp. 373.

Under N. Y. Code Civ. Proc., §1919, allowing the president of an unincorporated association to be sued for damages on any cause of action against the association, the president may be sued for damages resulting from a conspiracy entered into by the association, though several members are joined.

are sued judgment may go against one, though the conspiracy is not established, if the wrongful act by that defendant is established,⁵⁰ but judgment cannot be given against all unless a combination or conspiracy resulting in damage to defendant be proven.⁵¹ But the

Bourke v. Elk Drug Co., 75 App. Div. 145, 77 N. Y. Supp. 373.

50. **U. S.**—*James v. Evans*, 149 Fed. 136, 80 C. C. A. 240; *Davis v. Johnson*, 101 Fed. 952, 42 C. C. A. 111; *Smith v. Rines*, 2 Sumn. 338, 22 Fed. Cas. No. 13,100. **Ga.**—*Woodruff v. Hughes*, 2 Ga. App. 361, 58 S. E. 551, 554. **Ind.**—*Jenner v. Carson*, 111 Ind. 522, 13 N. E. 44; *Mendenhall v. Stewart*, 18 Ind. App. 262, 47 N. E. 943; *Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. 930. **Ia.**—*Aughey v. Windrem*, 137 Iowa 315, 114 N. W. 1047. **Me.**—*Dunlap v. Glidden*, 31 Me. 435, 52 Am. Dec. 625. **Mass.**—*City of Boston v. Simmons*, 160 Mass. 461, 23 N. E. 211, 15 Am. St. Rep. 230, 6 L. R. A. 629; *Bowen v. Matheson*, 14 Allen 499; *Parker v. Huntington*, 2 Gray 124. **Mo.**—*Hunt v. Simonds*, 19 Mo. 583. **Neb.**—*Harvey v. Harvey*, 75 Neb. 557, 106 N. W. 660; *Booker v. Puyear*, 27 Neb. 346, 43 N. W. 133, 137. **N. J.**—*Van Horn v. Van Horn*, 56 N. J. L. 318, 28 Atl. 669. **N. Y.**—*Hutchins v. Hutchins*, 7 Hill 104; *Jones v. Baker*, 7 Cow. 445; *Keit v. Wyman*, 67 Hun 337, 22 N. Y. Supp. 133; *Griffing v. Diller*, 66 Hun 633, 21 N. Y. Supp. 407; *Buffalo, etc., Co. v. Everest*, 30 Hun 586; *Betz v. Daily*, 3 N. Y. St. 309. **N. C.**—*Eason v. Garland*, 6 N. C. 329. **Ore.**—*Bingham v. Tipman*, 40 Ore. 363, 67 Pac. 98. **Pa.**—*Fillman v. Ryon*, 168 Pa. 484, 32 Atl. 89; *Rundell v. Kalbfus*, 125 Pa. 123, 17 Atl. 238; *Laverty v. Vanarsdale*, 65 Pa. 507. **W. Va.**—*Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459. **Eng.**—*Savile v. Roberts*, 1 Ld. Raym. 374, 91 Eng. Reprint 1147; *s. c.*, 12 Mod. 208, 88 Eng. Reprint 1267; *Skinner v. Gunton*, 1 Saund. 228, 230, 85 Eng. Reprint 249. **Can.**—*Copeland-Chatterson Co. v. Business Systems*, 11 Ont. L. R. 292, 7 Ont. W. R. 42, 72.

In a joint action for conspiracy to slander if the plaintiff fail to prove a conspiracy, he can only have judgment against a single defendant, although he may convict the others of having made slanderous utterances against him. They cannot be held liable in a joint action for their several slanderous utterances. But judgment may be had against the one most guilty according to the alle-

gations and proof, and a *nolle prosequi* or discontinuance entered as to the others. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

The action may be discontinued against all but one and judgment entered against him. *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

Under the common-law writ of conspiracy the verdict had to be against two at least in order to be upheld. *Davis v. Johnson*, 101 Fed. 952, 42 C. C. A. 111; *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104; *Jones v. Baker*, 7 Cow. (N. Y.) 445.

51. **U. S.**—*Evans v. Freeman*, 140 Fed. 419. **Ill.**—*Martin v. Leslie*, 93 Ill. App. 44. **Ind.**—*Jenner v. Carson*, 111 Ind. 522, 13 N. E. 44. **Ia.**—*Hines v. Whitehead*, 124 Iowa 262, 264, 99 N. W. 1064. **Ky.**—*Sehon, etc., v. Whitt*, 28 Ky. L. Rep. 1222, 29 Ky. L. Rep. 691, 92 S. W. 280. **Md.**—*Brinkley v. Platt*, 40 Md. 529, 533; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340. **Mass.**—*Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629. **N. Y.**—*Hutchins v. Hutchins*, 7 Hill 104. **Pa.**—*Fillman v. Ryon*, 168 Pa. 484, 32 Atl. 89; *Rundell v. Kalbfus*, 125 Pa. 123, 17 Atl. 238; *Colins v. Cronin*, 117 Pa. 35, 11 Atl. 869. **Tex.**—*St. Louis, etc., R. v. Thompson*, 102 Tex. 89, 113 S. W. 145. **W. Va.**—*Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

Libel.—Each defendant can not be held liable for three distinct publications of a libel where all did not participate in the publication of each libel, unless the conspiracy be proved. *Cranfill v. Hayden*, 22 Tex. Civ. App. 656, 55 S. W. 805.

Conspiracy To Slander.—“An action of slander cannot be maintained against two defendants; for each is severally liable for the words spoken by him. Yet, where two or more persons conspire to ruin another by slanderous utterances, they may be joined in the same action. But it is necessary to set out the words uttered to hold either of them liable separately, and the conspiracy must be proven to hold them liable jointly. They cannot be held

judgment against several parties should be against them jointly and severally.⁵²

liable separately; for thereby the nature of an action of slander could be changed by merely alleging a conspiracy not to be proven, so that a dozen different slanders by a dozen different persons could be prosecuted to final separate judgments in the same suit." *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459, *disapproving* *Van Horn v. Van Horn*, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184, s. c., 53 N. J. L. 514, 21 Atl. 1069.

Without motion to compel election when proof of conspiracy fails there is a waiver. *Sehon v. Whitt*, 28 Ky. L. Rep. 1222, 29 Ky. L. Rep. 691, 92 S. W. 280.

52. *Anderson's Admrs. v. Smith*, 102 Va. 697, 48 S. E. 29.

The verdict may apportion the damages according to the degree of culpability of the conspirators (*Standard Oil Co. v. Doyle*, 118 Ky. 662, 82 S. W. 271, 111 Am. St. Rep. 331; *St. Louis, etc. R. Co. v. Thompson*, 102 Tex. 89, 113 S. W. 114, *reversing* (Tex. Civ. App.), 108 S. W. 453), or according to the respective dates when the various defendants became members of the conspiracy (*Copeland-Chatterson Co. v. Business Systems*, 11 Ont. L. R. 292, 7 Ont. W. R. 42, 72).

CONSTABLES. — See **Sheriffs and Constables.**

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I. GENERAL RULES OF CONSTRUCTION.—A. MISCELLANEOUS RULES.—In their general nature the rules of construction applicable to pleadings are not materially different from those pertaining to other documents or writings.¹

A pleading must be taken as written.² The court cannot reconstruct it,³ or, by transposition of sentences, render that certain which the pleader has made uncertain.⁴

1. *Town of Cameron v. Hicks*, 65 W. Va. 484, 64 S. E. 832.

2. "It is the duty of the court to take the complaint or answer as it is framed, and not to endeavor to sustain it by transposing or introducing a statement not intended to be made a part thereof." *Dedrick v. Mallery*, 127 N. Y. Supp. 1023.

Though a count was rendered unintelligible by reference to count one, and though such reference was probably inadvertently inserted instead of a reference to count five, it was held that the court had no authority to change the plain writing and language. *Charlie's Transfer Co. v. Malone*, 159 Ala. 325, 48 So. 705.

A replication addressed to a particular plea, though entirely inapt, cannot be treated as directed to any other plea. *United Order of The Golden Cross v. Hooser*, 160 Ala. 334, 49 So. 354.

3. *Birmingham R., L. & P. Co. v. Wright*, 153 Ala. 99, 44 So. 1037.

4. *Birmingham R., L. & P. Co. v. Wright*, 153 Ala. 99, 44 So. 1037.

"In ascertaining whether or not an averment of a fact, necessary to support or qualify a cause of action, has been made, it is not required of a court to collate detached parcels of recitals in a petition, and construe them in a connection, and for a purpose, never intended by the pleader, in order to

A pleading should be fairly⁶ and reasonably⁶ construed according to its manifest meaning,⁷ and in a manner consistent with itself.⁸ Strict rules of grammar may be disregarded.⁹

supply, by the aid of inferences, a distinct and material averment, which has been clearly omitted in its proper place." *Whitlock v. Castro*, 2E Tex. 108, 113. Quoted with approval in *Yale v. Ward*, 30 Tex. 17.

5. *Ala.*—*Birmingham R., L. & P. Co. v. Weathers*, 164 Ala. 23, 51 So. 303. *Cal.*—*Manning v. App. Consol. Gold Min. Co.*, 149 Cal. 35, 84 Pac. 657. *Ind.*—*Town of Newcastle v. Grubbs*, 171 Ind. 482, 86 N. E. 757; *State v. Petersen*, 36 Ind. App. 269, 75 N. E. 602. *Ia.*—*Lampman v. Bruning*, 120 Iowa 167, 94 N. W. 562. *Minn.*—*Chamber of Commerce v. Wells*, 96 Minn. 492, 105 N. W. 1124. *N. Y.*—*Babcock v. Anson*, 106 N. Y. Supp. 642. *Ohio.*—*Crooks v. Finney*, 39 Ohio St. 57. *W. Va.*—*Town of Cameron v. Hicks*, 65 W. Va. 484, 64 S. E. 832.

The meaning of the pleader must be fairly ascertained, without regard to technical rules. *Robinson v. Greenville*, 42 Ohio St. 625.

"In construing the language of a declaration, the course is to make reasonable intendments and read and apply the terms in the natural and usual sense, and without supposing this or that qualification which, though possible, is not fairly indicated." *Batterson v. Chicago & G. T. R. Co.*, 49 Mich. 184, 13 N. W. 508.

The rule that, when a pleading is silent or ambiguous it must be taken most strongly against the pleader, is not inconsistent with the rule that it must be fairly construed, so as to reach the real intention of the pleader. *Loehr v. Murphy*, 45 Mo. App. 519.

"A strained construction cannot be placed upon a pleading, as against the pleader, to invalidate his pleading, if a fair and reasonable construction will sustain it, and especially is this true in this court in relation to a pleading construed and held good by the trial court." *Chicago & I. C. R. Co. v. McDaniel*, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769.

A bill in equity "is not to be read and construed as an indictment would have been read and construed a hundred years ago; but it is to be taken

to mean what it fairly conveys to a dispassionate reader, by a fairly exact use of English speech." *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, 180 Fed. 160.

"Pleas in bar are to receive, if not a liberal, certainly not a narrow and merely technical construction." *Withers v. Greene*, 9 How. (U. S.) 213, 13 L. ed. 109.

6. *Cal.*—*Brooks v. Carpentier*, 53 Cal. 287. *Conn.*—*Case v. Humphrey*, 6 Conn. 130. *Minn.*—*Rees v. Storms*, 101 Minn. 381, 112 N. W. 419. *S. C.*—*State v. Earle*, 66 S. C. 194, 44 S. E. 781. *W. Va.*—*Town of Cameron v. Hicks*, 65 W. Va. 484, 64 S. E. 832.

Upon demurrer a bill should not be dismissed, if by any reasonable construction of the language of its averments a case is stated entitling the plaintiff to the relief sought. *Shipley v. Fink*, 102 Md. 219, 62 Atl. 360.

"All pleadings must be construed reasonably, and not with such strictness as to refuse to adopt the natural construction of the pleading because a particular fact might have been more distinctly alleged, although its existence is fairly, naturally and reasonably to be presumed from the averments made in the pleading." *Lockhart v. Leeds*, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. ed. 263.

"A rational construction is to be given to pleading where it is susceptible of it; and we are not to resort to any other when it is equally natural and more consistent with the intent and object which the party has in view." *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 105.

7. *Wabash R. Co. v. Schultz*, 30 Ind. App. 495, 64 N. E. 481.

The language used is to be liberally construed so as to give effect to its object and purpose. *Pries v. Ashland L., P. & St. R. Co.*, 143 Wis. 606, 128 N. W. 281.

A plea is to be given a natural, rather than a forced and artificial, meaning. *Lammers v. Meyer*, 59 Ill. 214.

8. *Clement v. Graham*, 78 Vt. 290, 63 Atl. 146.

9. The court will not adhere to

Regard must be had to the evident intention of the pleader,¹⁰ and to what the other party had reason to understand from the pleading was the issue tendered.¹¹

The law applicable to the status made by the allegations must be taken into account.¹²

Where a complaint contains words which, if properly arranged, might state two causes of action, but which are not so arranged, it will be construed as stating only one.¹³

Facts averred as existing which are continuous in their nature, are to be taken as continuing unless the contrary is averred.¹⁴

strict rules of grammar under any circumstances, and will in a measure disregard them. *Conrad Nat. Bank v. Great Northern R. Co.*, 24 Mont. 178, 61 Pac. 1.

The pleading will be construed according to its substance and plain intent, rather than according to its strict grammatical construction. *Carlisle v. Bently*, 81 Neb. 715, 116 N. W. 772.

10. *Mo.*—*Thompson v. Keyes-Marshall Bros. Livery Co.*, 214 Mo. 487, 113 S. W. 1128; *Milliken v. Thyson Commission Co.*, 202 Mo. 637, 100 S. W. 604; *Ryan v. Riddle*, 109 Mo. App. 115, 82 S. W. 1117; *Loehr v. Murphy*, 45 Mo. App. 519. *Mont.*—*Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673. *Neb.*—*Carlisle v. Bently*, 81 Neb. 715, 116 N. W. 772; *Lemke v. Lemke*, 78 Neb. 525, 111 N. W. 138.

The object of construction is always to ascertain intention. *Southern Exp. Co. v. Pope*, 5 Ga. App. 689, 63 S. E. 809.

"The true meaning of the pleader is to be ascertained from a fair construction of the language employed, and this accepted." *Lampman v. Bruning*, 120 Iowa 167, 94 N. W. 562.

Words must be taken in the sense in which it is reasonable to suppose that the pleader intended to use them. *Case v. Humphrey*, 6 Conn. 130.

A pleading should not be construed entirely without reference to the idea patent on its face intended to be expressed. *Birmingham R. L. & P. Co. v. Morris*, 163 Ala. 190, 50 So. 198.

When the denials and averments in an answer all taken together clearly indicate that it was the intention of defendant to deny the allegations of the complaint and put all of such allegations in issue, they will be construed in accordance with such intention, and the case must be tried upon

the merits. *Nobach v. Scott* (Idaho), 119 Pac. 295.

11. *Thompson v. Keyes-Marshall Bros. Livery Co.*, 214 Mo. 487, 113 S. W. 1128.

Pleadings should be deemed to allege all that of which they may reasonably be supposed to convey notice to the opposite party. *Woolsey v. Henke*, 125 Wis. 134, 103 N. W. 267.

To determine the sufficiency of the petition, it should be looked at from the standpoint of defendant's counsel. *Missouri, K. & T. R. Co. v. Poole* (Tex. Civ. App.), 133 S. W. 239.

"To determine whether or not a pleading presents a certain issue, it is a safe rule to look at it from the standpoint of the party against whom it is exhibited and ascertain if the allegations are sufficient to notify him that evidence upon a certain point will be produced, or that he will be called upon to present a defense and evidence to meet it." *Ware v. Shafer*, 88 Tex. 44, 29 S. W. 756; *Broussard v. Mayumi* (Tex. Civ. App.), 144 S. W. 320.

12. *Louisville & N. R. Co. v. Smith*, 163 Ala. 141, 50 So. 241.

Allegations must be read in connection with the constitutional and statutory provisions governing the subject-matter involved. *State v. City of Milwaukee*, 145 Wis. 131, 129 N. W. 1101.

An allegation that four votes were "spoiled" must be construed in the light of the statutory provision relating to spoiled ballots. *Hicks v. Krigbaum*, 13 Ariz. 237, 108 Pac. 482.

13. *Santa Fe, P. & P. R. Co. v. Hurley*, 4 Ariz. 258, 36 Pac. 216; *Sharp v. Miller*, 54 Cal. 329.

14. Though the rule is usually stated as one of evidence, it is equally applicable to pleading. *Thomasson v. Mercantile Town Mut. Ins. Co.*, 114

Allegations of time in a complaint are presumed to refer to the conditions existing when the action was begun, unless controlled by other allegations showing that a different date was intended.¹⁵

Bad grammar does not vitiate a pleading when the meaning is obvious.¹⁶

The nature and character of a pleading is to be determined from the substantive facts therein alleged rather than from the name given it by the pleader.¹⁷ Thus, a pleading may be regarded as an answer though called a plea in abatement,¹⁸ or a cross-complaint;¹⁹ or as a counterclaim though called an answer²⁰ or a cross-complaint;²¹ or as a cross-complaint, though called a defense,²² or answer,²³ or counterclaim.²⁴

The construction adopted at the trial will be adhered to on appeal.²⁵

B. PLEADING TO BE CONSTRUED AS A WHOLE.—A pleading,²⁶ or a

Mo. App. 109, 89 S. W. 564; *Stone v. Wendover*, 2 Mo. App. 247.

An averment to the contrary should come from the opposite party. *Kinsman v. Page*, 22 Vt. 628.

15. *Curran v. Arp*, 125 N. Y. Supp. 758; *Barker v. Conrad Steamship Co.*, 36 N. Y. Supp. 256, 91 Hun 495, affirmed, 157 N. Y. 693, 51 N. E. 1089.

16. *Parsons v. Mayfield*, 73 Mo. App. 309.

When the person and case can rightly be understood. *Blanding v. Mansfield*, 72 Me. 427.

17. **U. S.**—*Bush v. Pioneer Mining Co.*, 101 C. C. A. 372, 179 Fed. 78. **Ill.** *Quartier v. Dowiat*, 219 Ill. 326, 76 N. E. 371, where the pleading was endorsed "bill in chancery." **Wash.** *Johnson v. Pacific Bank & Store Fixture Co.*, 59 Wash. 58, 109 Pac. 205. **W. Va.**—*Columbia Finance & Trust Co. v. Fierbaugh*, 59 W. Va. 334, 53 S. E. 468; *Pethel v. McCullough*, 49 W. Va. 520, 39 S. E. 199 (where what was called a petition was held an original bill); *Strom v. Fleming*, 22 W. Va. 404.

A pleading designated as a "reply amended petition" should not be struck out though there is no such pleading known to the practice. *Harris v. Langford*, 26 Ky. L. Rep. 1096, 83 S. W. 566.

That a plea was improperly called a cross-complaint does not require a denial of the relief warranted by the facts therein alleged. *Randolph v. Nichol*, 74 Ark. 93, 84 S. W. 1037.

18. *Tutty v. Ryan*, 13 Wyo. 134, 78 Pac. 357, 79 Pac. 920.

19. "It is immaterial what the de-

fendant called his pleading, whether he designated it an answer or cross-complaint, its character will be determined by the court. It is the facts set up in the pleading which make it an answer or cross-complaint." *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54. Quoted with approval in *Meeker v. Dalton*, 75 Cal. 154, 16 Pac. 764, and in *Brown v. Massey*, 19 Okla. 482, 92 Pac. 246.

20. A so-called supplemental paragraph of an answer treated as a counterclaim. *Harness v. Harness*, 63 Ind. 1.

A so-called "answer by way of counterclaim" was treated as a counterclaim. *Johnson v. Sherwood*, 34 Ind. App. 490, 73 N. E. 180. And see *Sidener v. Davis*, 69 Ind. 336.

21. *Reardon v. Higgins*, 39 Ind. App. 363, 79 N. E. 208.

22. *Swank v. Sweetwater Irr. & P. Co.*, 15 Idaho 353, 98 Pac. 297.

23. *Brown v. Massey*, 19 Okla. 482, 92 Pac. 246.

24. *McClanahan v. Williams*, 136 Ind. 30, 35 N. E. 897.

25. *Keyes v. Minneapolis & St. L. R. Co.*, 36 Minn. 290, 30 N. W. 888; *Wood v. City of Omaha*, 87 Neb. 213, 127 N. W. 174.

26. **U. S.**—*Buchanan v. Adkins*, 175 Fed. 692, 98 C. C. A. 246; *United States v. Union Pac. R. Co.*, 169 Fed. 66, 94 C. C. A. 433. **Ark.**—*Lindsey v. Bloodworth*, 134 S. W. 959. **Cal.**—*Kleinclauss v. Dutard*, 147 Cal. 245, 81 Pac. 516; *Nevin v. Gary*, 12 Cal. App. 1, 106 Pac. 422. **Conn.**—*Hill v. Fair Haven & Westville R. Co.*, 75 Conn. 177, 52 Atl. 725. **Ga.**—*Southern R. Co. v. Forrest*, 132 Ga. 853, 65 S. E. 93; *Autog-*

count thereof,²⁷ or a defense,²⁸ must be construed as a whole. All the material allegations will be considered together,²⁹ and particular allegations construed in connection with others to which they relate.³⁰

C. MEANING OF LANGUAGE AND WORDS USED.—The language used is to be given its ordinary meaning and common acceptation,³¹ and the

nolia & Co. v. Miller, 116 Ga. 621, 42 S. E. 1006; *Courson v. Hamilton*, 8 Ga. App. 709, 70 S. E. 143; *Brown v. Massachusetts Mills*, 7 Ga. App. 642, 67 S. E. 832. **Idaho**.—*Nobach v. Scott*, 119 Pac. 295. **Ind.**—*Smith v. Borden*, 160 Ind. 223, 66 N. E. 681; *Schilling v. Indianapolis & C. Traction Co.* (Ind. App.), 96 N. E. 167; *Republic Iron & Steel Co. v. Lulu* (Ind. App.), 92 N. E. 993. **Ia.**—*Teeple v. Hawkeye Gold Dredging Co.*, 137 Iowa 206, 114 N. W. 906. **Ky.**—*Hampton v. Glass*, 116 S. W. 243. **La.**—*Davies v. Bierce*, 114 La. 663, 38 So. 488; *Howcott v. Pettit*, 106 La. 530, 31 So. 61. **Minn.**—*Barkey v. Johnson*, 90 Minn. 33, 95 N. W. 583. **Mo.**—*Union Nat. Bank v. Lyons*, 220 Mo. 538, 119 S. W. 540; *Milliken v. Thyson Commission Co.*, 202 Mo. 637, 100 S. W. 604. **Mont.**—*Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; *Silver Bow County v. Davies*, 40 Mont. 418, 107 Pac. 81. **Neb.**—*Carlile v. Bentley*, 81 Neb. 715, 116 N. W. 772. **N. Y.**—*Babcock v. Anson*, 106 N. Y. Supp. 642. **N. C.**—*J. I. Case Threshing Mach. Co. v. Feezer*, 152 N. C. 516, 67 S. E. 1004. **N. D.**—*Tisdale v. Ward County*, 127 N. W. 512. **Ohio**.—*Robinson v. Greenville*, 42 Ohio St. 625; *Everett v. Waymire*, 30 Ohio St. 308. **Okla.**—*McClung v. Cullison*, 15 Okla. 402, 82 Pac. 499. **Ore.**—*Crossen v. Grandy*, 42 Ore. 282, 70 Pac. 906. **Tex.** *Ferrell v. City of Haskell* (Tex. Civ. App.), 134 S. W. 784; *McShan v. Watlington* (Tex. Civ. App.), 133 S. W. 723; *Ball v. Texarkana Water Corp.* (Tex. Civ. App.), 127 S. W. 1068. **Vt.** *Vaughan v. Everts*, 40 Vt. 526. **Wash.** *Boyle v. Great Northern R. Co.*, 13 Wash. 383, 43 Pac. 344. **Wyo.**—*David v. Whitehead*, 13 Wyo. 189, 79 Pac. 19.

On demurrer to a particular allegation the purpose of the whole bill will be considered. *Miller v. Sterringer*, 66 W. Va. 169, 66 S. E. 228.

27. **Ala.**—*Birmingham R., L. & P. Co. v. Morris*, 163 Ala. 190, 50 So. 193; *Louisville & N. R. Co. v. Smith*, 163 Ala. 141, 50 So. 241; *Louisville & N.*

R. Co. v. Johnson, 162 Ala. 665, 50 So. 300. **Mich.**—*Smith v. Holmes*, 54 Mich. 104, 19 N. W. 767.

28. The ultimate facts alleged must be determined from the entire defense, and not merely from one or more paragraphs thereof. *National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634.

On demurrer to certain paragraphs of a defense their sufficiency can only be determined by considering them in connection with the other paragraphs of such defense. *Molineux v. Hurlbut*, 79 Conn. 243, 64 Atl. 350.

29. **U. S.**—*Lockhart v. Leeds*, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. ed. 263. **Minn.**—*State v. Knife Falls Boom Co.*, 96 Minn. 194, 104 N. W. 817; *Stein v. Passmore*, 25 Minn. 256. **Wyo.**—*David v. Whitehead*, 13 Wyo. 189, 79 Pac. 19.

Isolated statements will not be permitted to control the scope and meaning of a pleading. *Penn Mut. Life Ins. Co. v. Norcross*, 163 Ind. 379, 72 N. E. 132; *Platter v. City of Seymour*, 86 Ind. 323.

Will consider all the facts pleaded, even though some of them need not have been. *Jones v. Carnes*, 17 Okla. 470, 87 Pac. 652.

"Pleas in bar are always construed according to their entire subject-matter, and will be sustained accordingly as taken together, and will not be determined by a disjoining of their members, or by laying stress on what may be immaterial." *Withers v. Greene*, 9 How. (U. S.) 213, 13 L. ed. 109.

30. **H. W. Metcalf Co. v. Orange County**, 56 Fla. 829, 47 So. 363.

31. **Ala.**—*Birmingham R., L. & P. Co. v. Weathers*, 164 Ala. 23, 51 So. 303. **Mo.**—*Ryan v. Riddle*, 109 Mo. App. 115, 82 S. W. 1117. **Neb.**—*Lemke v. Lemke*, 78 Neb. 525, 111 N. W. 138. **N. H.**—*Breck v. Blanchard*, 22 N. H. 303. **Ore.**—*Morton v. Weasinger*, 113 Pac. 7. **Tex.**—*Texas & P. R. Co. v. Bayliss*, 62 Tex. 570.

The plain language of an equity pleading is to be understood accord-

same is true of particular words,³² which are also to be taken in the sense in which the context shows they were used.³³

Legal and technical words are to be understood in their recognized sense, unless the context shows that another meaning was intended.³⁴

Ambiguous Expressions.—When an expression is capable of different meanings, that one will ordinarily be adopted which will support the pleading rather than one which will defeat it.³⁵

Words of specification draw into the same class those general terms which are superadded to attain the end without further prolixity.³⁶

The words "**as aforesaid**" may operate to put particular facts previously alleged in opposition to a general averment in connection with which they are used.³⁷

Words of reference will not be referred to the last antecedent, if the sense requires that they be referred to some prior one.³⁸

More Than One.—An allegation that more than one person did a particular thing is tantamount to an allegation that it was done by two persons.³⁹

The expression "**and thereupon**" marks the succession of events in

ing to its natural import in connection with the subject-matter. *Quinn v. Valiquette*, 80 Vt. 434, 68 Atl. 515.

32. *Ala.*—*Western Union Tel. Co. v. Snell*, 56 So. 854. *Ariz.*—*Santa Fe, P. & P. Ry. Co. v. Hurley*, 4 Ariz. 258, 36 Pac. 216. *Cal.*—*Christensen v. Cram*, 156 Cal. 633, 105 Pac. 950. *Ind.*—*Pein v. Miznerr*, 170 Ind. 659, 84 N. E. 981; *Paul Mfg. Co. v. Racine*, 43 Ind. App. 695, 88 N. E. 529. *Mich.*—*Batterson v. Chicago & G. T. R. Co.*, 49 Mich. 184, 13 N. W. 508. *Minn.*—*Starkey v. Minneapolis*, 19 Minn. 203.

Should be considered in their colloquial and not their technical sense. *Dugas v. Hammond*, 130 Ga. 87, 60 S. E. 268.

Particular Words Construed.—"Necessary" construed as meaning convenient. *Brooks v. Chicago, W. & V. Coal Co.*, 234 Ill. 372, 84 N. E. 1028.

"**Team**" includes the vehicle and gear by which it was attached to, and propelled by, the horses. *Krebs Hop Co. v. Taylor*, 52 Ore. 627, 97 Pac. 44, 98 Pac. 494.

"**Refused**" used in the sense of "failed." *Virginia & N. C. Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

"**And then and there placed**" construed to mean "by placing." *Winifred Bros. v. Rutland R. Co.*, 71 Vt. 48, 42 Atl. 980.

33. *Ala.*—*Louisville & N. R. Co. v.*

Smith, 163 Ala. 141, 50 So. 241. *Ind. Paul Mfg. Co. v. Racine*, 43 Ind. App. 695, 88 N. E. 529. *W. Va.*—*Dudley v. Barrett*, 66 W. Va. 363, 66 S. E. 507; *Town of Cameron v. Hicks*, 65 W. Va. 484, 64 S. E. 832.

34. *Robinson v. Greenville*, 42 Ohio St. 625.

In a pleading imputing legal liability the word "invitation" must be given its legal and not its colloquial, meaning. *Kennedy v. North Jersey St. R. Co.*, 72 N. J. L. 19, 60 Atl. 42.

35. *Conn.*—*Case v. Humphrey*, 6 Conn. 132. *Miss.*—*Pender v. Dicken*, 27 Miss. 252. *Va.*—*Virginia & N. C. Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

36. *Macumber v. White River Log & Booming Co.*, 52 Mich. 195, 17 N. W. 806.

37. *Birmingham R., L. & P. Co. v. Weathers*, 164 Ala. 23, 51 So. 303; *Birmingham R., L. & P. Co. v. Parker*, 156 Ala. 251, 47 So. 138.

38. *Lammers v. Meyer*, 59 Ill. 214. The usual rule that "said" refers to things last specified, does not apply where there is coupled with it something that limits and defines its application and shows that some others are meant. *Goodnow v. Houghton*, 16 Vt. 404.

39. *Hicks v. Kragbaum*, 13 Ariz. 237, 108 Pac. 482.

order of time, but does not exclude the existence of other facts than those previously recited.⁴⁰

Words of the singular, may include plural number, and *vice versa*, unless the connection is such that the adverse party is likely to be misled thereby.⁴¹

D. CLERICAL ERRORS AND OMISSIONS. — Mere clerical errors,⁴² such as the use of the word "when" for "where,"⁴³ or of the word "plaintiff" instead of "defendant,"⁴⁴ or the word "defendant" instead of "plaintiff,"⁴⁵ or an obvious mistake in a date,⁴⁶ or the omission of a word,⁴⁷ will be disregarded, and will not vitiate the pleading where the intention is clear.

E. GENERAL AND SPECIFIC ALLEGATIONS. — Specific allegations control general ones on the same subject,⁴⁸ provided they are sufficient

40. *Dennehey v. Woodsum*, 100 Mass. 195.

41. "Plaintiff" signifies the plaintiff party, and includes all who are specified by name as plaintiffs. *Blanding v. Mansfield*, 72 Me. 427.

Where the words plaintiff or defendant are used in the singular or plural number, they will be regarded as used in the number which the context shows was intended to be used. *Noyes v. McLafin*, 62 Ill. 474.

42. *Crossen v. Grandy*, 42 Ore. 282, 70 Pac. 906.

For example, "plaintiff" instead of "plaintiff's intestate" (*King v. Mail & Express Co.*, 98 N. Y. Supp. 891); "defendant" instead of decedent (*Kenney v. New York Cent. & H. R. R. Co.*, 2 N. Y. Supp. 512, 48 Hun. 535); "pain" read as "paid" (*Connor v. Becker*, 62 Neb. 858, 87 N. W. 1065).

The word "proper" was read "improper," where the whole scope of the petition showed that such was the intention. *Haggerty v. St. Louis, K. & N. B. Co.*, 100 Mo. App. 424, 74 S. W. 456.

43. Where the context shows that such was the intention. *Raker v. Bucher*, 100 Cal. 214, 34 Pac. 654, 849.

44. *Avent-Beattyville Coal Co. v. King Powder Co.*, 19 Ky. L. Rep. 920, 41 S. W. 433; *Burnstein v. Levy*, 98 N. Y. Supp. 853. "Complainant" instead of "respondent." *Robinson v. Griffin* (Ala.) 56 So. 124.

45. *Kentucky Cent. R. Co. v. Carr*, 19 Ky. L. Rep. 1172, 43 S. W. 193.

46. "1893," for "1894." *State ex rel. Fisher v. Rodecker*, 145 Mo. 450, 46 S. W. 1083. "1901" read 1891. *State v. Quantic*, 37 Mont. 32, 94 Pac. 491.

47. For example, "dollars" in stating the amount of damage. *Stone v. St. Louis, I. M. & S. R. Co.*, 146 Mo. App. 298, 129 S. W. 1074.

The omission of the word "plaintiff" between the words "the" and "claims" in an amended complaint is a self-correcting clerical error. *Martin v. Jesse French Piano & Organ Co.*, 151 Ala. 239, 44 So. 112.

48. U. S.—*United States v. Union Pac. R. Co.*, 169 Fed. 65, 94 C. C. A. 433; *Hayes-Young Tie Plate Co. v. St. Louis Transit Co.*, 137 Fed. 80, 70 C. C. A. 1; *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 68 C. C. A. 289. Ind.—*American Car & Foundry Co. v. Vance*, 97 N. E. 327; *Cleveland, C. C. & St. L. R. Co. v. Foland*, 92 N. E. 165, 91 N. E. 594; *Cleveland, C. C. & St. L. R. Co. v. Cyr*, 86 N. E. 868; *Atkins v. Kattman* (Ind. App.), 97 N. E. 174; *King v. Laycock Power House Co.*, 46 Ind. App. 420, 92 N. E. 741; *Hayes v. Hayes*, 40 Ind. App. 471, 82 N. E. 90; *Baltimore & O. S. W. R. Co. v. Kleespies*, 39 Ind. App. 151, 76 N. E. 1015, 78 N. E. 252. Minn.—*Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N. W. 378; *Moon v. Allen*, 82 Minn. 89, 84 N. W. 654; *Willison v. Northern Pac. R. Co.*, 111 Minn. 370, 127 N. W. 4 (negligence); *Martin County Bank v. Day*, 73 Minn. 195, 75 N. W. 1115 (libel). Mo.—*Thompson v. Keyes-Marshall Bros. Livery Co.*, 214 Mo. 487, 113 S. W. 1128; *McNanamee v. Missouri Pac. R. Co.*, 135 Mo. 440, 37 S. W. 119; *Sayers v. Craven*, 107 Mo. App. 407, 81 S. W. 473. Okla.—*Whitaker v. Crowder State Bank*, 26 Okla. 786, 110 Pac. 776. Ore.—*Morton v. Wessinger*, 113 Pac. 7. S. C.—*Goodwin*

for all legal purposes,⁴⁹ and unless the pleading clearly indicates that the general allegations were intended to cover other matters than those specifically alleged.⁵⁰ The specific allegations in such case are deemed explanatory of what the general charge is intended to mean.⁵¹ To render the rule applicable, however, the specific allegations must be clearly repugnant to the general ones, and must show that the latter are untrue.⁵²

F. INFERENCES FROM FACTS PLEADED.—Facts directly and positively averred carry with them into the pleading such other facts as are necessarily inferred from the facts well pleaded, where but one inference can be drawn therefrom,⁵³ and matters so implied are as

v. Charleston & W. C. R. Co. 76 S. C. 557, 57 S. E. 530. **Tex.**—*Missouri Pac. R. Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608; *Houston & T. C. R. Co. v. Rogers* (Tex. Civ. App.), 117 S. W. 1053; *Missouri, K. & T. R. Co. v. Chittim* (Tex. Civ. App.), 40 S. W. 23. **Wash.**—*Mallory v. Benway*, 34 Wash. 315, 75 Pac. 869.

"It is a rule of pleading that where a general fact or result is pleaded, and also the special facts by which such result is reached, and they do not support the result, the special facts control, and the pleading is bad." *Carlson v. Presbyterian Board of Relief*, 67 Minn. 436, 70 N. W. 3.

Broad general allegations must be read in connection with specific ones. *Grand Rapids & I. R. Co. v. Village of Morley*, 166 Mich. 66, 131 N. W. 135.

A general averment in a cross-complaint will control over specific averments relating to an exhibit which is not the foundation of the pleading and, hence, cannot be looked to to determine its sufficiency. *Shetterly v. Axt*, 37 Ind. App. 687, 77 N. E. 865, 76 N. E. 901.

A general allegation of ownership is limited by specific allegations as to the manner in which title was acquired. *Armour Bros. Banking Co. v. Riley County Bank*, 30 Kan. 163, 1 Pac. 506.

A general allegation that a place was a public one is controlled by specific allegations of facts showing its true character. *Sheffield Co. v. Norton*, 161 Ala. 153, 49 So. 772.

Specific allegations which show knowledge, or equal opportunity for knowledge, will overcome a general allegation of want of knowledge. *Cleveland, C., C. & St. L. R. Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073; *Cleveland, C., C. & St. L. R. Co. v. Morrey*, 172 Ind. 513, 88 N. E. 932.

Words of Reference.—Where a petition contains general averments of negligence, "as hereinbefore more specifically mentioned and described," only such issues are thereby pleaded as are found in the specific allegations. *Chicago, R. I. & P. R. Co. v. Wheeler*, 70 Kan. 755, 79 Pac. 673.

An allegation that the carelessness and negligence "as hereinbefore complained of consisted in this," setting out the specific allegations, pleaded only such issues as were found in such specific allegations. *Chicago, R. I. & P. R. Co. v. McIntire* (Okla.), 119 Pac. 1008.

Videlicet.—In *Mallett v. Stevenson*, 26 Conn. 428, it was held that the expression "intoxicating liquors" was by a *videlicet* restricted to the particular kinds of liquors described thereunder.

49. *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N. W. 373.

50. *Goodwin v. Charleston & W. C. R. Co.*, 76 S. C. 557, 57 S. E. 530.

51. *Thompson v. Keyes-Marshall Bros. Livery Co.*, 214 Mo. 487, 113 S. W. 1128; *Mueller v. La Prelle Shoe Co.*, 109 Mo. App. 506, 84 S. W. 1010; *Goodwin v. Charleston & W. C. R. Co.*, 76 S. C. 557, 57 S. E. 530.

52. *Warbritton v. Demorett*, 129 Ind. 346, 27 N. E. 730, 28 N. E. 613.

53. **Ind.**—*Indiana, N. & T. Co. v. Lippincott Glass Co.*, 165 Ind. 361, 75 N. E. 649; *Cleveland, C., C. & St. L. R. Co. v. Stevens* (Ind. App.), 96 N. E. 493; *Holcomb v. Norman* (Ind. App.), 91 N. E. 625. **Minn.**—*Vukelis v. Virginia Lumb. Co.*, 107 Minn. 68, 119 N. W. 509. **Mont.**—*Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; *Silver Bow County v. Davies*, 40 Mont. 418, 107 Pac. 81. **N. Y.**—*Wallace v. Jones*, 182 N. Y. 37, 74 N. E. 576; *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513; *Czer-*

much a part of the pleading as what is expressed.⁵⁴ To take the place of a direct allegation, however, an inference must naturally and necessarily arise out of some fact or facts positively stated.⁵⁵

II. WHETHER CONSTRUED IN FAVOR OF OR AGAINST THE PLEADER.—A. COMMON LAW RULE.—At common law pleadings which were equivocal or ambiguous in meaning were construed most strongly against the pleader.⁵⁶ And this rule still prevails in jurisdictions adhering to the common law system of procedure,⁵⁷ in

ney v. Haas, 129 N. Y. Supp. 537; Chicago Crayon Co. v. Slattery, 123 N. Y. Supp. 987.

"The pleading is to be read in the light of all such ultimate facts as must be necessarily intended from the facts which are well pleaded. A complaint ought to be fairly construed, and it is often the fact that matters of substance are shown by the very narrative of the manner in which an occurrence took place." Town of Newcastle v. Grubbs, 171 Ind. 482, 86 N. E. 757.

The allegation that a certain condition exists because of a certain fact necessarily carries with it the implication that the fact exists also. Bank of Anderson v. Home Ins. Co., 14 Cal. App. 208, 111 Pac. 507. See also, *infra*, II, B and C.

54. Western Real Estate Trustees v. Hughes, 172 Fed. 206, 96 C. C. A. 658; Moore v. East Tenn. Tel. Co. 142 Fed. 965, 74 C. C. A. 227; Boelk v. Nolan, 56 Ore. 229, 107 Pac. 689.

An express averment of a fact is not necessary when such fact can be inferred from the pleading. Richardson v. El Paso Consol. Gold Mining Co. (Colo.), 118 Pac. 982. See also, *infra*, II, B and C.

55. Soule v. Weatherby (Utah), 118 Pac. 833.

The only inferences that can supply the place of direct averment are necessary inferences. Cleveland, C., C. & St. L. R. Co. v. Perkins, 171 Ind. 307, 86 N. E. 405; Rowan v. Butler, 171 Ind. 28, 86 N. E. 714; Shellhouse v. Field (Ind. App.), 97 N. E. 940; Holliday & Wyon Co. v. O'Donnell, 44 Ind. App. 647, 90 N. E. 24; Thomas Madden Son & Co. v. Wilcox (Ind. App.), 89 N. E. 955, 88 N. E. 871.

A necessary averment cannot be supplied on inferences drawn from other facts alleged unless such averment must logically and necessarily be so inferred therefrom. Emmerson v. Botkin, 26

Okla. 218, 109 Pac. 531; Reddick v. Webb, 6 Okla. 392, 50 Pac. 363.

One inference may not be used as the basis of another, and the facts constituting the basis of the inference must reasonably and fairly exclude every other hypothesis except the fact inferred. Krank v. Continental Ins. Co., 50 Misc. 144, 100 N. Y. Supp. 399. See also, *infra*, II, B and C.

56. Will's Gould Pl. 305; 1 Chit. Pl., 237; United States v. Parker, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. ed. 601; Gillette v. Bullard, 20 Wall. (U. S.) 571, 22 L. ed. 387.

"This is the rule laid down by Chitty (1 Chitty, 578), and in which he is supported by numerous authorities. And the reason assigned for this rule of construction is, that it is a natural presumption, that the party pleading will state his case as favorably as he can for himself. And if he do not state it with all its legal circumstances, the case is not in fact favorable to him; and the rule of construction in such case is, that if a plea has on the face of it two intendments, it shall be taken most strongly against the defendant; that is, says he, the most unfavorable meaning shall be put upon the plea; a rule which obtains also in other pleadings; and a number of cases are put, illustrating this rule." United States v. Linn, 1 How. (U. S.) 104, 11 L. ed. 64.

57. U. S.—United States v. Linn, 1 How. (U. S.) 104, 11 L. ed. 64; Buchanan Co. v. Adkins, 175 Fed. 692, 99 C. C. A. 246; Moore v. East Tenn. Telephone Co., 142 Fed. 965, 74 C. C. A. 227. Ala.—Grubbs v. Hawes, 56 So. 227; King v. Sawyer, 55 So. 320; Broyles v. Central of Ga. R. Co., 166 Ala. 616, 52 So. 81; Southern R. Co. v. Adams Machinery Co., 165 Ala. 436, 51 So. 779. Conn.—O'Keefe v. National Folding Box & Paper Co., 66 Conn. 38, 33 Atl. 587; Gaylord v. Payne, 4 Conn.

Louisiana,⁵⁸ and to a certain extent in many states where the code system of pleading prevails.⁵⁹ Where recognized, it is generally held to apply to pleadings in equity as well as to those in actions at law,⁶⁰ though there are holdings to the contrary.⁶¹ The basis of the rule is that it is to be presumed that every person states his case as favorably to himself as possible.⁶²

190. Fla.—Hillsborough Grocery Co. v. Ingalls, 60 Fla. 105, 53 So. 930; Atlantic C. L. R. Co. v. Beazley, 54 Fla. 311, 45 So. 761; Southern Home Insurance Co. v. Putnal, 57 Fla. 199, 49 So. 922; Kirton v. Atlantic C. L. R. Co., 57 Fla. 79, 49 So. 1024. Ga.—Georgia & Florida Development Co. v. Buck, 134 Ga. 674, 68 S. E. 514; Baggett v. Edwards, 126 Ga. 463, 55 S. E. 250; Brown v. Massachusetts Mills, 7 Ga. App. 642, 67 S. E. 832; Southern Express Co. v. Pope, 5 Ga. App. 689, 63 S. E. 809. Ill.—Rose v. Mutual Life Ind. Co., 240 Ill. 45, 88 N. E. 204; Harrison v. Thackaberry, 154 Ill. App. 246; Ruehle v. Montelius, 149 Ill. App. 416; Rose v. Mutual Life Ins. Co., 144 Ill. App. 434. Ky.—Decker v. Gilbert, 140 Ky. 108, 130 S. W. 960; Watson v. City of Morehead, 125 S. W. 724; Stevenson v. Flournoy, 89 Ky. 561, 13 S. W. 210. Miss.—Keystone Lumber Yard v. Yazoo & M. V. R. Co., 94 Miss. 192, 47 So. 803. N. J.—Dick v. McPherson, 72 N. J. L. 332, 62 Atl. 383; Marples v. Standard Oil Co., 71 N. J. L. 352, 59 Atl. 32; Stevens & Condit Transp. Co. v. Central R. Co. of N. J., 33 N. J. L. 229. N. H.—Breck v. Blanchard, 22 N. H. 303. Tenn.—Lillard v. Mitchell, 37 S. W. 702. Vt.—Wright v. Burroughs, 61 Vt. 390, 18 Atl. 311. Va. Clinchfield Coal Co. v. Clintwood Coal & Timber Co., 108 Va. 433, 62 S. E. 329. W. Va.—Town of Cameron v. Hicks, 65 W. Va. 484, 64 S. E. 832.

58. Breaux Bridge Lumber Co. v. Herbert, 121 La. 188, 46 So. 206.

59. See *infra*, II, B.

60. Ala.—Puckett v. Puckett, 56 So. 585; Bozeman v. Sun Ins. Co., 170 Ala. 373, 54 So. 178. Cal.—Griswold v. Mather, 5 Conn. 435. Fla.—City of Miami v. Shotts, 59 Fla. 462, 51 So. 929; Hull v. Burr, 58 Fla. 432, 50 So. 754; Durham v. Edwards, 38 So. 926. Ill.—Martin v. McCall, 247 Ill. 484, 93 N. E. 418; Foss v. People's Gas Light Co., 241 Ill. 238, 89 N. E. 351; People v. Grand Trunk R. Co., 232 Ill. 292, 83 N. E. 839. Miss.—Nestor v. Davis,

56 So. 347. N. J.—Schuler v. Southern Iron & Steel Co., 77 N. J. Eq. 60, 75 Atl. 552. Tenn.—Lillard v. Mitchell, 37 S. W. 702.

On demurrer in equity, in equipoise the construction is against the pleader. Quinn v. Valiquette, 80 Vt. 434, 68 Atl. 515.

Where there are contradictory or inconsistent allegations in a bill, its equity will be tested by the weaker, rather than by the stronger allegations. Barco v. Doyle, 50 Fla. 488, 39 So. 103.

On demurrer, no intendments are to be made in favor of the orators that do not naturally result from the facts alleged. Blondin v. McArthur (Vt.), 80 Atl. 663; Quinn v. Valiquette, 80 Vt. 434, 68 Atl. 515.

On Motion To Dissolve an Injunction. Hussey v. Gourley, 153 Ill. App. 501.

61. On demurrer. Moore v. Harper, 27 W. Va. 362.

On motion to dissolve an injunction for want of equity in a bill, its equity will be sustained if the facts, whether well or poorly pleaded, make out a case for equitable relief, and all defects as to manner or form of pleading will be considered as made, but this presumption does not extend to the addition of facts not set forth. Woodward v. State (Ala.), 55 So. 506.

62. Will's Gould Pl. 306; 1 Chit. Pl. 237, and the following cases: U. S. United States v. Linn, 1 How. 104, 11 L. ed. 64. Ala.—Alabama Great Southern R. Co. v. Cardwell, 55 So. 185; Elmore, Quillan & Co. v. Parish Bros., 170 Ala. 499, 54 So. 203; Birmingham R., L. & P. Co. v. Weathers, 164 Ala. 23, 51 So. 303. Conn.—Griswold v. Mather, 5 Conn. 435; Gaylord v. Payne, 4 Conn. 190. Fla.—Kirton v. Atlantic C. L. R. Co., 57 Fla. 79, 49 So. 1024; Barco v. Doyle, 50 Fla. 488, 39 So. 103. Ga.—Southern Express Co. v. Pope, 5 Ga. App. 689, 63 S. E. 809. Ill.—Lemon v. Stevenson, 36 Ill. 49. La.—Breux Bridge Lumb. Co. v. Herbert, 121 La. 188, 46 So. 206. Pa.

The rule is operative only when two meanings present themselves, and does not apply, if, on a fair and reasonable interpretation of the words used, no ambiguity appears.⁶³ The mere omission of a necessary averment is not sufficient to put it in effect,⁶⁴ nor does it apply where the pleader admits that his pleading is bad and seeks to amend.⁶⁵

Under it, every intendment is taken against the pleader,⁶⁶ and nothing will be assumed in his favor.⁶⁷

Omitted facts will be taken as having no existence.⁶⁸

If the pleading is reasonably susceptible of two constructions, the one most unfavorable to the pleader will be adopted.⁶⁹ Thus, if a pleading may be given a construction which will render it good or one which will render it bad, the latter construction will prevail,⁷⁰ though the contrary has been held as to an expression capable of different meanings.⁷¹ If the pleader both admits and denies the execution of a contract,⁷² or the existence of an indebtedness,⁷³ which is the basis

Reynolds v. Craft, 38 Pa. Super. 46. **Vt.** *Crosby v. Bouchard*, 82 Vt. 66, 71 Atl. 835.

63. 1 Chit. Pl. 237; *Town of Camerón v. Hicks*, 65 W. Va. 484, 64 S. E. 832.

To justify its application the pleading must be equivocal on its face. *Zavelo v. Reeves & Co. (Ala.)*, 54 So. 654.

"It is true, as a general statement, that ambiguous statements are construed adversely to the pleader, 'but a defendant is not entitled to press the principle so far as to draw any inference of fact he pleases which may happen to be not inconsistent with the averments of the bill.' 1 Daniel Ch. Pl. & Prac. p. 546." *Lillard v. Mitchell (Tenn.)*, 37 S. W. 702.

64. Though such omission would render the pleading bad on demurrer. *Zavelo v. Reeves & Co. (Ala.)*, 54 So. 654.

65. *Nevada County & Sacramento Canal Co. v. Kidd*, 28 Cal. 673; *Atlanta & W. P. R. Co. v. Georgia R. & E. Co.*, 125 Ga. 798, 54 S. E. 753.

66. *Gordon v. City Nat. Bank*, 140 Ky. 47, 130 S. W. 818; *Fuller v. Illinois Cent. R. Co.*, 138 Ky. 42, 127 S. W. 501; *Watson v. City of Morehead (Ky.)*, 125 S. W. 724.

Doubts as to the meaning of portions of a pleading cannot be resolved in favor of the pleader. *Neill v. Harris*, 133 Ga. 493, 66 S. E. 246.

67. *Crosby v. Bouchard*, 82 Vt. 66, 71 Atl. 835.

68. *Wagner v. Koch*, 45 Ill. App. 501.

69. 1 Chit. Pl. 237, and the following cases: **U. S.**—*United States v. Linn*, 1 How. 104, 11 L. ed. 64. **Ala.**—*Alabama Great Southern R. Co. v. Cardwell*, 55 So. 185; *Western Assur. Co. v. McGlattery*, 115 Ala. 213, 22 So. 104, 67 Am. St. Rep. 26. **Fla.**—*Capital City Bank v. Hilson*, 59 Fla. 215, 51 So. 853; *Bennett v. Herring*, 1 Fla. 434. **Ill.**—*Boynton v. Renwick*, 46 Ill. 280; *Halligan v. Chicago & R. I. R. Co.*, 15 Ill. 558. **N. J.**—*Schuler v. Southern Iron & Steele Co.*, 77 N. J. Eq. 60, 75 Atl. 552; *Stephens & Condit Transp. Co. v. Central R. Co. of N. J.*, 33 N. J. L. 229.

The facts with reference to the matter pleaded as a defense will be taken to be as adverse to defendant as a fair construction of the language used in the plea will admit. *Engle v. Tennis Coal Co.*, 125 Ky. 239, 101 S. W. 309.

70. *Puckett v. Puckett (Ala.)*, 56 So. 585.

71. **Conn.**—*Case v. Humphrey*, 6 Conn. 130. **Miss.**—*Pender v. Dicken*, 27 Miss. 252. **Va.**—*Virginia & N. C. Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

72. *City of Moultrie v. Schofield's Sons Co.*, 6 Ga. App. 464, 65 S. E. 315.

73. *Williams Mfg. Co. v. Warner Refining Co.*, 125 Ga. 408, 54 S. E. 95; *Beddingfield v. Bates Advertising Co.*, 2 Ga. App. 107, 58 S. E. 320.

of the adverse party's claim against him, the admission, rather than the denial, will prevail.

On the other hand, where the pleading is ambiguous and the facts alleged are such as would be proper or adequate under either of two forms of action, it will be so construed as to uphold the fullest possible recovery under the facts alleged, in view of the presumption that the pleader intended to serve his best interest.⁷⁴ For the same reason, if to construe the pleading as setting up one form of action will make it such that it may be upheld, when otherwise it could not be, or will authorize a recovery when otherwise none could be had, that construction will be adopted.⁷⁵

B. UNDER THE CODES. — The codes of many states provide that, for the purpose of determining their effect, pleadings are to be liberally construed with a view to doing substantial justice between the parties.⁷⁶ There is considerable conflict of authority as to the effect of

74. *Southern Exp. Co. v. Pope*, 5 Ga. App. 689, 63 S. E. 809.

A petition was construed as stating a cause of action *ex delicto*, where plaintiff could not otherwise have recovered punitive damages. *Payton v. Gulf Line R. Co.*, 4 Ga. App. 762, 62 S. E. 469.

75. An action against a carrier for loss of property shipped was treated as one *ex contractu*, where plaintiff could not have recovered *ex delicto*. *Southern Exp. Co. v. Pope*, 5 Ga. App. 689, 63 S. E. 809.

A similar action was construed as an action *ex delicto* where necessary to sustain it. *Lytle v. Southern R. Co.*, 3 Ga. App. 219, 59 S. E. 595.

76. *U. S.*—*United States v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. ed. 601 (construing this provision of the Nevada code); *Burley v. German-American Bank*, 111 U. S. 216, 4 Sup. Ct. 341, 28 L. ed. 406; *Gillette v. Bulard*, 20 Wall. 571, 22 L. ed. 387; *Travelers' Ins. Co. v. Great Lakes Engineering Wks.*, 184 Fed. 426, 107 C. C. A. 20. *Ariz.*—*Gill v. Manhattan Life Ins. Co.*, 11 Ariz. 232, 95 Pac. 89. *Ark.*—*Kirby's Dig.*, §6130; *Bushy v. Reynolds*, 31 Ark. 657. *Cal.*—Code Civ. Proc., §452; *Estate of Wickersham*, 153 Cal. 603, 96 Pac. 311. *Idaho.*—Rev. Codes, §4207; *Nobach v. Scott*, 119 Pac. 295; *Stuart v. Noble Ditch Co.*, 9 Idaho 765, 76 Pac. 255. *Ind.*—*Burns' Ann. St.* 1908, §385; *Town of Newcastle v. Grubbs*, 171 Ind. 482, 86 N. E. 757; *Republic Iron & Steel Co. v. Lulu (Ind. App.)*, 92 N. E. 993; *Wabash R. Co. v. Beedle (Ind. App.)*, 88 N. E.

535, 87 N. E. 690. *Kan.*—Gen. St. 1909, §5710; *Atchison, T. & S. F. R. Co. v. Mason*, 4 Kan. App. 391, 46 Pac. 31. *Minn.*—Rev. Laws, 1905, §4143; *Martin v. Great Northern R. Co.*, 110 Minn. 118, 124 N. W. 825; *Branton v. McLaughlin*, 109 Minn. 244, 123 N. W. 808. *Mo.*—Rev. St. 1899, §629, Ann. St., p. 652; *Thompson v. Keyes-Marshall Bros. Livery Co.*, 214 Mo. 487, 113 S. W. 1128; *Missouri Pac. R. Co. v. Continental Nat. Bank*, 212 Mo. 505, 111 S. W. 574. *Mont.*—Rev. Codes, §6566; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; *Silver Bow County v. Davies*, 40 Mont. 418, 107 Pac. 81; *Pengelly v. Peeler*, 39 Mont. 26, 101 Pac. 147. *Neb.*—Code, §121; *O'Grady v. Chicago, B. & Q. R. Co.*, 133 N. W. 426; *Tacoma Mill Co. v. Gilcrest Lumber Co.*, 132 N. W. 926. *Nev.*—*Ferguson v. Virginia & T. R. Co.*, 13 Nev. 184; *State v. Central Pac. R. Co.*, 7 Nev. 99. *N. Y.*—Code Civ. Proc., §519; *Parks v. Knickerbocker Trust Co.*, 122 N. Y. Supp. 521; *Bernard v. Fromme*, 116 N. Y. Supp. 807; *Candee v. Baker*, 116 N. Y. Supp. 55; *Leiman v. Rosenzweig*, 103 N. Y. Supp. 83. *N. C.*—Revisal, §495; *Ludwick v. Penny*, 73 S. E. 228; *Wyatt v. Seaboard Air Line Ry.*, 72 S. E. 383; *New Bern Banking & Trust Co. v. Duffy*, 72 S. E. 96; *Brewer v. Wynne*, 154 N. C. 467, 70 S. E. 947; *J. I. Case Threshing Mach. Co. v. Feezer*, 152 N. C. 516, 67 S. E. 1004; *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 834; *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874. *N. D.*—Rev. Codes 1905, §6869; *Weber v. Lewis*, 126 N. W. 105.

this provision, due largely, perhaps, to the different methods of reaching defects in pleadings prevailing in the different states. Many courts hold that the common law rule requiring a construction against the pleader is thereby abolished,⁷⁷ and that, on a demurrer for want of facts, the pleading should be liberally construed in favor of the pleader,⁷⁸ and should be given a construction that will sustain it, if

Ohio.—Rev. St. 1908, §5096; *Sterling Wrench Co. v. Amstutz*, 50 Ohio St. 484, 34 N. E. 794; *Everett v. Waymore*, 30 Ohio St. 308. **Okla.**—Comp. Laws 1909, §5655; *Emmerson v. Botkin*, 2d Okla. 218, 109 Pac. 531; *Smith-Wogan Hardware & Implement Co. v. Moon Buggy Co.*, 26 Okla. 161, 108 Pac. 1103. **Ore.**—Lord's Ore. Laws, §85. **S. D.**—Rev. Code Civ. Proc., §136; *Westphal v. Nelson*, 25 S. D. 100, 125 N. W. 640; *Schriner v. Dickinson*, 20 S. D. 433, 107 N. W. 536. **Utah.**—Rev. St. 1898, §2986; *Chesney v. Chesney*, 33 Utah 503, 94 Pac. 989. **Wash.** *Pierce's Code*, §401, Ball. Ann. Codes & Ct., §4931; *O'Brien v. Seattle Ice Co.*, 43 Wash. 217, 86 Pac. 399; *Malloy v. Benway*, 34 Wash. 315, 75 Pac. 869; *Grout v. Tacoma Eastern R. Co.*, 33 Wash. 524, 74 Pac. 665; *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976. **Wis.** *Stats.* 1898, §2668; *Daniels v. Town of Milwaukee*, 146 Wis. 150, 131 N. W. 339; *State v. Milwaukee*, 145 Wis. 131, 129 N. W. 1101; *Loehr v. Dickson*, 141 Wis. 332, 124 N. W. 293; *Jones v. Monson*, 137 Wis. 478, 119 N. W. 179; *Milwaukee Trust Co. v. Van Valkenburgh*, 132 Wis. 638, 112 N. W. 1083. **Wyo.**—Comp. St. 1910, §4416; *David v. Whitehead*, 13 Wyo. 189, 79 Pac. 19; *Summers v. Mutual Life Ins. Co.*, 12 Wyo. 369, 75 Pac. 937; *Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

77. **U. S.**—*Travelers' Ins. Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426, 107 C. C. A. 20. **Mont.** *Conrad Nat. Bank v. Great Northern R. Co.*, 24 Mont. 178, 61 Pac. 1; *Daniels v. Andes Ins. Co.*, 2 Mont. 78. **N. Y.** *Clark v. West*, 193 N. Y. 349, 86 N. E. 1; *Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451, 51 N. E. 301; *Davenport v. Walker*, 116 N. Y. Supp. 411; *Ampersand Hotel Co. v. Home Ins. Co.*, 115 N. Y. Supp. 480. **Ohio.**—*Robinson v. Greenville*, 42 Ohio St. 625; *Crooks v. Finney*, 39 Ohio St. 57. **Wyo.** *Summers v. Mutual Life Ins. Co.*, 12 Wyo. 369, 75 Pac. 937; *Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

son, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

78. **Minn.**—*Vukelis v. Virginia Lumb. Co.*, 107 Minn. 68, 119 N. W. 509; *Branton v. McLaughlin*, 109 Minn. 244, 123 N. W. 808; *Hoag v. Mendenhall*, 19 Minn. 335. **Wia.**—*Town of Stinnett v. Noggle*, 135 N. W. 167; *Town of Stinnett v. Noggle*, 135 N. W. 167; *Daniels v. Town of Milwaukee*, 146 Wis. 150, 131 N. W. 339. **Wyo.**—*Summers v. Mutual Life Ins. Co.*, 12 Wyo. 369, 75 Pac. 937; *Crane v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

Pleadings are entitled to a broad and liberal construction, and if by any fair and reasonable construction a cause of action can be spelled out of the allegations, however inartificially they may be stated, the pleading will be held sufficient. *Chamber of Commerce v. Wells*, 96 Minn. 492, 105 N. W. 1124; *Warren Bros. Co. v. King*, 96 Minn. 190, 104 N. W. 816.

All presumptions are with the pleading, and it is to be construed as favorably as reasonably may be. *Martin v. Great Northern R. Co.*, 110 Minn. 118, 124 N. W. 825.

Every possible construction most favorable to the pleadings must be adopted. *Allen v. Eneroth*, 111 Minn. 395, 127 N. W. 426.

Averments which sufficiently point out the nature of the plaintiff's claim are sufficient if under them he would be entitled to give the necessary evidence to establish his claim. *Clarke v. West*, 193 N. Y. 349, 86 N. E. 1; *Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451, 51 N. E. 301; *Rochester R. Co. v. Robinson*, 133 N. Y. 242, 30 N. E. 1008; *Ampersand Hotel Co. v. Home Ins. Co.*, 115 N. Y. Supp. 480.

A demurrer to the complaint should be overruled if, by a liberal interpretation of its averments, a cause of action can be gleaned therefrom. *Darlington v. Gates Land Co.*, 142 Wis. 198, 125 N. W. 456.

Pleadings will be construed as liberally in favor of the pleader as for-

possible.⁷⁹ It is further held that every fair and reasonable inference and intendment will be indulged to support the pleadings,⁸⁰ and that

merly they would have been after a verdict in his favor. *United States v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. ed. 601; *Ferguson v. Virginia & T. R. Co.*, 13 Nev. 184.

In *Estate of Wickersham*, 153 Cal. 603, 96 Pac. 311, it is held that, though it is often said that a pleading is to be construed most strongly against the pleader, the true rule, and the one binding on the courts, is that contained in Code Civ. Proc., §452, that in the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties. See also *Manning v. App. Consol. Gold Mining Co.*, 149 Cal. 35, 84 Pac. 657; *Moore v. Moore*, 56 Cal. 89.

See also the cases cited in the two preceding notes.

79. *Ariz.*—*Phillips v. Smith*, 11 *Ariz.* 309, 95 Pac. 91. *Nev.*—*Ferguson v. Virginia & T. R. Co.*, 13 Nev. 184. *Ohio.* *Railway Co. v. Iron Co.*, 46 *Ohio St.* 44, 18 N. E. 486.

The permissible construction which will support the pleading should be adopted rather than one which will defeat it. *Travelers' Ins. Co. v. Hal-lauer*, 131 *Wis.* 371, 111 N. W. 527; *Hart v. City of Neillsville*, 125 *Wis.* 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952; *Emerson v. Nash*, 124 *Wis.* 569, 102 N. W. 921.

The test to be applied is, will it reasonably permit of a construction sustaining it. *Emerson v. Nash*, 124 *Wis.* 369, 102 N. W. 921; *Miller v. Bayer*, 94 *Wis.* 123, 68 N. W. 869.

80. *U. S.*—*Ware-Kramer Tobacco Co. v. American Tobacco Co.*, 180 *Fed.* 160. *Ark.*—*Dickerson v. Hamby & Haynie*, 131 *S. W.* 674; *Cox v. Smith*, 93 *Ark.* 371, 125 *S. W.* 437; *Cazort & McGhee Co. v. Dunbar*, 91 *Ark.* 400, 121 *S. W.* 270. *Ariz.*—*Phillips v. Smith*, 11 *Ariz.* 309, 95 Pac. 91. *Colo.*—*Downey v. Colorado Fuel & Iron Co.*, 48 *Colo.* 27, 108 Pac. 972. *Minn.*—*Disbrow v. Creamery Package Mfg. Co.*, 110 *Minn.* 237, 125 N. W. 115; *Branton v. McLaughlin*, 109 *Minn.* 244, 123 N. W. 808. *Neb.*—*O'Grady v. Chicago, B. & Q. R. Co.*, 133 N. W. 426; *Dailey v. Burlington & M. R. Co.*, 58 *Neb.* 396, 78

N. W. 722; *Roberts v. Samson*, 50 *Neb.* 745, 70 N. W. 384. *N. Y.*—*Clark v. West*, 193 N. Y. 349, 86 N. E. 1; *Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451, 51 N. E. 301. *N. C.*—*Brewer v. Wynne*, 154 N. C. 467, 70 S. E. 947. *Tex.*—Rule 17 of the rules adopted by the supreme court for the district and county courts (94 *Tex.* 670, 67 S. W. xxi); *Wiggins v. Bisso*, 92 *Tex.* 219, 47 S. W. 637; *Gulf, W. T. & P. R. Co. v. Montier*, 61 *Tex.* 122; *Whetstone v. Coffey*, 48 *Tex.* 269; *Union Stockyards Co. v. Hovencamp* (*Tex. Civ. App.*), 144 S. W. 704; *State v. Racine Sattley Co.* (*Tex. Civ. App.*), 134 S. W. 400; *Missouri, K. & T. R. Co. v. Gilbert* (*Tex. Civ. App.*), 130 S. W. 1037; *Trezavant & Cochran v. R. H. Powell & Co.* (*Tex. Civ. App.*), 130 S. W. 234; *Gorham v. Dallas, C. & S. W. R. Co.* (*Tex. Civ. App.*), 95 S. W. 551. *Wash.*—*Allen v. Baxter*, 42 *Wash.* 434, 85 Pac. 26; *Malloy v. Benway*, 34 *Wash.* 315, 75 Pac. 869; *Grout v. Tacoma Eastern R. Co.*, 33 *Wash.* 524, 74 Pac. 665; *Harris v. Halverson*, 23 *Wash.* 779, 63 Pac. 549. *W. Va.*—*Robbins v. Baltimore & O. R. Co.*, 59 S. E. 512. *Wis.*—*Hall v. Bell*, 143 *Wis.* 296, 127 N. W. 967; *Milwaukee Trust Co. v. Van Valkenburgh*, 132 *Wis.* 638, 112 N. W. 1083; *Emerson v. Nash*, 124 *Wis.* 369, 102 N. W. 921. *Wyo.*—*Cone v. Ivinston*, 4 *Wyo.* 203, 33 Pac. 31, 35 Pac. 933.

A demurrer to the petition will be overruled if by evidence legally admissible the allegations of the petition plaintiff could show a right of recovery. *Mack v. Houston, E. & W. T. R. Co.* (*Tex. Civ. App.*), 134 S. W. 846.

The pleading will be held to state all facts that can be implied or inferred from its allegations by reasonable and fair intendment. *Vukelis v. Virginia Lumb. Co.*, 107 *Minn.* 68, 119 N. W. 509; *Wallace v. Jones*, 182 N. Y. 37, 74 N. E. 576; *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513; *Kain v. Larkin*, 141 N. Y. 144, 36 N. E. 9; *Marie v. Garrison*, 83 N. Y. 14; *Czerney v. Haas*, 129 N. Y. Supp. 537; *Chicago Crayon Co. v. Slattey*, 123 N. Y. Supp. 987; *Lesser v. Bradford Realty Co.*, 101 N. Y. Supp. 571.

"For the purpose of testing a com-

defects of form therein will be disregarded,⁸¹ and the pleading

plaint upon a challenge for insufficiency, every fact necessary to entitle plaintiff to some judicial relief within the competency of the court to grant, which can reasonably be inferred from the language used, giving thereto, as a whole, the broadest meaning in favor of the pleading it will reasonably bear, must be considered as stated just as effectively as matters expressly and plainly alleged. In short, every reasonable intendment must be indulged in favor of the pleading." *Schmidt v. Joint School Dist. No. 4*, 146 Wis. 635, 132 N. W. 583.

The pleader will be given the benefit of all reasonable inferences to be deduced from the specific facts stated. *Bell v. Central Nat. Bank*, 28 App. Cas. (D. C.) 580.

It is sufficient if a necessary fact is alleged by reasonable inference. *Weber v. Lewis* (N. D.), 126 N. W. 105; *St. Croix Consol. Copper Co. v. Musser-Sauntry Land, Logging & Mfg. Co.*, 145 Wis. 267, 130 N. W. 102.

Where an omitted fact can be inferred from the whole complaint, a demurrer should not be sustained because of its omission. *White Bros. & Crum Co. v. Watson*, 64 Wash. 666, 117 Pac. 497.

81. *Ariz.*—*Phillips v. Smith*, 11 Ariz. 309, 95 Pac. 91. *Minn.*—*Vukelis v. Virginia Lumb. Co.*, 107 Minn. 68, 119 N. W. 509. *Mont.*—*Conrad Nat. Bank v. Great Northern R. Co.*, 24 Mont. 178, 61 Pac. 1. *Neb.*—*Roberts v. Samson*, 50 Neb. 745, 70 N. W. 384. *N. Y.*—*Marie v. Garrison*, 83 N. Y. 14; *Zabriske v. Smith*, 13 N. Y. 322. *N. D.*—*Weber v. Lewis*, 126 N. W. 105. *Ohio.*—*Everett v. Waymire*, 30 Ohio St. 308. *Wash.*—*Harris v. Halverson*, 23 Wash. 779, 63 Pac. 549. *Wis.*—*Milwaukee Trust Co. v. Van Valkenburgh*, 132 Wis. 638, 112 N. W. 1083; *Modern Steel Structural Co. v. English Const. Co.*, 129 Wis. 31, 108 N. W. 70. *Wyo.*—*Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

The statute "does not mean that a pleading shall be construed to state what it does not, but that if it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken

against him as to deprive him of it." *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 84, quoted with approval in *Brewer v. Wynne*, 154 N. C. 467, 70 S. E. 947. See also *New Bern Banking & Trust Co. v. Duffy* (N. C.), 72 S. E. 96.

A general demurrer is properly overruled when the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing only by necessary implication. *Amestoy v. Electric R. T. Co.*, 95 Cal. 311, 30 Pac. 550; *Bank of Anderson v. Home Ins. Co.*, 14 Cal. App. 208, 111 Pac. 507.

Motion.—If the averments are incomplete, ambiguous, or defective, the proper mode to obtain correction is by motion to make them more definite and certain. *Dickerson v. Hamby & Haynie* (Ark.), 131 S. W. 674; *Roberts v. St. Louis, I. M. & S. Ry. Co.* (Ark.), 130 S. W. 531; *Cazort & McGhee Co. v. Dunbar*, 91 Ark. 400, 121 S. W. 270.

Awkwardness or inartificiality of expression (*Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894; *Sterling Wrench Co. v. Amstutz*, 50 Ohio St. 484, 34 N. E. 794), indefiniteness (*Railway Co. v. Iron Co.*, 46 Ohio St. 44, 18 N. E. 486; *Golley & Finley Iron Works v. Callan*, 9 Ohio C. C. 217), that the allegations are too general (*Casey v. American Bridge Co.*, 95 Minn. 11, 103 N. W. 623), and that matters are pleaded by way of conclusion (*Chamber of Commerce v. Wells*, 96 Minn. 492, 105 N. W. 1124), are not available on general demurrer.

The pleading will be held good though it might be subject to a motion to make more specific or to a special demurrer. *Downey v. Colorado Fuel & Iron Co.*, 48 Colo. 27, 108 Pac. 972.

In *West Virginia* the statute provides that on a demurrer the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has heretofore been deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judgment according to law and the very right of the cause cannot be given. Code 1899, c. 125, §25; Code 1906, §3849; *Union Stopper Co. v. Mc-*

upheld unless wholly insufficient in matter of substance.⁸³

The rule of liberal construction cannot, however, operate to supply an essential averment which has been wholly omitted.⁸³ So, too, no construction can be permitted which will be, in effect, a perversion of the language used.⁸⁴

Other courts hold that such statutory provisions extend to matter of form only,⁸⁵ and that, while on a demurrer for want of facts the pleading must be liberally construed,⁸⁶ ambiguous and doubtful

Gara, 66 W. Va. 403, 66 S. E. 698; Kern v. Zeigler, 13 W. Va. 707.

82. The demurrer will not be sustained unless the pleading is so fatally defective that, taking all the facts to be admitted, the court can say they constitute no cause of action whatever. *Roberts v. Samson*, 50 Neb. 745, 70 N. W. 384.

If to any extent or on any reasonable theory the pleading presents facts sufficient to justify a recovery, the demurrer will be overruled. *Casey v. American Bridge Co.*, 95 Minn. 11, 103 N. W. 623; *Paterson v. Chicago, M. & St. P. R. Co.*, 95 Minn. 57, 103 N. W. 621.

The test is can the pleading be cured by amendment. *Cazort & McGhee Co. v. Dunbar*, 91 Ark. 400, 121 S. W. 270.

83. *Ariz.*—*Gill v. Manhattan Life Ins. Co.*, 11 Ariz. 232, 95 Pac. 89. *N. Y.* *Bowsky v. Schlichten*, 132 N. Y. Supp. 421. *Okla.*—*Emmerson v. Botkin*, 26 Okla. 218, 109 Pac. 531. *Utah.*—*Chesney v. Chesney*, 33 Utah 503, 94 Pac. 989.

Substance is still as essential as under the common law, and omitted facts will be taken against the pleader. *Conrad Nat. Bank v. Great Northern R. Co.*, 24 Mont. 178, 61 Pac. 1.

Where it was not alleged in the complaint that there was a specific date of payment of the bill of exchange which was the basis of the action, it was held that it must be assumed that it was payable on demand. *Riddle v. Bank of Montreal*, 130 N. Y. Supp. 15.

Even under the code "nothing will be assumed in favor of the pleader which has not been averred, or may not, upon a liberal and fair interpretation, be implied from his averments." *Witham v. Blood*, 124 Iowa 695, 100 N. W. 558.

84. *Crooks v. Finney*, 39 Ohio St. 57. See also *Ringo v. New Farmers'*

Bank's Trustee, 101 Ky. 91, 39 S. W. 701.

85. *State v. Casteel*, 110 Ind. 174, 11 N. E. 219; *Hays v. Hays*, 40 Ind. App. 491, 82 N. E. 90.

It does not affect the fundamental requirements of good pleading. *Sidway v. Missouri Land & Livestock Co.*, 163 Mo. 342, 63 S. W. 705; *Young v. Schofield*, 132 Mo. 650, 34 S. W. 497; *Ruebsam v. St. Louis Transit Co.*, 108 Mo. App. 437, 83 S. W. 984.

Kan.—*Upham v. Head*, 74 Kan. 17, 85 Pac. 1017; *City of La Harpe v. Greer*, 74 Kan. 74, 85 Pac. 1015.

86. *Ind.*—*State v. Casteel*, 110 Ind. 174, 11 N. E. 219; *Pittsburg, C. C. & St. L. R. Co. v. Rogers* (Ind. App.), 87 N. E. 28; *Hays v. Hays*, 40 Ind. App. 491, 82 N. E. 90. *Tex.*—*Missouri, K. & T. R. Co. v. Gilbert* (Tex. Civ. App.), 130 S. W. 1037.

The common law rule that pleadings will be construed most strongly against the pleader has been so far modified by the code as to require such liberal construction as may be necessary to the administration of substantial justice. *Cincinnati, L. St. L. & C. R. Co. v. Smock*, 133 Ind. 411, 33 N. E. 103; *Dickensheets v. Kaufman*, 28 Ind. 251.

The court is not required to construe them most strongly against the pleader, but in order to promote substantial justice between the parties a liberal construction will be given. *Smith v. Borden*, 160 Ind. 223, 66 N. E. 681.

Where a pleading is neither indefinite nor ambiguous, the court is not required to construe it most strongly against the pleader, when a liberal construction will promote substantial justice between the parties. *Heritage v. State*, 43 Ind. App. 595, 88 N. E. 114.

Every equivocal word or phrase need not be construed most strongly in favor of the pleader, but his meaning must be fairly ascertained from the whole

allegations⁸⁷ and inconsistent allegations⁸⁸ will be taken most strongly against the pleader.

Many courts hold that, notwithstanding the code provisions requiring a liberal construction, the presumption that the pleading is as favorable to the pleader as the facts will warrant still obtains,⁸⁹ and hence that inferences will not be indulged to supply essential

pleading, without regard to technical rules. *Robinson v. Greenville*, 42 Ohio St. 625.

Fairly and reasonably, not strictly, construed. *Travelers' Ins. Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426, 107 C. C. A. 20.

87. *Ind.*—*Chicago & I. C. R. Co. v. McDaniel*, 134 Ind. 171, 32 N. E. 728, 33 N. E. 769; *State v. Casteel*, 110 Ind. 174, 11 N. E. 219; *Pond v. Sweetser*, 85 Ind. 144; *Chicago & E. R. Co. v. Chaney* (Ind. App.), 97 N. E. 181; *Holliday & Wyon Co. v. O'Donnell*, 44 Ind. App. 647, 90 N. E. 24; *Hasselman v. Japanese Development Co.*, 2 Ind. App. 130, 27 N. E. 318, 28 N. E. 207; *Hays v. Hays*, 40 Ind. App. 471, 82 N. E. 90. *Ia.* *Stephens v. City Council*, 132 Iowa 490, 107 N. W. 614; *J. Thompson & Sons Mfg. Co. v. Perkins & Son*, 97 Iowa 607, 66 N. W. 874. *Kan.*—*Grant v. Isett*, 81 Kan. 246, 105 Pac. 1021; *Beadle v. Kansas City, Ft. S. & M. R. Co.*, 48 Kan. 379, 29 Pac. 696; *Draper v. Cowles*, 27 Kan. 484. *Mo.*—*Loehr v. Murphy*, 45 Mo. App. 519. *Ore.* *Haines v. City of Forest Grove*, 54 Ore. 443, 103 Pac. 775.

In determining the theory of the complaint. *Cleveland, C., C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917.

The rule is equally applicable to a petition in a divorce case. *Hays v. Hays*, 40 Ind. App. 491, 82 N. E. 90.

The rule is applicable to conflicting or ambiguous allegations, and confines the court to the construction of such words and phrases as are used in the particular pleading under consideration (*Cincinnati, I., St. L. & C. R. Co. v. Smock*, 133 Ind. 411, 33 N. E. 108), and does not extend so far as to require or authorize the court to insert words not used in the pleading (*Cincinnati, I., St. L. & C. R. Co. v. Smock*, 133 Ind. 411, 33 N. E. 108).

In the application of the rule the language used must be given a reasonable and fair construction, and if by placing such a construction on the

pleading, it will withstand a demurrer, a demurrer to it should be overruled. "We do not think, that because a word may have two meanings, or that a construction may be placed upon, or interpretation given to, language used which would render a pleading defective, such meaning or interpretation should be placed upon it, unless the meaning or interpretation is such as it is fair to infer the pleader intended. If, on the contrary, a more common and natural meaning can be placed upon the word used, or a more natural and reasonable interpretation can be given to the language of the pleader which will uphold the pleading, it should be done. A strained construction can not be placed upon a pleading, as against the pleader, to invalidate his pleading, if a fair and reasonable construction will sustain it, and especially is this true in this court in relation to a pleading construed and held good by the trial court." *Chicago & I. C. R. Co. v. McDaniel*, 134 Ind. 171, 32 N. E. 728, 33 N. E. 769.

88. *Mechanics' Savings & Bldg. Loan Assn. v. O'Conner*, 29 Ohio St. 651.

Where a pleading both admits and denies the same thing. *Losch v. Pickett*, 36 Kan. 216, 12 Pac. 822.

89. *Cal.*—*Rogers v. Shannon*, 52 Cal. 99; *Green v. Covillaud*, 10 Cal. 317; *Schaadt v. Mut. Life Ins. Co.*, 2 Cal. App. 715, 84 Pac. 249. *Ind.*—*W. B. Conkey Co. v. Larson*, 173 Ind. 585, 91 N. E. 163; *Wabash R. Co. v. Beedle*, 173 Ind. 437, 90 N. E. 760; *Pein v. Miznerr*, 170 Ind. 659, 84 N. E. 981; *Wabash R. Co. v. Engleman*, 160 Ind. 329, 66 N. E. 892; *Cleveland, C., C. & St. L. Co. v. Stevens* (Ind. App.), 96 N. E. 493; *Lake Shore & M. S. R. Co. v. Chicago, L. S. & S. B. R. Co.* (Ind. App.), 92 N. E. 989. *Ore.*—*Morton v. Wessinger*, 113 Pac. 7.

"Even under a code, while pleadings are to be liberally construed, and the pleader given the benefit of every allegation made or reasonably implied from the language employed, the prin-

facts,⁹⁰ and that no facts will be presumed to exist in his favor that have not been averred or alleged.⁹¹ Under this rule matters as to which the pleading is silent will be assumed not to exist,⁹² or to be 'adverse to the pleader.'⁹³ So, too, it must be assumed that allegations in favor of the adverse party are warranted by the facts.⁹⁴

The code rule requiring a liberal construction has been held not to apply to applications for extraordinary writs,⁹⁵ or where the ambiguous pleading is itself the basis of an attack on an answering pleading.⁹⁶

ciple at the basis of the ancient rule, that the party is presumed to have stated his case as strongly as the facts will justify, still prevails." Witham v. Blood, 124 Iowa 695, 100 N. W. 558.

It is presumed that he will set forth all the facts favorable to his case. Cushman v. Cloverland Coal & Min. Co., 170 Ind. 402, 84 N. E. 759, 16 L. R. A. (N. S.) 1078, 127 Am. St. Rep. 391; Penn American Plate Glass Co. v. Fuller, 46 Ind. App. 645, 90 N. E. 1047; Stahl v. Illinois Steel Co., 45 Ind. App. 211, 90 N. E. 632.

90. Ind.—Cleveland, C., C. & St. L. R. Co. v. Stevens (Ind. App.), 96 N. E. 493; Force Handle Co. v. Hisey (Ind. App.), 94 N. E. 229; Holcomb v. Norman (Ind. App.), 91 N. E. 625. Ore. See Brooks v. Northern Pac. R. Co., 114 Pac. 949.

Where facts may or may not be inferred, the inferences and presumptions are against the pleader. Cleveland, C., C. & St. L. R. Co. v. Stevens (Ind. App.), 96 N. E. 493; Thomas Madden Son & Co. v. Wilcox (Ind. App.), 89 N. E. 955, 88 N. E. 871.

91. Wabash R. Co. v. Beedle, 173 Ind. 437, 90 N. E. 760, reversing 87 N. E. 690; Wabash R. Co. v. Engleman, 160 Ind. 329, 66 N. E. 892.

92. Platt v. City & County of San Francisco, 158 Cal. 74, 110 Pac. 304.

Where a fact necessary to a cause of action or defense is omitted. Hildreth v. Montecito Creek W. Co., 139 Cal. 22, 72 Pac. 395; Callahan v. Longhran, 102 Cal. 476, 26 Pac. 835; Huene v. Cribb, 9 Cal. App. 141, 98 Pac. 78; Bell v. Haun, 9 Cal. App. 41, 97 Pac. 1126.

On the question of laches in an equity case, where no circumstances excusing the apparent delay are alleged, it will be presumed that none exist. Kleinfeld v. Dutard, 147 Cal. 245, 81 Pac. 516.

93. U. S.—Cambers v. First Nat. Bank, 144 Fed. 717. Cal.—United Real Estate & Trust Co. v. Barnes, 159 Cal. 242, 113 Pac. 167. Ind.—Cushman v. Cloverland Coal & Min. Co., 170 Ind. 402, 84 N. E. 759, 127 Am. St. Rep. 391, 16 L. R. A. (N. S.) 1078; Penn-American Plate Glass Co. v. Harshaw, Fuller & Goodwin Co., 46 Ind. App. 645, 90 N. E. 1047; Stahl v. Illinois Steel Co., 45 Ind. App. 211, 90 N. E. 632. Mo.—Loehr v. Murphy, 45 Mo. App. 519. Ore.—Hume v. Rogue River Packing Co., 51 Ore. 237, 92 Pac. 1060, 96 Pac. 865, 83 Pac. 391; Pursel v. Deal, 16 Ore. 295, 18 Pac. 461.

"The rule of pleading, that the statements of a party are to be taken most strongly against himself, is reinforced in injunction suits by the further requirement that the material and essential elements which will entitle him to relief shall be sufficiently certain to negative every reasonable inference arising from the facts so stated, from which it might be deduced that he might not, under other supposable facts connected with the subject, thus be entitled to relief." Harrison v. Crumb, 1 White & W. Civ. Cas. (Tex.), §990. Quoted with approval in Gillis v. Rosenheimer, 64 Tex. 243, and City of Paris v. Sturgeon (Tex. Civ. App.), 110 S. W. 459.

Where a default has occurred. White v. McFarland, 148 Mo. App. 338, 128 S. W. 23.

94. Pein v. Miznerr, 170 Ind. 659, 84 N. E. 981.

95. Injunction.—Bishop v. Huff, 81 Neb. 729, 116 N. W. 665; School Dist. v. De Long, 80 Neb. 667, 114 N. W. 934.

96. People v. Williams, 129 N. Y. Supp. 455, reversing 70 Misc. 135, 128 N. Y. Supp. 190.

On special demurrer it is often held that the pleadings will be construed most strongly against the pleader.⁹⁷

The federal courts in common law actions follow the rule as to the construction of pleadings prevailing in the state where they are sitting.⁹⁸

C. AFTER ISSUE JOINED OR TRIAL ON THE MERITS. — In most jurisdictions it is held that a pleading will be liberally construed when first attacked after issue joined,⁹⁹ or at or after the trial,¹ as by a demurrer *ore tenus*,² or objection to the introduction of evidence,³ or demurrer

97. *Aldis v. Schleicher*, 9 Cal. App. 372, 99 Pac. 526; *Cleveland, C., C. & St. L. R. Co. v. Powers*, 173 Ind. 103, 88 N. E. 1073, 89 N. E. 485.

Where the pleading is fairly susceptible of two intendments, that will be adopted which is most unfavorable to the pleading. *Gorham v. Dallas, C. & S. W. R. Co.* (Tex. Civ. App.), 95 S. W. 551.

98. *United States v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. ed. 601; *Gillette v. Bullard*, 20 Wall. (U. S.) 571, 22 L. ed. 387; *Travelers' Ins. Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426, 107 C. C. A. 20.

See also the title "Federal Courts."

99. *Lampman v. Bruning*, 120 Iowa 167, 94 N. W. 562.

While nothing is to be assumed in favor of the pleader unless averred, he is to be accorded the advantage of every reasonable intentment, even to implications necessarily inferred, regardless of technical objections or informalities. *Lampman v. Bruning*, 120 Iowa 167, 94 N. W. 562.

1. "There is a marked difference between an objection made to a pleading previous to the trial, and one made after the trial is in progress." *McKinley v. Laurence County Water Co.*, 139 Mo. App. 297, 123 S. W. 77.

A pleading is to be considered more critically on demurrer than after a trial on the merits. *Hammond v. Michigan Cent. R. Co.*, 162 Mich. 431, 127 N. W. 318.

It should be much more liberally construed than if the objection had been taken by demurrer. *Kelly v. Rogers*, 21 Minn. 146.

An objection at that time is not favored, and will be overruled if the petition is sufficient to support a judgment. *Coleman v. Treece*, 149 Mo. App. 61, 130 S. W. 56.

The pleading will be construed liberally, and will be held to allege what can, by reasonable and fair intentment, be implied from its averments. *Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; *Wyatt v. Seaboard Air Line Ry.* (N. C.), 72 S. E. 383.

Every reasonable intentment will be indulged in its favor. *Newton v. Highland Improvement*, 62 Minn. 436, 61 N. W. 1146. And see *Brown v. Fitcher*, 91 Minn. 41, 97 N. W. 416.

The objection that the pleading is vague and indefinite and contains allegations by way of recitals cannot then be raised. *Orman v. Mannix*, 17 Colo. 564, 30 Pac. 1037.

On a contention that the answer did not justify the submission of a particular issue to the jury. *Case Thresh. Mach. Co. v. Feezer*, 152 N. C. 516, 37 S. E. 1004.

In determining whether an instruction was within the issues. *O'Brien v. Seattle Ice Co.*, 43 Wash. 217, 86 Pac. 399.

So in *Considering a Pleading for the Purpose of Rendering Judgment*. *Watson v. Harris* (Tex. Civ. App.), 130 S. W. 237; *Pabst Brewing Co. v. City of Milwaukee* (Wis.) 133 N. W. 1112.

2. *First Nat. Bank v. Pennington*, 57 Neb. 404.

It should be construed liberally, and in the light of the entire record. *Punteney Mitchell Mfg. Co. v. T. G. Northwall Co.*, 66 Neb. 5, 91 N. W. 863. And see *National Fire Ins. Co. v. Eastern Bldg. & Loan Assn.*, 63 Neb. 698, 88 N. W. 863, when it was further said that it should be given such construction as the parties themselves have seen fit to place upon it, though standing alone it might not admit of such construction.

3. See *infra*, this section.

to the evidence,⁴ or motion for nonsuit,⁵ or for a directed verdict,⁶ or motion for judgment on the pleadings,⁷ or motion to dismiss the complaint.⁸

The rule of liberal construction will not be extended so as to enable a party to raise issues for the first time by the evidence,⁹ or to recover upon an issue other than the one made in the pleadings,¹⁰ nor to supply matters wholly omitted,¹¹ nor will it be applied where the allegations of a pleading are inconsistent.¹²

4. *Coeur D'Alene Lumb. Co. v. Goodwin*, 181 Fed. 949, 104 C. C. A. 413; *Hennis v. Bowers*, 79 Kan. 463, 100 Pac. 71.

5. *Wall v. Buffalo Water Works Co.*, 18 N. Y. 119; *Jackson v. Sumpter Valley R. Co.*, 50 Ore. 455, 93 Pac. 356; *West v. Eley*, 39 Ore. 461, 65 Pac. 798.

Will be more liberally construed than on demurrer. *Carey v. Hays*, 41 Wash. 580, 84 Pac. 581.

All intendments will be indulged in its favor. *Keene v. Eldridge*, 47 Ore. 179, 82 Pac. 803.

6. In *Ferrell v. City of Haskell* (Tex. Civ. App.), 134 S. W. 784, it was held that if the court did not adopt the construction most favorable to the pleader, it should have granted his application for leave to amend.

7. *Roebuck v. Wick*, 98 Minn. 130, 107 N. W. 1054; *Hinds, Noble & Eldredge v. Bonner*, 116 N. Y. Supp. 663.

It will be more liberally construed than when tested by demurrer before trial. *Keady v. United Rys. Co.*, 57 Ore. 325, 108 Pac. 197, 100 Pac. 658; *Townsend v. Price*, 19 Wash. 415, 53 Pac. 668.

Most strongly in favor of the pleader. *Weicher v. Cargill*, 82 Minn. 265, 84 N. W. 1007.

Every reasonable intendment is in favor of the sufficiency of the pleading. *Malone v. Minnesota Stone Co.*, 38 Minn. 325, 31 N. W. 170.

The pleading will be reasonably construed, and every reasonable intendment will be indulged in its favor. *Cobb v. Wm. Keneffick Co.*, 23 Okla. 440, 100 Pac. 545.

The objection of indefiniteness is not reached by such a motion. *Stewart v. Erie & W. T. Co.*, 17 Minn. 372; *Webb v. Bidwell*, 15 Minn. 479.

The motion cannot be sustained merely because the facts are averred

imperfectly or informally. *McCarthy v. Heiselman*, 140 App. Div. 240, 125 N. Y. Supp. 13; *Theiling v. Marshall*, 124 N. Y. Supp. 1066.

The rule that a doubtful pleading is to be construed most strongly against the pleader no longer prevails, but it is to be fairly and liberally construed to the end that the court, upon a trial, may get at the merits and do justice to the parties. *Metropolitan Printing Co. v. O'Neil*, 131 N. Y. Supp. 1009.

8. Most favorable to plaintiff. *Bernard v. Fromme*, 116 N. Y. Supp. 807; *Wright v. United Traction Co.*, 115 N. Y. Supp. 630.

Liberally, and in so far as matters of form are concerned, in favor of, and not against, the pleading. *Catterson v. Brooklyn Heights R. Co.*, 116 N. Y. Supp. 760. Such a motion does not reach indefiniteness and uncertainty. *Palmer v. Van Deusen*, 106 N. Y. Supp. 707.

The motion cannot be sustained merely because the facts are imperfectly or informally or argumentatively averred, or because the pleading lacks definiteness and precision. *Kain v. Larkin*, 141 N. Y. 144; *Sanders v. Soutter*, 126 N. Y. 193; *Fredericks v. Kreuder*, 121 N. Y. Supp. 1001.

Must consider such facts as can by reasonable and fair intendment be implied from those alleged. *Ampersand Hotel Co. v. Home Ins. Co.*, 115 N. Y. Supp. 480.

9. *Santa Fe, P. & P. R. Co. v. Hurley*, 4 Ariz. 258, 36 Pac. 216.

10. Ariz.—*Santa Fe, P. & P. R. Co. v. Hurley*, 4 Ariz. 258, 36 Pac. 216. Ark.—*Mason v. Gates*, 90 Ark. 241, 119 S. W. 70. N. C.—*Griffin v. Atlantic C. L. R. Co.*, 134 N. C. 101, 46 S. E. 7.

11. A necessary, substantial fact. *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673.

12. *Oldham's Admx. v. Oldham's Admr.*, 141 Ky. 526, 133 S. W. 232.

Objection to Evidence.—An attack on a pleading by objecting to the introduction of evidence to support it is not favored.¹³ A pleading so attacked will be liberally construed,¹⁴ and all reasonable presump-

Where an answer contained an express admission that a note was paid at maturity, and a direct averment that it was not paid at maturity, it was held that the admission controlled, and that evidence to show that it was not paid was properly excluded. *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346, 81 Pac. 849.

13. **Mo.**—*Haseltine v. Smith*, 154 Mo. 404, 55 S. W. 633. **Okla.**—*Hogan v. Bailey*, 27 Okla. 15, 110 Pac. 890; *First Nat. Bank v. Cochran*, 17 Okla. 538, 87 Pac. 855. **S. D.**—*Stenson v. Elfmann*, 128 N. W. 588; *Anderson Lumb. Co. v. Spears*, 25 S. D. 624, 127 N. W. 643.

14. **U. S.**—*Coeur D'Alene Lumb. Co. v. Goodwin*, 181 Fed. 949, 104 C. C. A. 413. **Ark.**—*Choctaw, O. & G. R. Co. v. Doughty*, 77 Ark. 1, 91 S. W. 768. **Idaho.**—*Stuart v. Noble Ditch Co.*, 9 Idaho 765, 76 Pac. 255. **Kan.**—*Simmonds v. Richards*, 86 Pac. 452; *Burnette v. Elliott*, 72 Kan. 624, 84 Pac. 374; *Mills v. Vickers*, 6 Kan. App. 834, 50 Pac. 976; *Bank v. Marshall*, 5 Kan. App. 252, 47 Pac. 561. **Mo.**—*Tucker v. Missouri & K. Tel. Co.*, 132 Mo. App. 418, 112 S. W. 6. **Neb.**—*Harnett v. Holdrege*, 97 N. W. 443; *Welch v. Adams*, 87 Neb. 681, 127 N. W. 1064; *Fire Assn. v. Ruby*, 60 Neb. 216, 58 Neb. 730, 79 N. W. 723, 82 N. W. 629; *Norfolk Beet Sugar Co. v. Hight*, 56 Neb. 162, 76 N. W. 566. **N. Y.**—*Eppley v. Kennedy*, 198 N. Y. 348, 91 N. E. 797. **Okla.**—*First Nat. Bank v. Cochran*, 17 Okla. 538, 87 Pac. 855. **Ore.**—*Patterson v. Patterson*, 40 Ore. 560, 67 Pac. 664. **Wyo.**—*City of Rawlins v. Jungquist*, 16 Wyo. 403, 94 Pac. 464, 96 Pac. 144.

South Dakota.—In *Bon Homme County v. McSouth*, 19 S. D. 555, 104 N. W. 256, it was held that the rule requiring a liberal construction can only be invoked where the objection has been overruled, the action tried on its merits, and the imperfections of the pleading cured by proper proof, and not where the objection was sustained and a verdict directed for the opposite party on the pleader's election to stand on his pleadings. But in *Stenson v. Elfmann* (S. D.), 128 N. W.

588; *Whitbeck v. Sees*, 10 S. D. 417, 73 N. W. 915, the rule requiring a liberal construction was applied in reversing a judgment based on a verdict directed after the exclusion of any evidence.

The pleading will be very liberally construed, and will be sustained if it can reasonably be done. *Missouri, K. & T. R. Co. v. Murphy*, 75 Kan. 707, 90 Pac. 290.

Will not be scanned critically. *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 938.

Will be more liberally construed than on demurrer. **Mo.**—*Heether v. City of Huntsville*, 121 Mo. App. 495, 97 S. W. 239. **N. D.**—*Walters v. Rock*, 18 N. D. 45, 115 N. W. 511; *Waldner v. Bowden State Bank*, 13 N. D. 604, 102 N. W. 169; *Stutsman County v. Mansfield*, 5 Dak. 78, 37 N. W. 304. **Ore.**—*North v. Union Savings & Loan Assn.*, 117 Pac. 822. **S. D.**—*Stenson v. Elfman*, 128 N. W. 588; *Johnson v. Burnside*, 3 S. D. 230, 52 N. W. 1057. **Wis.**—*Holz v. Hanson*, 105 Wis. 236, 91 N. W. 663; *Teetshorn v. Hull*, 30 Wis. 162.

The sufficiency of the pleading is to be determined under the rules which obtain after verdict and judgment. *State v. Reynolds*, 137 Mo. App. 261, 117 S. W. 653; *State v. Delaney*, 122 Mo. App. 239, 99 S. W. 1; *Robinson v. Metropolitan Life Ins. Co.*, 105 Mo. App. 567, 80 S. W. 9; *Maugh v. Hornbeck*, 98 Mo. App. 389, 72 S. W. 153; *Bade v. Hibberd*, 50 Ore. 501, 93 Pac. 364.

"Such an objection, however, will not be treated as a demurrer to the complaint, nor as a motion to make the complaint more definite and certain, in which defective and indefinite and uncertain allegations can be urged against its sufficiency, but will be treated as an attack on the complaint is treated after verdict; it must be found that there is an absolute failure to state a cause of action, after every reasonable intendment and legitimate inference susceptible of being drawn or deduced from the facts stated in the complaint are drawn and deduced and applied in aid thereof." *Prescott v. Puget Sound B. & D. Co.*, 31 Wash. 177, 71 Pac. 772. Followed

tions and intendments will be indulged in its favor to sustain it.¹⁵

The objection does not reach defects of form,¹⁶ and will be overruled unless the pleading is wholly insufficient.¹⁷

After Verdict and Judgment.— Ordinarily pleadings will be liberally construed in order to support a verdict or judgment based thereon,¹⁸

in *Brooks v. McCabe & Hamilton*, 39 Wash. 62, 80 Pac. 1004.

15. **Minn.**—*Doyle v. City of Duluth*, 74 Minn. 157, 76 N. W. 1029; *Com. Title Ins. & Trust Co. v. Dokko*, 71 Minn. 533, 74 N. W. 891. **Mo.**—*Downs v. Andrews*, 145 Mo. App. 173, 130 S. W. 472; *Smith v. Wabash R. Co.*, 129 Mo. App. 413, 107 S. W. 22; *Nairn v. Missouri, K. & T. R. Co.*, 126 Mo. App. 707, 106 S. W. 102; *State v. Delaney*, 122 Mo. App. 239, 99 S. W. 1. **Ore.** *Brooks v. Northern Pac. R. Co.*, 114 Pac. 949; *Cederson v. Oregon Nav. Co.*, 38 Ore. 343, 62 Pac. 637, 63 Pac. 763. **S. D.**—*Anderson Lumb. Co. v. Spears*, 25 S. D. 624, 127 N. W. 643; *Strait v. City of Eureka*, 17 S. D. 326, 96 N. W. 695.

"If a necessary fact is alleged by fair inference or intendment, the objection will be overruled." *Waldner v. Bowden State Bank*, 13 N. D. 604, 102 N. W. 163.

16. Not a merely defective statement of a good cause of action. *Wilson v. City of St. Joseph*, 139 Mo. App. 557, 123 S. W. 504; *Bade v. Hibberd*, 50 Ore. 501, 93 Pac. 364.

Matters of form and irrelevant and redundant allegations will be disregarded, and the complaint will be sustained if on any view the plaintiff is entitled to relief. *Raymond v. Blacgrass*, 36 Mont. 449, 93 Pac. 648.

The complaint will be sustained notwithstanding informality and indirectness in its averments. *Welch v. Bradley*, 45 Minn. 540, 48 N. W. 440.

Such an objection cannot take the place of a motion to make more definite and certain (*Fritz v. City of Watertown*, 21 S. D. 280, 111 N. W. 630), and does not reach superfluous or repugnant allegations (*Ryan v. Riddle*, 109 Mo. App. 115, 82 S. W. 1117), or the objection that an allegation is indefinite and largely a conclusion of law (*Western Real Estate Trustees v. Hughes*, 172 Fed. 206, 96 C. C. A. 658, and cases cited).

17. **Mo.**—*Walker v. City of St. Joseph*, 139 Mo. App. 557, 123 S. W.

504. **N. D.**—*Waldner v. Bowden State Bank*, 13 N. D. 604, 102 N. W. 169.

Wash.—*Brooks v. McCabe & Hamilton*, 39 Wash. 62, 80 Pac. 1004; *Prescott v. Puget Sound B. & D. Co.*, 31 Wash. 177, 71 Pac. 772. **Wyo.**—*City of Rawlins v. Jungquist*, 16 Wyo. 403, 94 Pac. 464, 96 Pac. 144.

Will determine only whether the petition states a cause of action. *Haffner v. Dobrinski*, 17 Okla. 438, 88 Pac. 1042; *First Nat. Bank v. Cochran*, 17 Okla. 538, 87 Pac. 855.

It will be overruled if the petition is susceptible of a construction that will constitute a cause of action. *Lee v. Missouri Pac. R. Co.*, 195 Mo. 400, 92 S. W. 614.

Such objection should be entertained only when the pleading cannot be made good by amendment. *Anderson Lumb. Co. v. Spears*, 25 S. D. 624, 127 N. W. 643; *Strait v. City of Eureka*, 17 S. D. 326, 96 S. W. 695.

The objection will be overruled if the declaration is sufficient to sustain a judgment. *Kean v. Mitchell*, 13 Mich. 207.

Should not be sustained unless there is a total want of averment sufficient to sustain a verdict should one be rendered on evidence introduced thereunder. *Hogan v. Bailey*, 27 Okla. 15, 110 Pac. 890; *First Nat. Bank v. Cochran*, 17 Okla. 538, 87 Pac. 855.

Will be sustained only where a motion in arrest of a judgment based thereon would be sustained. *Spalding v. Nesbit*, 104 Mo. App. 447, 79 S. W. 181.

18. In determining whether the judgment is supported by the complaint every reasonable intendment will be indulged. *Santa Fe, P. & P. R. Co. v. Hurley*, 4 Ariz. 258, 36 Pac. 216.

On review of a decree dismissing a suit the answer will be liberally construed, and every reasonable intendment will be indulged in its favor. *Walker v. Harold*, 44 Ore. 205, 74 Pac. 705. See also the title "Verdict."

and since all presumptions are in favor of the court's action, pleadings setting up an adverse right will be taken most strongly against the pleader.¹⁹

The latter rule does not, however, require such a construction to be given as will make the pleading absurd, if it is reasonably susceptible of a different one.²⁰

On collateral attack on a judgment, the pleadings in the original action will be liberally construed for the purpose of supporting such judgment,²¹ and will be understood as it is reasonable to infer that the parties and the judge did understand them, and not as they were bound to understand them.²²

III. THEORY OF PLEADINGS AND CHARACTER AND FORM OF ACTIONS.—A pleading must proceed on a definite theory, on which the pleader must recover if at all.²³ If it is insufficient on that

19. *Duval v. Advance Thresher Co.*, 85 Neb. 181, 122 N. W. 880, 123 N. W. 1022, 83 Neb. 593, 119 N. W. 957; *Broussard v. Mayumi* (Tex. Civ. App.), 144 S. W. 320 (judgment for defendant).

"After judgment on demurrer, the intendment of the law is in favor of the court's action, hence, a failure to allege in the pleading every fact necessary to support a right contrary to the judgment is taken against the pleader." *Wright v. Yates*, 140 Ky. 283, 130 S. W. 1111.

On appeal from a judgment for plaintiff, it was held that the answer would be construed most strongly against the defendant. *Evinger v. Moran*, 14 Cal. App. 328, 112 Pac. 68.

20. *Marshall v. Shafter*, 32 Cal. 176.

21. *Martin v. Martin* (Ala.), 55 So. 632; *Whitlow v. Echols*, 78 Ala. 206; *King v. Kent's Heirs*, 29 Ala. 542.

22. For the purpose of determining whether the necessary jurisdictional facts were shown. *Martin v. Martin* (Ala.), 55 So. 632; *Whitlow v. Echols*, 78 Ala. 206; *King v. Kent's Heirs*, 29 Ala. 542.

23. Cal.—*Buena Vista F. & V. Co. v. Tuohy*, 107 Cal. 243, 40 Pac. 386; *Bartley v. Fraser* (Cal. App.), 117 Pac. 683. Ind.—*State v. Adams' Express Co.*, 172 Ind. 10, 87 N. E. 712; *Oolitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N. E. 246, reversing 80 N. E. 441; *Yorn v. Bracken*, 153 Ind. 492, 55 N. E. 257; *Cottrell v. Aetna Life Ins. Co.*, 97 Ind. 311; *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Schilling v. Indianapolis & C. Tr. Co.* (Ind. App.), 96 N. E. 167; *Fowler v. Ft. Wayne &*

W. V. T. Co., 45 Ind. App. 441, 91 N. E. 47. Mo.—*Wernick v. St. Louis & S. F. R. Co.*, 131 Mo. App. 37, 109 S. W. 1027. N. M.—*Gallegos v. Sandoval*, 15 N. M. 216, 106 Pac. 373. S. D.—*Jones v. Winson*, 22 S. D. 480, 118 N. W. 716.

Each paragraph. *Flowers v. Poorman*, 43 Ind. App. 528, 87 N. E. 1107.

"While it is true that the code has abolished the distinctions between actions at law and suits in equity, and has provided that there shall be but one form of action for the enforcement and protection of private rights and the redress and prevention of private wrongs, yet there still exist certain elements or features pertaining to actions which are unchanged thereby: These do not belong to the action as a judicial instrument for establishing a right, but inhere to and belong to the primary and remedial rights themselves. For the enforcement and protection of these rights but one form of action exists, but, as to the remedies which lie back of all forms of action, the law still recognizes and observes distinctions which are as vital as before the code. It is just as necessary today as it ever was that a suitor should so state his cause of action that the court may determine whether it be *ex contractu* or *ex delicto*. In the one case the plaintiff would have to be satisfied with a money judgment, while in the other an order of arrest might issue, and an execution against the body. This certainty of statement is also important for the purpose of determining the proper tribunal for the trial of the action." Joseph Dessert

particular theory, it cannot be held good on a different one.²⁴

The rule does not require that plaintiff be entitled to all the relief asked for in the complaint to render it sufficient,²⁵ nor should it be carried to such a degree of refinement as will lead to an absurdity or defeat the ends of justice.²⁶

That the theory of the pleading is not apparent does not render it bad on demurrer for want of facts;²⁷ nor does the mere fact that it is difficult to determine which of two theories is the true one, where the pleading is so framed as to make either theory consistent therewith.²⁸

Lumb. Co. v. Wadleigh, 103 Wis. 318, 79 N. W. 237.

"A complaint should be framed on the theory that it is either a complaint in tort or one *ex contractu*, and the two theories cannot be combined in one action; neither can an action at law and an action in equity be combined in one count in the same action." *Jones v. Winsor*, 22 S. D. 480, 118 N. W. 716.

On demurrer the court must first decide with certainty what the specific cause of action counted and relied upon is, and then determine whether the complaint contains a sufficient statement of such cause, and, if it does not, must sustain the demurrer. *Supervisors v. Decker*, 30 Wis. 624; *cited with approval in Jones v. Winsor*, 22 S. D. 480, 118 N. W. 716.

Uncertainty.—"If the pleading is not drawn on a single and definite theory, or there is such a confusion of theories alleged that the court cannot determine from the general scope of the pleading upon which of several theories a recovery is sought, it is insufficient." *Gretnier v. Fehrenschild*, 64 Kan. 764, 68 Pac. 619.

In *Marley v. Duff* (Del.), 80 Atl. 235, a demurrer to a count in a declaration was sustained on the ground that it was impossible to determine therefrom whether the alleged cause of action was intended to be laid in trespass or case.

24. *Ind.*—*Cottrell v. Aetna Life Ins. Co.*, 97 Ind. 311; *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *South Bend Chilled Plow Co. v. Cissne*, 35 Ind. App. 373, 74 N. E. 282. *Kan.*—*Gretnier v. Fehrenschild*, 64 Kan. 764, 68 Pac. 619. *N. M.*—*Gallegos v. Sandoval*, 15 N. M. 216, 106 Pac. 373.

When it assumes to proceed upon a distinct theory, it cannot be made good

upon some other by casting into it isolated statements which if fully pleaded in separate paragraphs might constitute a cause of action or defense. *Vandalia R. Co. v. State*, 166 Ind. 219, 76 N. E. 980.

Where the complaint is plainly framed for the purpose of obtaining equitable relief and demands no legal relief, it will not be sustained on demurrer on the ground that a cause of action for money damages can be spelled out. *Black v. Vanderbilt*, 70 App. Div. 16, 74 N. Y. Supp. 1095; *Cody v. First Nat. Bank*, 63 App. Div. 199, 71 N. Y. Supp. 277; *Dingwall v. Chapman*, 116 N. Y. Supp. 520.

But see *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49, where it is held that though plaintiff proceeds on the theory that he is entitled to equitable relief, and his complaint fails to state facts entitling him to such relief, if facts are stated entitling him to a money judgment he will be given the relief to which he appears to be entitled.

25. *Oolitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N. E. 246, 80 N. E. 441; *Yorn v. Bracken*, 153 Ind. 492, 55 N. E. 257.

26. *Baltimore & O. S. W. R. Co. v. Trennepohl*, 44 Ind. App. 105, 87 N. E. 1059 (grounds of negligence); *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185, 39 N. E. 908.

27. "Such a defect would be uncertainty, the remedy for which is a motion to make more certain, and not a demurrer." *Scott v. Cleveland, C., C. & St. L. R. Co.*, 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154.

28. *Oolitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N. E. 246; *reversing* (Ind. App.), 80 N. E. 44.

"Such a defect would be uncertainty, the remedy for which is a motion

The theory of a pleading must be determined from its general scope and tenor.²⁹ It will be construed as proceeding on the theory which is most apparent and most clearly outlined by the facts stated,³⁰ and isolated and detached allegations which are not essential to the main theory will be disregarded.³¹

The character of the action is to be determined from the complaint,³² and from the object and purposes of the suit.³³

In determining the theory of the pleading and the form of the action, the substantive facts pleaded are controlling,³⁴ rather than the

to make more certain and not a demurrer." *Scott v. Cleveland, C. C. & St. L. R. Co.*, 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154; *State v. Petersen*, 36 Ind. App. 269, 75 N. E. 602.

29. *Knight & Jilison Co. v. Miller*, 172 Ind. 27, 87 N. E. 823; *State v. Adams Express Co.*, 172 Ind. 10, 87 N. E. 712; *Vandalia B. Co. v. State*, 166 Ind. 219, 76 N. E. 980; *Bunkle v. Pullin* (Ind. App.), 97 N. E. 956; *Flowers v. Poorman*, 43 Ind. App. 528, 87 N. E. 1107; *City of Logansport v. Uhl*, 99 Ind. 531, 49 Am. Rep. 109.

Not from isolated or detached averments. *Western Union Tel. Co. v. Reed*, 96 Ind. 195.

If susceptible of construction as proceeding on either of two inconsistent theories, that one will be adopted which is most consistent with the general character and scope of the pleading. *Schilling v. Indianapolis & C. Tr. Co.* (Ind. App.), 96 N. E. 167.

30. *State v. Scott*, 171 Ind. 349, 86 N. E. 409; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Monette v. Turpie*, 132 Ind. 482, 32 N. E. 328; *Bateman v. Snoddy*, 132 Ind. 480, 32 N. E. 327; *Cleveland, C. C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917.

31. *Oolitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N. E. 246, *reversing*, 80 N. E. 441; *Monnett v. Turpie*, 132 Ind. 482, 32 N. E. 328; *Bunkle v. Pullin* (Ind. App.), 97 N. E. 956; *Schilling v. Indianapolis & C. Tr. Co.* (Ind. App.), 96 N. E. 167; *Lesh v. Bailey* (Ind. App.), 95 N. E. 341; *Cottrell v. Aetna Life Ins. Co.*, 97 Ind. 311.

A complaint stating a cause of action on contract will not be deemed bad because it contains some language inappropriate to such a cause of action, or because the pleader in drawing his conclusions proceeds on the idea that defendant's culpability con-

sisted in making a false representation. *Conkling v. Standard Oil Co.*, 133 Iowa 596, 116 N. W. 822.

32. U. S.—*Motley, Green & Co. v. Detroit Steel & Spring Co.*, 161 Fed. 389. Ga.—*Bunting v. Hutchinson*, 5 Ga. App. 194, 63 S. E. 49. Ill.—*Quartier v. Dowdatt*, 219 Ill. 326, 76 N. E. 371; *Durham v. Stubbings*, 111 Ill. App. 10. Ind.—*Monnett v. Turpie*, 132 Ind. 482, 32 N. E. 328; *Lesh v. Bailey* (Ind. App.), 95 N. E. 341; *State v. Beck* (Ind. App.), 93 N. E. 664. Mo.—*Union Nat. Bank v. Lyons*, 220 Mo. 538, 119 S. W. 540. N. D.—*Cooke v. Northern Pac. R. Co.*, 133 N. W. 303.

From the written statement of plaintiff's demand, in an action in the municipal court. *Pluard v. Gerrity*, 146 Ill. App. 224.

It must be determined from the complaint alone, and neither the answer nor the reply can be considered. *Gallejos v. Sandoval*, 15 N. M. 216, 106 Pac. 373; *Goodwin v. Griffiths*, 88 N. Y. 629.

But see *Lindley v. McGlaughlin*, 57 Wash. 581, 107 Pac. 355, where it was held that, since the code permits equitable defenses to be set up in an action at law, all the pleadings are to be considered in determining whether the action is of legal or equitable cognizance.

See also, the titles "Choice and Election of Remedies;" "Equity Jurisdiction and Procedure;" "Torts."

33. *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 320.

34. Cal.—*Bartley v. Fraser* (Cal. App.), 117 Pac. 683. Ind.—*Monnett v. Turpie*, 132 Ind. 482, 32 N. E. 328; *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763; *Krise v. Wilson*, 31 Ind. App. 590, 68 N. E. 693. N. Y.—*Jones v. Gould*, 123 App. Div. 236, 108 N. Y. Supp. 31. S. C.—*Strain v. Robb*, 30 S. C. 342, 9 S. E. 271.

unexpressed intention of the pleader,³⁵ or the opinion of counsel,³⁶ or the form of the pleading,³⁷ or the designation of the parties,³⁸ or the title of the action,³⁹ or the character of the evidence which is necessary to maintain it,⁴⁰ or the name given to it by the pleader,⁴¹

"The character and classification of an action depend upon the intrinsic contents of the petition, its recitals of fact, the nature of the wrong sought to be remedied, and the quality of the remedy invoked." *Pennington & Evans v. Douglas, A. & G. R. Co.*, 3 Ga. App. 665, 60 S. E. 485.

"The true and logical test would seem to be that if it appears by the whole complaint that the contract is alleged chiefly or wholly by way of necessary inducement in order to show the existence of a duty, and the emphasis is laid upon willful or wrongful disregard of this duty, the intent is to charge a tort, while if the contract appears to be stated as the basis of the action, and the emphasis is laid not upon the willful or negligent breach of duty, but upon default in carrying out the contract, the intent is to charge a mere breach of contract." *Boehrer v. Juergens & Anderson Co.*, 133 Wis. 426, 113 N. W. 655.

35. "The effect of a pleading is to be determined by its averments, and not by the statements of the pleader as to what he intended that it should contain." *Kansas City v. Hart*, 60 Kan. 684, 57 Pac. 938, quoted with approval in *Kuehler v. Weaver*, 23 Okla. 420, 100 Pac. 915.

"The court looks to the declaration to ascertain what causes of action are provable under it, and not to the mind of the plaintiff when he commenced his action; the intention of the plaintiff at that time to recover upon an item not embraced within the purview of the declaration will not avail him, nor will his want of an intention to maintain a particular claim prevent his recovery for that, if it is recoverable under the declaration." *Haley v. Hobson*, 68 Me. 167.

If facts are stated constituting a good cause of action, though not the one the pleader intended, the complaint is good on general demurrer, or objection to evidence, or after verdict. *Frechette v. Ryan*, 145 Wis. 589, 130 N. W. 453; *Bruheim v. Stratton*, 145 Wis. 271, 129 N. W. 1092; *Bieri v. Fonger*, 139 Wis. 150, 120 N. W. 862.

It is immaterial whether the pleader intended to state a cause of action at law or in equity. *St. Croix Consol. Copper Co. v. Musser-Sauntry Land, Logging & Mfg. Co.*, 145 Wis. 267, 130 N. W. 102.

"It is true the complaint must proceed upon some definite theory, but by the phrase 'theory of the case' is not meant what may have been in the mind of the pleader as to the source of his legal rights, but the phrase means the basis upon which the pleading proceeds, the facts upon which a right of action is claimed to exist in favor of the party asserting them. If the facts stated in the pleading, and upon which plaintiff predicates a right to recover, are sufficient to authorize such recovery, either at the common law or by virtue of the provisions of some statute, his complaint will withstand a demurrer, although the pleader himself may have misconceived the law awarding him the right." *Pittsburg, C. & St. L. R. Co. v. Rogers*, 45 Ind. App. 230, 87 N. E. 28.

36. *Bunting v. Hutchinson*, 5 Ga. App. 194, 63 S. E. 49.

37. *Whittenton Mfg. Co. v. Memphis & O. R. P. Co.*, 21 Fed. 896.

38. *Motley, Green & Co. v. Detroit Steel & Spring Co.*, 161 Fed. 389, holding use of term "complainant," instead of "plaintiff," not to be controlling.

39. *Jones v. Gould*, 123 App. Div. 236, 108 N. Y. Supp. 31.

40. *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820.

41. *Pennington & Evans v. Douglas, A. & G. R. Co.*, 3 Ga. App. 665, 60 S. E. 485; *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763; *Johnson v. Sherwood*, 34 Ind. App. 490, 73 N. E. 180; *Krise v. Wilson*, 31 Ind. App. 590, 63 N. E. 693.

The form of the action "depends much more upon the matter alleged and set forth as the ground of the claim, than upon the mere name that happens to be given to it." *Coggswell v. Baldwin*, 15 Vt. 404.

The indorsement of a pleading "Bill in chancery" was held not to deter-

or the prayer for relief.⁴² The form of the declaration⁴³ and of the prayer,⁴⁴ may be considered, however.

Reference may also be had to the summons in case of doubt.⁴⁵

If possible, a construction will be adopted which will give full force and effect to all of the material allegations of the pleading,⁴⁶ and will afford the pleader full relief for all injuries stated in his pleading.⁴⁷

As between two apparent theories or forms of action, that which will afford the greatest possible recovery, under the facts stated will be adopted.⁴⁸

So, too, a construction which will permit a recovery will be preferred to one which will not.⁴⁹

mine its nature and character. *Quartier v. Dowiat*, 219 Ill. 326, 76 N. E. 371.

42. *Cal.*—*Bartley v. Fraser* (Cal. App.), 117 Pac. 683. *Ind.*—*Monnett v. Turpie*, 132 Ind. 482, 32 N. E. 328; *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763; *Krise v. Wilson*, 31 Ind. App. 590, 68 N. E. 693. *N. Y.*—*Jones v. Gould*, 123 App. Div. 236, 108 N. Y. Supp. 31. *S. C.*—*Strain v. Babb*, 30 S. C. 342, 9 S. E. 271.

"The prayer for relief does not determine the character of the pleading, nor assign it a particular theory." *Houck v. Graham*, 106 Ind. 195, 55 Am. Rep. 727.

43. *Whittenton Mfg. Co. v. Memphis & O. R. P. Co.*, 21 Fed. 896; *Quartier v. Dowiat*, 219 Ill. 326, 76 N. E. 371.

44. *Quartier v. Dowiat*, 219 Ill. 326, 76 N. E. 371; *Knight & Jilison Co. v. Miller*, 172 Ind. 27, 87 N. E. 823; *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879; *Monnett v. Turpie*, 132 Ind. 482, 32 N. E. 328; *Galway v. State*, 93 Ind. 161; *Krise v. Wilson*, 31 Ind. App. 590, 68 N. E. 693.

45. *Supervisors v. Decker*, 30 Wis. 624.

46. *Flint & Walling Mfg. Co. v. Beckett*, 167 Ind. 491, 79 N. E. 503; *Monnett v. Turpie*, 132 Ind. 482, 32 N. E. 328; *Lesh v. Bailey* (Ind. App.), 95 N. E. 341; *Flowers v. Poorman*, 43 Ind. App. 528, 87 N. E. 1107.

"Under the modern system of pleading the actual facts constituting a cause of action are narrated, and, as a consequence, the line of distinction between tort and contract is frequently so shadowy and uncertain that it is difficult to determine to which class an action belongs. The proper con-

struction in such cases is that which makes the complaint or declaration, as a whole, maintainable, and the different counts consonant with each other." *Kimber v. Young*, 137 Fed. 744, 70 C. C. A. 178.

47. *Monnett v. Turpie*, 132 Ind. 482, 32 N. E. 328; *Lesh v. Bailey* (Ind. App.), 95 N. E. 341; *Flowers v. Poorman*, 43 Ind. App. 528, 87 N. E. 1107.

In *Ames v. Ames*, 75 Neb. 473, 106 N. W. 584, it is said, "It would seem reasonable to hold, that where a party files a petition in the district court which states facts sufficient to entitle him to both legal and equitable relief, and prays relief, a part of which only can be had at law, but all of which may be had in equity, he intends thereby to invoke the chancery and not the common law powers of the court."

48. Where the pleading is ambiguous and the facts alleged are such as would be proper or adequate under either of two forms of action, it will be so construed as to uphold the fullest possible recovery under the facts alleged, in view of the presumption that the pleader intended to serve his best interest. *Southern Express Co. v. Pope*, 5 Ga. App. 689, 63 S. E. 809; *Payton v. Gulf Line R. Co.*, 4 Ga. App. 762, 62 S. E. 469.

49. If a complaint presents two apparent theories, one sufficiently and the other insufficiently pleaded, the former will be adopted. *Casey v. American Bridge Co.*, 95 Minn. 11, 103 N. W. 623; *Paterson v. Chicago, M. & St. P. R. Co.*, 95 Minn. 57, 103 N. W. 621.

Though the complaint was insufficient on the theory that the cause of action was for fraud, it was held to be error to dismiss it where, if the allegations relative to the false statements of de-

Some courts hold that where plaintiff has a right to sue either upon a contract or for a tort arising out of a breach of duty under the contract, the petition, if equivocal, will generally be construed as claiming damages for the tort,⁵⁰ while others will, under such circumstances, regard the action as one on the contract.⁵¹

The theory adopted in the trial court will be adhered to on appeal.⁵²

defendant were disregarded, it set up a cause of action for breach of contract. *Herlihy v. Blokus*, 131 N. Y. Supp. 623.

An action was treated as being *ex contractu* where an action *ex delicto* would have been barred by limitations. *St. Louis, I. M. & S. R. Co. v. Sweet*, 63 Ark. 563.

If to construe a pleading as setting up one form of action will make it such that it may be upheld when otherwise it could not be, or will authorize a recovery when otherwise none could be had, such construction will be adopted, in view of the presumption that the pleader intended to serve his best interest. *Southern Express Co. v. Pope*, 5 Ga. App. 689, 63 S. E. 809; *Lytle v. Southern R. Co.*, 3 Ga. App. 219, 59 S. E. 595.

50. **U. S.**—*Whittenton Mfg. Co. v. Memphis & O. R. P. Co.*, 21 Fed. 896. **Ga.**—*Central E. Co. v. Chicago Portrait Co.*, 122 Ga. 11, 49 S. E. 727, 106 Am. St. Rep. 27; *Aiken v. Southern R. Co.*, 118 Ga. 118, 44 S. E. 828. **Ia.**—*Owens Bros. v. Chicago, R. I. & P. R. Co.*, 139 Iowa 538, 117 N. W. 762. **Miss.**—*New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660. **Tex.**—*Kansas City Southern R. Co. v. Rosebrook-Josey Grain Co.* (Tex. Civ. App.), 114 S. W. 436.

See also the titles "Choice and Election of Remedies;" "Torts."

51. **Kan.**—*Missouri, K. & T. R. Co. v. Sealy*, 99 Pac. 230; *Delaney v. Great Bend Imp. Co.*, 79 Kan. 126, 98 Pac. 781. **N. Y.**—*Goodwin v. Griffis*, 83 N. Y. 629; *Carroll v. Sharp*, 122 N. Y. Supp. 694; *Barber v. Ellingwood*, 122 N. Y. Supp. 369. **S. C.**—*V. P. Randolph & Co. v. Walker*, 78 S. C. 157, 59 S. E. 856.

See also the titles "Choice and Election of Remedies;" "Torts."

52. **Ind.**—*Studabaker v. Taylor*, 170 Ind. 498, 83 N. E. 747, 127 Am. St. Rep. 397; *Oolitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N. E. 246, reversing 80 N. E. 441; *Indiana Natural Gas & Oil Co. v. Stewart*, 45 Ind. App. 554, 90 N. E. 384; *Zeller, McClellan & Co. v. Vinardi*, 42 Ind. App. 232, 85 N. E. 378. **Ia.**—*Conkling v. Standard Oil Co.*, 138 Iowa 596, 116 N. W. 822. **Minn.**—*Peteler Portable Ry. Mfg. Co. v. Northwestern Adamant Mfg. Co.*, 60 Minn. 127, 61 N. W. 1024. **Mo.**—*Union Nat. Bank v. Lyons*, 220 Mo. 538, 119 S. W. 540; *Witascheck v. Glass*, 46 Mo. App. 209.

Where the pleading from its terms, is susceptible of such construction. *Flowers v. Poorman*, 43 Ind. App. 528, 87 N. E. 1107.

To discover such theory the appellate court may look to the pleadings and the entire record and briefs of counsel. *Knight & Jillson Co. v. Miller*, 172 Ind. 27, 87 N. E. 823.

CONTEMPT

By WILLOUGHBY RODMAN, and CHARLES COAN,
Of the Los Angeles Bar.

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I. WHAT IS A CONTEMPT OF COURT.—DEFINITION.

Contempt is the wilful disregard of the authority of a court of justice or legislative body, or disobedience to its lawful orders.¹

Contempt of court is committed by a person who does any act in wilful contravention of the dignity or authority of the court, or tending to impede or frustrate the administration of justice.² Such acts include reflections on the tribunal or its proceedings, or on the parties, jurors, witnesses or counsel.³

Contempt of court may also be committed by one who, while under the court's authority, or a party to a proceeding therein, wilfully disobeys its lawful orders or fails to comply with an undertaking which he has given.⁴

Direct Contempt.—A direct contempt of court is the doing of any improper act in the presence of the court while in session, tending to

1. **Mont.**—*In re Macknight*, 11 Mont. 126, 135, 27 Pac. 336, 28 Am. St. Rep. 451, citing *Anderson's Law Dict. N. Y.* Conover v. Wood, 5 Abb. Pr. 84, 89. **Pa.**—*Bridgewater v. Beaver Val. Tr. Co.*, 27 Pa. Co. Ct. 328. **Eng.**—*Miller v. Knox*, 4 Bing. N. C. 574, 6 Scott 1, 33 E. C. L. 470.

Other Definitions.—"Contempt of court is a despising of the authority, justice or dignity of the court." *Dahnke v. People*, 168 Ill. 102, 48 N. E. 137, 30 L. R. A. 197.

"A wilful disregard or disobedience of a public authority." *In re MacKnight*, 11 Mont. 126, 135, 27 Pac. 336, 28 Am. St. Rep. 451 (citing *Bouv. Law Dict.*); *Saal v. South Brooklyn R. Co.*, 122 App. Div. 364, 107 N. Y. Supp. 996.

"A contempt of court is disobedience to the court by acting in opposition to the authority, justice and dignity thereof." *Rooker v. Bruce*, 171 Ind. 86, 90, 85 N. E. 351.

At Common Law.—"At common law the offense of contempt has been held to be the tendency thereof to obstruct the administration of justice in a pending case, thereby rendering nugatory the court's decree, and bringing it into disrepute and disrespect among men." *Dollard v. Koronsky*, 64 Misc. 611, 118 N. Y. Supp. 922.

2. *People v. Wilson*, 64 Ill. 195, 212; *Bridgewater v. Beaver Val. Tr. Co.*, 27 Pa. Co. Ct. 328.

Acts Punishable.—"This power extends not only to acts which directly and openly insult, or resist the powers of the court, or the persons of the judges, but to *consequential, indi-*

rect and constructive contempts, which obstruct the process, degrade the authority, or contaminate the purity of the court." *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 417.

3. *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199; *Ex parte Wright*, 65 Ind. 504.

Publication of Statement Against Counsel Punishable.—*In People v. Wilson*, 64 Ill. 195, 226, 232, the concurring opinion of Thornton, J., intimates that a libelous publication against attorneys employed in a cause on trial may be punished as a contempt of court.

4. *People v. Wilson*, 64 Ill. 195, 212; *Bridgewater v. Beaver Val. Tr. Co.*, 27 Pa. Co. Ct. 328.

Failure To File Pleading.—"The failure to file an answer in a case at law within the time allowed by law or order of court is in no sense to be regarded as a contempt of court." *Rooker v. Bruce*, 171 Ind. 86, 90, 85 N. E. 351.

Elements of Contempt.—In New York there are four elements essential to the prosecution of contempts, and these are: (1) An offense within the definition of section 14, Code Civ. Proc., or of the common law; (2) the operation of that offense to cause impairment, prejudice, or defeat to right and remedies of the adversary; (3) the further operation of that offense to cause actual loss or injury to the adversary; (4) that there be no other remedy for recoupment prescribed by law, which means of course statute law. *Dollard v. Koronsky*, 64 Misc. 611, 118 N. Y. Supp. 922.

directly disturb the proceedings or to defeat, obstruct or impair the administration of justice, or the refusal to do any proper act required to be done in open court, in the presence of the court, where such refusal directly tends to disturb the proceedings or to defeat, obstruct or impair the administration of justice.⁵ It has also been defined as a contempt in *facie curiae*. It consists of such conduct or language on the part of the contemnor as interferes with the orderly administration of justice,⁶ or some disobedience to an order, judgment or process of the court, or some open or intended disrespect to the court or its officers in the presence of the court, or such conduct in or near the court as to interrupt or interfere with its proceedings, or with the administration of justice.⁷

Constructive Contempt.—To constitute a constructive contempt of court some act must be done, not in the presence of the court or judge, that tends to obstruct the administration of justice, or to bring the court or judge or the administration of justice into disrespect.⁸ Con-

5. Colo.—Cooper v. People *ex rel.* Wyatt, 13 Colo. 337, 356, 22 Pac. 790. Ill.—People v. Wilson, 64 Ill. 195; O'Neill v. People, 113 Ill. App. 195. Miss.—Neely v. State, 54 So. 315. Mo. Matter of Clark, 126 Mo. App. 391, 103 S. W. 1105. Okla.—Smythe v. Smythe, 28 Okla. 266, 114 Pac. 257. Ore.—State v. Sieber, 49 Ore. 1, 8, 88 Pac. 313. Pa.—Bridgewater v. Beaver Val. Tract. Co., 27 Pa. Co. Ct. 328. Wash.—State v. Buddress, 114 Pac. 879. W. Va.—State v. Hansford, 43 W. Va. 773, 28 S. E. 791; State v. Gibson, 33 W. Va. 97, 10 S. E. 58; State v. Frew, 24 W. Va. 469, 49 Am. Rep. 257. Wyo.—Laramie Nat. Bank v. Steinhoff, 7 Wyo. 464, 53 Pac. 299.

Judge Absent.—A contempt may be committed in the "presence" of the court though the judge presiding may not be actually present. *In re Savin*, Petitioner, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. ed. 150 (where the acts occurred in the jury room used as a witness room and in the hallway of the court house); McCarthy v. Hugo, 82 Conn. 262, 73 Atl. 778 (court was at recess but had not adjourned, and the act was committed in the court room though the judge was in his retiring room); State v. Smith, 49 Conn. 376 (the court had withdrawn to an anteroom but was within hearing of the proceedings in the court room).

Failure to obey a subpoena is classified as a direct contempt. Ferriman v. People, 128 Ill. App. 230, 234; O'Hair v. People, 32 Ill. App. 277.

6. Neely v. State (Miss.), 54 So. 315.

7. *In re Dill*, 32 Kan. 668, 5 Pac. 39.

8. Cal.—Frowley v. The Superior Court, 158 Cal. 220, 110 Pac. 817. Colo.—People v. New Times Pub. Co., 35 Colo. 253, 84 Pac. 912, *affirmed*, 205 U. S. 454, 27 Sup. Ct. 556, 51 L. ed. 879. Ill.—O'Neill v. People, 113 Ill. App. 195. Kan.—*In re Dill*, 32 Kan. 668, 689, 5 Pac. 39. Mo.—*In re Clark*, 208 Mo. 121, 106 S. W. 990; Crow v. Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624. N. Y.—Saal v. South Brooklyn R. Co., 122 App. Div. 364, 106 N. Y. Supp. 996; Dollard v. Koronsky, 64 Misc. 611, 118 N. Y. Supp. 922. Okla.—Smythe v. Smythe, 28 Okla. 266, 114 Pac. 257. Pa.—Bridgewater v. Beaver Val. Tract. Co., 27 Pa. Co. Ct. 328. Va.—Burdett v. Com., 103 Va. 838, 48 S. E. 873, 68 L. R. A. 251. W. Va.—State v. Hansford, 43 W. Va. 773, 28 S. E. 791; State v. Frew, 24 W. Va. 469, 49 Am. Rep. 257. Wyo.—Laramie Nat. Bank v. Steinhoff, 7 Wyo. 464, 53 Pac. 299. Can.—Stoddard v. Prentice, 6 Brit. Col. 308; Reg. v. Ellis, 28 N. Bruns. 497.

"The authority to punish for constructive contempts has been recognized by numerous courts in England and America." People v. Wilson, 64 Ill. 195, 227, *citing*: U. S.—Oswald's Case, 1 Dall. 319, 1 L. ed. 155; United States v. Duane, Wall. C. C. 102, 25 Fed. Cas. No. 14,997; Hollingsworth v. Duane,

structive contempt is sometimes referred to as indirect contempt.*

Rules Applicable Generally.—In all classes of criminal contempts disobedience must be wilful;¹⁰ and the contemner must have an opportunity to be heard.¹¹

There must also be an adjudication that the contemnor was guilty of misconduct.¹²

II. NATURE AND SOURCE OF THE POWER TO PUNISH FOR CONTEMPTS, AND WHERE LODGED.—INHERENT AUTHORITY.—The doctrine that courts of record possess the inherent power to take cognizance of and punish contempts is as old, relatively speaking, as the courts themselves.¹³

- Wall. Sr. 77, 12 Fed. Cas. No. 6,616.
N. H.—Tenney's Case, 23 N. H. 162.
N. Y.—People v. Freer, 1 Caines 394.
Pa.—Respublica v. Passmore, 3 Yeates 441.
 "The substantial difference between a direct and a constructive contempt is one of procedure." *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878, 68 L. R. A. 251, 262.
 9. *Cooper v. People ex rel. Wyatt*, 13 Colo. 337, 356, 22 Pac. 790; *Saal v. South Brooklyn R. Co.*, 122 App. Div. 364, 106 N. Y. Supp. 996.
 10. *Clark v. Bininger*, 75 N. Y. 344.
 11. *Clark v. Bininger*, 75 N. Y. 344.
 12. *Clark v. Bininger*, 75 N. Y. 344.
 13. **U. S.**—*Bessette v. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. ed. 997; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. ed. 405; *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *United States v. Hudson*, 7 Cranch 32, 3 L. ed. 259; *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622. **Ala.**—*Ex parte Dickens*, 162 Ala. 272, 50 So. 218; *Coleman v. Roberts*, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84; *Easton v. State*, 39 Ala. 551. **Ark.**—*State v. Morrill*, 16 Ark. 384; *Cossart v. State*, 14 Ark. 538; *Neil v. State*, 9 Ark. 259, 50 Am. Dec. 209. **Cal.**—*Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *Ex parte Creely*, 8 Cal. App. 713, 97 Pac. 766. **Colo.**—*People v. News Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912. **Conn.**—*Goodhart v. State*, 78 Atl. 853; *State v. Howell*, 80 Conn. 668, 69 Atl. 1057, 125 Am. St. Rep. 141; *Welch v. Barber*, 52 Conn. 147, 157, 52 Am. Rep. 567; *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650. **Ga.**—*Bradley v. State*, 111 Ga. 168, 36 S. E. 630, 78 Am. St. Rep. 157, 50 L. R. A. 691. **Ill.**—*Hake v. People*, 230 Ill. 174, 82 N. E. 561; *People v. Wilson*, 64 Ill. 195, 225; *O'Neill v. People*, 113 Ill. App. 195. **Ind.**—*Rucker v. State*, 170 Ind. 635, 85 N. E. 356; *Holman v. State*, 105 Ind. 513, 5 N. E. 556; *Anderson v. Indianapolis Drop Forging Co.*, 34 Ind. App. 100, 72 N. E. 277. **Ia.**—*Drady v. Given*, 126 Iowa 345, 102 N. W. 115; *Field v. Thornell*, 106 Iowa 7, 75 N. W. 685. **Kan.**—*In re Hanson*, 80 Kan. 783, 105 Pac. 694. **Ky.**—*French v. Com.*, 30 Ky. L. Rep. 98, 97 S. W. 427. **La.**—*State v. Judge of Civil Dist. Court*, 45 La. Ann. 1250, 14 So. 310, 40 Am. St. Rep. 282. **Mass.**—*Cartwright's Case*, 114 Mass. 230. **Mich.**—*In re Chadwick*, 109 Mich. 588, 67 N. W. 1071. **Miss.**—*Watson v. Williams*, 36 Miss. 331. **Mo.**—*Ex parte Sanford*, 236 Mo. 665, 139 S. W. 376; *Crow v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; *Fiedler v. Bambrick Bros. Const. Co. (Mo. App.)*, 142 S. W. 1111. **Mont.**—*State v. Faulds*, 17 Mont. 140, 42 Pac. 285. **Neb.**—*Nebraska Children's Home Soc. v. State*, 57 Neb. 765, 78 N. W. 267. **N. H.**—*State v. Matthews*, 37 N. H. 450. **N. J.**—*Rhinehart v. Lance*, 43 N. J. L. 311, 39 Am. Rep. 592. **N. Y.**—*Yates v. Lansing*, 9 Johns. 395; *Lowenthal v. Hodge*, 120 App. Div. 304, 105 N. Y. Supp. 120. **N. C.**—*Ex parte Moore*, 63 N. C. 397; *State v. Woodfin*, 27 N. C. 199, 42 Am. Dec. 161. **N. D.**—*State v. Markuson*, 5 N. D. 147, 64 N. W. 934. **Ohio.**—*Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. Rep. 691, 36 L. R. A. 254. **Okla.**—*Ex parte Gudenoge*, 2 Okla. Crim. 110, 100 Pac. 39. **Ore.**—*State v. Bourne*, 21 Ore. 218, 27 Pac. 1048. **Pa.**—*Respublica v. Passmore*, 3 Yeates 441, 2 Am. Dec.

The discretion used in the exercise of this power is in a great measure arbitrary and indefinable, but "is perfectly compatible with civil liberty and auxiliary to the purest ends of justice."¹⁴

388. S. C.—*State v. Johnson*, 1 Brev. 155. S. D.—*In re Taber*, 13 S. D. 62, 82 N. W. 398; *State v. Knight*, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809. Tenn.—*State v. Galloway*, 5 Coldw. 326, 98 Am. Dec. 404. Tex.—*Taylor v. Goodrich*, 25 Tex. Civ. App. 109, 40 S. W. 515. Vt.—*Rudd v. Darling*, 64 Vt. 456, 25 Atl. 479; *Cooper's Case*, 32 Vt. 253. Va.—*Carter v. Com.*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310. Wash.—*State v. Bud-dress*, 114 Pac. 879; *State v. North Shore Boom, etc. Co.*, 55 Wash. 1, 103 Pac. 426, 107 Pac. 196. W. Va.—*State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257. Wis.—*State v. Circuit Court*, 97 Wis. 1, 72 N. W. 193, 65 Am. St. Rep. 90, 38 L. R. A. 554. Eng.—*Ex parte Fernandez*, 10 C. B. N. S. 3, 7 Jur. N. S. 571, 4 L. T. N. S. 324, 9 W. R. 832, 100 E. C. L. 3; *Middlesex Sheriff's Case*, 11 Ad. & El. 273, 39 E. C. L. 80. Can.—*Ex parte Lees*, 24 U. C. C. P. 214.

All superior courts which are courts of record have this inherent power, and in most of the states as well as "in England and in Canada the power to punish for contempt has been conferred upon almost all inferior courts." *Ex parte Sanford*, 236 Mo. 665, 139 S. W. 376.

A probate court may enforce its orders directing the payment or distribution of funds in the hands of an administrator, executor or guardian by imprisonment for contempt where the money is shown to be in his hands. *Hand v. Haughland*, 87 Ark. 105, 112 S. W. 184; *Meeks v. State*, 80 Ark. 579, 98 S. W. 378.

"Justices of the peace in England have always been allowed to exercise powers of this sort." *State v. Johnson*, 1 Brev. (S. C.) 155, citing *Bac. Abr. Justices of the Peace*; *King v. Jackson*, 1 T. R. 653, 99 Eng. Reprint 1302; *Kent v. Pocock*, 2 Str. 1168, 93 Eng. Reprint 1104; *Rex v. Revel*, 1 Str. 420, 93 Eng. Reprint 609; *Groenvelt v. Bunnell*, 1 Ld. Raym. 454, 91 Eng. Reprint 1202. And in Alabama also they possess such authority. *Early v. Fitzpatrick*, 161 Ala. 171, 49 So. 686; *Coleman v. Roberts*, 113 Ala. 323,

21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84.

"The court of chancery may punish for contempts by fine, not exceeding \$50 and by imprisonment, not exceeding five days, one or both." Alabama Code 1907, §3057. The statute (§4630) furthermore limits authority to issue attachments and inflict summary punishment for contempt to the disobedience or resistance of an officer of the court, etc. It is held that §3057 aforesaid does not apply in civil contempts and that said section "does not limit the power of the chancery court in enforcing obedience to its decrees." *Ex parte Dickens*, 162 Ala. 272, 285, 50 So. 218, citing *Ex parte Edwards*, 11 Fla. 174, 187; *Rebham v. Fuhrman*, 21 Ky. L. Rep. 17, 50 S. W. 976.

County commissioners' court in Alabama has the authority to punish for contempt. *Watson v. Scarborough*, 147 Ala. 689, 40 So. 672.

Under the Georgia statute (Civ. Code 1910, §4644) every court whether a court of record or not has power to punish for contempt committed in its immediate presence. *Plunkett v. Hamilton*, 136 Ga. 72, 70 S. E. 781.

A board of police commissioners sitting for the trial of delinquent policemen is a "court" with power to punish for contempt. *Plunkett v. Hamilton*, 136 Ga. 72, 70 S. E. 781.

A town council has also been held a court with similar powers. *Swafford v. Berrong*, 84 Ga. 65, 10 S. E. 593.

In Nebraska it is held that this inherent authority extends to the board of fire and police commissioners of Omaha when sitting judicially (*Rosewater v. Pinzenscham*, 38 Neb. 835, 57 N. W. 563), and to a notary public in taking a deposition (*Dogge v. State*, 21 Neb. 272, 31 N. W. 929).

14. *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 417.

"The power to protect itself from contempts and also to determine what is a contempt, is inherent in every court of superior jurisdiction." *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199.

"At common law the courts pos-

The Court Offended.—Contempts are punished as offenses against the administration of justice, and are punishable by the court in which the contempt was committed or whose authority was defied.¹⁵ That

sessed the power of punishing as for a contempt, libelous publications upon their proceedings, whether pending or past, but in this country the courts are more circumscribed in their jurisdiction in that respect, and their power to punish is confined to publications concerning pending cases." *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199. See also *State v. Morrill*, 16 Ark. 384, approved and followed in *Burdett v. Com.*, 103 Va. 838, 48 S. E. 878, 68 L. R. A. 251, which cited also the following cases: *Kan. In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747, where an attorney was fined for a disrespectful letter written to the judge after the final decision. *Ky.—In re Woolley*, 11 Bush 95. *Mich.—In re Chadwick*, 109 Mich. 588, 67 N. W. 1071, where the attorney for the losing party, in a newspaper letter, charged the judge with unfairness. *W. Va. State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257.

Power Relates to Direct and Constructive Contempts.—*State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257.

Moderation of Common Law.—"It is not claimed, that the power to punish contempts need be exercised in this country to the same extent allowed by the common-law. Mr. Justice Scott, in *Neel v. State*, 4 Eng. 263, said: 'It has never been contended in this country, that the common-law, although it is our birthright, and in force among us, without express recognition by our Constitution and laws, was ever actually in force in all its length and breadth, but only to an extent that was not wholly inconsistent with these great principles, upon which our free institutions, purely American, have been reared and maintained. So these doctrines, which we are considering (powers of courts to punish contempts), in being recognized by the courts must be regarded as having received a corresponding abatement of those of its lineaments which are at open war with the nature and character of our Constitution, and the actual state of things among us, under its legitimate operation, or it would be an exotic that could not germinate in our soil.'

Therefore courts will tolerate the regulation of the power, so that the Legislature does not by such regulation substantially destroy the efficiency of the court." *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257.

15. *U. S.—Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214. *Ala.—Callan v. McDaniel*, 72 Ala. 96. *Cal.—Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853. *Ga.—Ormond v. Ball*, 120 Ga. 916, 48 S. E. 383. *Ky.—Johnston v. Com.*, 1 Bibb 598. *Me.—Androscoggin, etc. R. Co. v. Androscoggin, etc. R. Co.*, 49 Me. 392. *Miss.—Watson v. Williams*, 36 Miss. 331. *Mo.—State v. Ryan*, 182 Mo. 349, 81 S. W. 435. *Nev.—Phillips v. Welch*, 12 Nev. 158. *N. Y.—Yates v. Lansing*, 9 Johns. 395, 423. *N. C. In re Rhodes*, 65 N. C. 516. *Ohio. Mennuez v. Grimes Candy Co.*, 77 Ohio St. 386, 83 N. E. 82. *Pa.—In re Williamson*, 26 Pa. 9, 67 Am. Dec. 374. *S. C.—James v. Smith*, 2 S. C. 183. *Tenn.—Sanders v. Metcalf*, 1 Tenn. Ch. 419. *Tex.—State v. Thurmond*, 37 Tex. 340. *Can.—In re Clarke*, 7 U. C. Q. B. 223.

Waiver by Submitting to Jurisdiction.—One who voluntarily submits himself and the subject-matter to the jurisdiction of the court, cannot assert subsequently that the court had no power to make the order he is charged with violating. *Autenrith v. Wilder*, 155 Ill. App. 545.

Effect of an Appeal.—"The doing of an act enjoined may be punished as a contempt notwithstanding the appeal, and the contempt is a contempt of the court which granted the injunction," notwithstanding the fact that the appeal operates as a supersedeas. *Barnes v. The Chicago Typographical Union*, 232 Ill. 402, 83 N. E. 932.

Terms of the Order.—When a court has jurisdiction of the parties and the subject-matter, and the power to make the order, it will punish for a contempt even where the order is too broad in its terms. *Swedish-American Tel. Co. v. Casualty Co.*, 208 Ill. 562, 70 N. E. 768; *Nelson v. London Guar. & Acc. Co.*, 132 Ill. App. 10.

Necessity for Formal Proceedings.—"The power to proceed summarily,

power was exercised by the English courts of chancery,¹⁶ and the statutory enactments have been held simply to have preserved the power they exercised and to be declaratory thereof.¹⁷

In What Proceedings.—Proceedings to punish for a contempt may be resorted to in a civil as well as a criminal action, and also independently of any civil or criminal action.¹⁸ But the authority is limited to matters involving judicial action.¹⁹

without formal indictment and without the intervention of a jury, to hear charges of contempt of court, and to assess punishment upon those found guilty, has been an attribute of all courts of record in every stage of the development of our system of procedure." *Jones v. Mould*, 151 Iowa 599, 132 N. W. 45.

16. *People v. Sturtevant*, 9 N. Y. 263, 278; *Hull v. Thomas*, 3 Edw. Ch. (N. Y.) 236; *Bowley v. Feldman*, 84 App. Div. 400, 82 N. Y. Supp. 679; *King v. Tooley*, 12 Mod. 312, 88 Eng. Reprint 1343; *Hearn v. Tennant*, 14 Ves. 136, 33 Eng. Reprint 473; *Skip v. Harwood*, 3 Atk. 564, 26 Eng. Reprint 1125.

17. *Ind.*—*Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199. *Mich.*—*In re Chadwick*, 109 Mich. 588, 76 N. W. 1071; *Langdon v. Wayne Circuit Court Judges*, 76 Mich. 367, 43 N. W. 310. *Mo.*—*Crow v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624. *N. Y.*—*People v. Rice*, 144 N. Y. 249, 39 N. E. 88.

In Colorado a distinction is made as to the procedure between criminal and civil contempts, the courts having "ruled that the procedure for criminal contempts was according to the course of the common law, while for civil contempts the procedure was as provided by the civil code." *People v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912, *affirmed*, 205 U. S. 454, 27 Sup. Ct. 556, 51 L. ed. 879; *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961.

Abolition of Court.—If a statute abolishing a court transfers all actions and proceedings then pending to another court, the latter court has power to punish for contempt of the court abolished in a pending proceeding. *In re Hay Foundry & Ironworks*, 22 App. Div. 87, 47 N. Y. Supp. 802.

18. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. ed. 997.

19. "The decisions in this country will be searched in vain for a case where the publication of matter relating to the judge while acting in a purely ministerial capacity was declared a contempt." The only other case discovered by the court where the "contempt charged" did not refer in some way to a specific cause or to specified judicial proceedings, is *In re Moore*, 63 N. C. 397; *Hamma v. People*, 42 Colo. 401, 94 Pac. 326, 15 L. R. A. (N. S.) 621. This has also been held in *Detournion v. Dornemon*, 1 Mart. (La.) 137, and *Fitler v. Probasco*, 2 Browne (Pa.) 137.

It has furthermore been held that a judge cannot punish for contempt of court acts reflecting on him in his private capacity. *Neel v. State*, 9 Ark. 263, 50 Am. Dec. 209; *Ex parte Hickey*, 4 Smed. & M. (Miss.) 751.

"Contempts are punished as offenses against the administration of justice," and are not regarded as the resentment of personal affronts offered to judges. *Menuet v. Grimes Candy Co.*, 77 Ohio St. 386, 83 N. E. 82.

Bankruptcy Proceedings.—The power of the federal courts to punish contempt arising in bankruptcy proceedings is unquestioned. *In re Watts*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933, 10 Am. B. R. 113; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. ed. 405, 7 Am. B. R. 224; *Ex parte Robinson*, 86 U. S. 505, 22 L. ed. 205; *Bank of Ravenswood v. Johnson*, 143 Fed. 463, 74 C. C. A. 597, 16 Am. B. R. 206; *Matter of Lacov*, 142 Fed. 960, 74 C. C. A. 130, 15 Am. B. R. 290; *Schweer v. Brown*, 130 Fed. 323, 64 C. C. A. 574, 12 Am. B. R. 173; *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451, 8 Am. B. R. 393; *Smith v. Belford*, 106 Fed. 658, 45 C. C. A. 526, 5 Am. B. R. 291; *In re Schlesinger*, 102 Fed. 117, 42 C. C. A. 207, 4 Am. B. R. 361; *In re Rosser*, 101 Fed. 562, 41 C. C. A. 497, 4 Am. B. R. 153; *Moody v. Cole*, 148 Fed. 295, 17 Am.

To Whom Application Must Be Made.—When a contempt of a particular court is charged, the application to punish must be presented to that court or to a judge thereof within its territorial jurisdiction.²⁰ One court cannot punish for contempt of another.²¹

Change of Judge.—A judge is not disqualified from hearing the proceeding because he is the subject of the attack and the offender is not entitled to a change of judges.²²

Change of Venue.—The general statutes relative to change of venue have no application to contempt proceedings.²³

Legislative Regulation.—It has been said that it is not within the province of the legislature either to take away the power, or, under the guise of regulation, to render it ineffective.²⁴ This is at least

B. R. 818; *In re Leinweber*, 128 Fed. 641, 12 Am. B. R. 175; *In re Taylor*, 114 Fed. 607, 7 Am. B. R. 410; *In re Anderson*, 103 Fed. 854, 4 Am. B. R. 640; *Ripon Knitting Wks. v. Schreiber*, 101 Fed. 810, 4 Am. B. R. 299.

20. *Kirby v. Chicago, R. I. & P. R. Co.* (Colo.), 116 Pac. 150.

Acts by the defendant amounting to a general appearance is not a waiver of an objection to an attachment issued outside of the court's jurisdiction. *Kirby v. Chicago, R. I. & P. R. Co.*, *supra*.

Consent To Remove Place of Hearing.—After the court has obtained jurisdiction of the proceeding and the parties have appeared and each has introduced his evidence, the parties may consent that the further hearing be held in another county by the same court or judge. *Ferguson v. Wheeler*, 126 Iowa 111, 101 N. W. 638.

21. *State v. Ryan*, 182 Mo. 349, 356, 81 S. W. 435; *State v. Shepherd*, 177 Mo. 205, 237, 76 S. W. 79.

22. *Cal.*—*Lamberson v. Superior Court*, 151 Cal. 458, 91 Pac. 100, 11 L. R. A. (N. S.) 619. *Colo.*—*Bloom v. People*, 23 Colo. 416, 48 Pac. 519. *Mont.*—*State ex rel. Boston & M. Co. v. Clancy*, 30 Mont. 193, 76 Pac. 10. *Ohio.*—*Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

See, however, *Back v. State*, 75 Neb. 603, 106 N. W. 787, where it is said that there may be a transfer from a judge where the facts proved "clearly show that an impartial trial could not be had before him."

23. "While respectable authority may be found in support of the contention that it is beyond the legitimate power to provide for a change of venue or change of judge in contempt pro-

ceedings, it is not now necessary to consider the matter." *State ex rel. Boston & M. Co. v. Clancy*, 30 Mont. 193, 199, 76 Pac. 10.

24. *Ark.*—*State v. Morrill*, 16 Ark. 384. *Cal.*—*In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755. *Colo.*—*People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961. *Conn.*—*Goodhart v. State*, 78 Atl. 853. *Ill.*—*People v. Wilson*, 64 Ill. 195. *Ind.*—*Fishback v. State*, 131 Ind. 304, 30 N. E. 1088; *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199; *Mahoney v. State*, 33 Ind. App. 655, 72 N. E. 151, 104 Am. St. Rep. 276. *Kan.*—*In re Hanson*, 80 Kan. 783, 105 Pac. 694. *Ky.*—*Arnold v. Com.*, 80 Ky. 300. *Mo.*—*Chicago, B. & Q. R. Co. v. Gildersleeve*, 219 Mo. 170, 118 S. W. 86; *Crow v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624. *Mont.*—*State ex rel. Boston & M. Co. v. Clancy*, 30 Mont. 193, 76 Pac. 10. *Neb.*—*Hawes v. State*, 46 Neb. 149, 64 N. W. 699. *Ohio.*—*Hale v. State*, 55 Ohio St. 210, 45 N. E. 199. *Okla.*—*Smith v. Speed*, 11 Okla. 95, 66 Pac. 511, 55 L. R. A. 402. *Ore.*—*State v. Kaiser*, 20 Ore. 50, 23 Pac. 964, 8 L. R. A. 584, in which the court affirms this doctrine as to direct contempts. *W. Va.*—*State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257.

See also *Ex parte Crenshaw*, 80 Mo. 447, in which the court held that the statute under consideration did not have the effect of taking away the power of courts to punish other contempts than those referred to in the statute, and *Sherwood, J.*, in a concurring opinion holds that the provision under consideration was uncon-

undoubtedly true in so far as it relates to constitutional courts.²⁵ And

stitutional. *State v. Rose*, 74 Kan. 260, 85 Pac. 803, which was an original proceeding in the supreme court.

Compare Burdett v. Com., 103 Va. 838, 48 S. E. 878, 68 L. R. A. 251; *Carter v. Com.*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310, in which the court said: "There is an inherent power of self-defense and self-preservation in the courts of this state, created by the constitution. This power may be regulated by the legislature, but cannot be destroyed, or so far diminished as to be rendered ineffectual."

In *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071, the court in speaking of the legislative control of this power, said: "Usually these provisions have been found ample, and undoubtedly the desire of the courts has been to follow them without questioning the power of the legislature to absolutely control their jurisdiction in this regard. It would seem to follow that, if the legislature may curtail this jurisdiction, and determine that in no other matters than those for which it may provide shall the courts have jurisdiction, it may take away the power to punish entirely."

In Colorado it is held on authority of *People v. Hughes*, 5 Colo. 445, that their statute "was not a limitation upon the power of the courts to punish for contempts. This is in accordance with a long line of adjudicated cases and we see no reason to change the conclusion then reached." *Cooper v. People ex rel. Wyatt*, 13 Colo. 337, 356, 22 Pac. 790, 6 L. R. A. 430.

"In this country, where the courts are in the divisions of power by the constitutions of the several states constituted a separate and distinct department of government, clothed with jurisdiction, and not expressly limited by the Constitution in their powers to punish for contempt, the inherent power that is thus necessarily granted them cannot be taken away by the legislative department of the government." *State v. Frew*, 24 W. Va. 416, 457, 49 Am. Rep. 257.

The court declined to pass upon the question as not being necessary to the disposition of the case, in *Middlebrook v. State*, 43 Conn. 257, 268; *In re Woolley*, 11 Bush (Ky.) 95.

In New York, it is said that "pro-

ceedings to punish for contempt are purely statutory." *Matter of Depue*, 185 N. Y. 60, 68, 77 N. E. 798.

Constitutional Limitation.—"It is worthy of observation that in only the states of Georgia and Louisiana is power given, by the Constitution of the state, to the Legislature to limit the power of the court to punish for contempt. In all the other states the better opinion is that where the court is a creature of the Constitution, the inherent power to punish contempt cannot be shorn, abridged, limited or regulated." *Crow v. Shepherd*, 177 Mo. 205, 236, 76 S. W. 79.

25. **U. S.**—*Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205. **Ark.**—*State v. Morrill*, 16 Ark. 384. **Colo.**—*People v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912, *affirmed*, 205 U. S. 454, 27 Sup. Ct. 556, 51 L. ed. 879; *Hughes v. People*, 5 Colo. 436. **Ga.** *Bradley v. State*, 111 Ga. 168, 36 S. E. 630, 78 Am. St. Rep. 157, 50 L. R. A. 691. **Ky.**—*In re Woolley*, 11 Bush 95, where the question is discussed but not directly passed on. **Ohio.**—*Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254. **W. Va.**—*State v. Frew*, 24 W. Va. 416, 457, 49 Am. Rep. 257.

And see *In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 21 L. R. A. 755 (holding that the right to limit the authority of the court is with the power that created it); *People v. Wilson*, 64 Ill. 195, 225 (holding that in Illinois "the constitution has established the judiciary and made it a co-ordinate department of the State government. A necessary incident to its establishment is the power to punish for contempt").

Contra.—The case of *Com. v. Deskins*, 4 Leigh (Va.) 685, which seems to be at variance with this rule is fully discussed and explained in *State v. Frew*, 24 W. Va. 416, 460, 49 Am. Rep. 257; and in *Carter v. Com.*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310.

In *Ex parte Edwards*, 11 Fla. 174, 187, under a statute providing for the punishment, the court said: "Such acts, which are merely the subjects of punishment, are doubtless the only ones to which the restriction and limitation of the statute was designed to apply. It never could have been the design or intention of the Legislature to deprive

where there has been any abridgment of that right, the court, with the exceptions above noted, will be found to have been created by, and to have existed under legislative authority,²⁶ or the authority to pass

the Court of Chancery of the only means which it possesses to enforce affirmatively its orders and decrees, or to enforce any decree, whether affirmative or otherwise, which may be passed upon the final hearing of the cause."

In *Ex parte Hickey*, 4 Smed. & M. (Miss.) 751, 772, in which this subject is elaborately reviewed and the power of the legislature to act is admitted.

In *Ex parte Schenck*, 65 N. C. 353, it was held that the inherent power of the court was not affected.

In Indiana, it is well settled "that the Legislature may reasonably regulate the exercise of the power and prescribe the rules of practice and procedure in such cases." *Rucker v. State*, 170 Ind. 635, 85 N. E. 358, citing *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088; *Cheadle v. State*, 110 Ind. 301, 309, 11 N. E. 426, 59 Am. Rep. 199; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224.

26. Ill.—*Newton v. Locklin*, 77 Ill. 103. Ind.—*Hawkins v. State*, 125 Ind. 571, 25 N. E. 818. N. Y.—*Rutherford v. Holmes*, 66 N. Y. 368, as to the authority of a justice of the peace, that being a statutory court in that jurisdiction. Tenn.—*State v. Galloway*, 5 Coldw. 326, 98 Am. Dec. 404. W. Va. *State v. Frew*, 24 W. Va. 416, 459, 49 Am. Rep. 257.

Power To Regulate.—As applying to the United States courts congress has passed a statute by which the power of those courts to punish for contempt has been limited to the "misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said courts." U. S. Rev. St., §725, 4 Fed. St. Anno. 534.

This statute is referred to in *Ex parte Robinson*, 19 Wall. (U. S.) 505, 22 L. ed. 205, in which Mr. Justice Field said: "The moment the courts of the United States were called into ex-

istence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2d, 1831. The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted."

In *Carter v. Com.*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310, Keith, J., said: "It may be remarked, also, with respect to the case of *Ex parte Robinson* (19 Wall. 505, 22 L. ed. 205), that the United States statute of 1831 while it carefully enumerates the subjects for which courts may punish summarily for contempt, that enumeration is so comprehensive as to afford complete protection to the courts in the performance of their duties, and contains no limitation whatever upon the power to punish in the enumerated cases; and that, while punishment which courts may inflict is limited to fine and imprisonment, their discretion is without limit as to the amount of the fine or the duration of the imprisonment. The courts of the United States will never be embarrassed by the decision in *Ex parte Robinson*."

California Statute.—The amendment of 1891 to subd. 13 of §1209, California Code of Civil Procedure, "was not intended to affect the power of the court to deal with its own officers for acts of disrespect in connection with their official positions. Its purpose obviously was to prevent the punishment of ordinary citizens, not connected with the court, nor owing it any special duty of fidelity and respect, for any 'speech or publication,' in censure or abuse of the court or the justices thereof, made

such legislation was conferred upon the legislature by the constitution.²⁷

But the legislature may aid the jurisdiction or enlarge the power of the courts by declaring certain improper conduct to be a contempt which has not theretofore been so regarded and treated, and may regulate the practice in proceedings against persons for an alleged contempt.²⁸

And where the lawmaking power has undertaken by statute to cover the entire field and enact laws treating of the entire subject-matter of contempts, it has been said that such enactments constructively repeal the common law on the subject,²⁹ and that the court could not punish for cases not provided for by statute.³⁰

to other persons, or to the general public, or even to the justices themselves, in the exercise of the common privilege of free speech." *In re Shay* (Cal.), 117 Pac. 442.

27. *Baldwin v. State*, 126 Ind. 24, 30, 25 N. E. 820; *Burke v. Territory*, 2 Okla. 499, 37 Pac. 829.

In Georgia the power of the courts to punish for contempt is limited by the constitution, which provides that the legislature prescribe its limits. *Harrell v. Word*, 54 Ga. 649.

Limitation in Creating Act.—"All courts of record have the inherent power to enforce their orders and mandates by punishment as for a contempt of court unless the law creating them expressly limits that power." *United States v. Tom Wah*, 180 Fed. 207.

28. *Ark.*—*State v. Morrill*, 16 Ark. 384. *Ind.*—*Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199; *Worland v. State*, 82 Ind. 49. *Mich.* *Langdon v. Wayne Circuit Judges*, 76 Mich. 367, 43 N. W. 310. *S. C.*—*State v. Johnson*, 1 Brev. 155.

The authority of the United States "to punish for contempt and imprison for non-payment of money judgments is circumscribed and controlled by the law of the state," and when the state has abolished imprisonment for debt in certain cases, the United States courts in that jurisdiction will follow such statute. *Mallory Mfg. Co. v. Fox*, 20 Fed. 409.

29. "Formerly it was left wholly with the courts to determine what acts or omissions should be held to constitute contempts, to prescribe the method of procedure in such cases, and to determine upon the punishment to

be inflicted." The Iowa statute makes no attempt to distinguish between civil and criminal contempts and has undertaken to cover the whole field as related to the subject. The general doctrine that the enactment of a statute which treats of the whole of any subject-matter is a constructive repeal of the common law on that subject applies, and the courts must be governed in all cases by the provisions of the statute and "may not resort to the common law either to find subjects of contempt or to justify a course of procedure other than as by the statute prescribed." *Drady v. Given*, 126 Iowa 345, 102 N. W. 115. See also *In re Gorham*, 129 N. C. 481, 40 S. E. 311.

Offenses Not Covered by Statute. The enactment of a statute conferring authority to punish a witness for failure to appear does not prevent the punishment of a witness who appeared but refused to testify. *Plunkett v. Hamilton*, 136 Ga. 72, 70 S. E. 781.

30. *Miss.*—*Ex parte Hickey*, 4 Smed. & M. 751. *N. C.*—*Ex parte Schenck*, 65 N. C. 353. *Tenn.*—*State v. Gallo-way*, 5 Coldw. 326, 98 Am. Dec. 404.

"While a criminal contempt proceeding in which a warrant of attachment is issued is an original special proceeding under the provisions of section 7555, Rev. Codes 1905, it is not, strictly speaking, an independent proceeding as it grows out of, and is, to a certain extent, connected with the proceeding in the main action. Such contempt proceeding is dependent for its foundation upon the proceedings in the main action and the violation of the injunctive order therein issued." *State v. Heidt* (N. D.), 127 N. W. 72, per Fisk, J.

Punishment by Officers Sitting Judicially.—The refusal of a witness to answer questions on the taking of a deposition before a referee or notary or before a judge may be punishable as for a contempt of court.³¹

Where the deposition is being taken before a referee or notary the practice is to lay before the court a formal complaint in writing, duly verified, setting out the facts, and thereupon an attachment, citation or order to show cause issues as in other cases of contempt not committed in the immediate view and presence of the court.³² But where the deposition is being taken before a judge at chambers, he is not acting as a mere ministerial functionary, but is armed with all the powers of a judge at chambers and may punish for a refusal to answer in such a case as in any other proceeding pending before him.³³

Punishment by Non-Judicial Bodies.—By statute in some jurisdictions the power to punish for contempt has been conferred directly upon bodies created by legislative authority,³⁴ while in others the failure to obey a subpoena or to testify is certified to a court and the offender cited to appear before such court to purge himself of the contempt or be punished for its commission.³⁵ But where the constitution confers all judicial power upon courts therein named, "the legislature can no more command the court to use the judicial power of punishing for contempt in order to enforce obedience to a non-judicial body

31. *Crocker v. Conrey*, 140 Cal. 213, 73 Pac. 1006; *Burns v. The Superior Court*, 140 Cal. 1, 73 Pac. 597, overruling *Lezinsky v. Superior Court*, 72 Cal. 510, 14 Pac. 104.

32. *Crocker v. Conrey*, 140 Cal. 213, 73 Pac. 1006; *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597.

33. *Crocker v. Conrey*, 140 Cal. 213, 73 Pac. 1006.

34. In *In re Sanford*, 236 Mo. 665, 693, 139 S. W. 376, it was held, as a necessary implication from the power conferred upon a board of equalization to summon and examine witnesses, that such board had the power to commit witnesses for contempt, where they were duly subpoenaed and refused to testify or produce books and papers called for by the subpoena. The court examined the case as one of first impression in Missouri. The opinion is explained in the concurring opinion of Valliant, C. J., who said: "I do not understand the opinion as holding that the board of equalization is a court, or that it derives its authority to commit for contempt on the theory that it is a court. Its work, as is well said in the opinion, is judicial in its character, as all official work that requires

the taking of evidence and the pronouncing of a legal conclusion is judicial in its character. But the board of equalization is an arm of the Legislative Department of the State Government, and has as much authority to enforce obedience to its lawful orders as if it were an arm of the Judicial Department. As an arm of the Legislative Department the board has no authority to adjudge one guilty of criminal contempt, but it has authority to adjudge him guilty of civil contempt and enforce obedience to its lawful orders. In the one case it is punishment for past conduct, in the other it is coercion to enforce obedience. Woodson, Graves, Kennish and Brown, J. J., concur."

35. *Kanter v. Clerk of Circuit Court*, 108 Ill. App. 287, 299.

In California a Board of Equalization has the power to require the attendance of persons to be examined as to the proper assessment of their property and upon the refusal to appear or to answer questions, may direct that the chairman report the facts to the superior court of the county. *People v. Latimer* (Cal.), 117 Pac. 1051.

than it can command the court to use its judicial function to give to the decision of a non-judicial board the character of a judgment."³⁶

Power of Legislative Bodies.—There is no express power in the constitution conferring on either house of congress the right to punish for contempt other than of its own members for disorderly conduct or for failure to attend its sessions,³⁷ except in a contested election

36. *State v. Ryan*, 182 Mo. 349, 81 S. W. 435.

"It is not disputed that, in a case where a board or a committee of a Legislative body has the lawful authority to summon witnesses before it, the Legislature may enact that the refusal of a witness to appear and testify shall be a misdemeanor, and that upon conviction thereof in a court of competent jurisdiction he may be punished by fine and imprisonment. In our search for the law to be applied in this case we have come across cases of that kind, of which *In re Chapman*, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. ed. 1154, is an example. But that stands on an entirely different principle. We have seen no case in which it has been decided that a court can be compelled to use the power that inheres in it for the maintenance of its own authority to enable a non-judicial board to maintain its authority. The General Assembly has the power, within the limits of the Constitution, to declare that the doing of a certain thing shall be a crime, and prescribe the degree of the crime, the punishment, the procedure, and the court in which it is to be tried; but the case before us now is not of that kind." *State v. Ryan*, *supra*.

Congress has authority in creating a non-judicial body authorized to institute inquiries to provide that a refusal to appear or testify before it touching matters pertinent to the inquiry be punishable by the courts as a contempt of court, subject to the privilege that the witness was not bound to make disclosures that might tend to incriminate him, or subject him to penalty or forfeiture. *Interstate Commerce Co. v. Brimson*, 154 U. S. 447, 469, 14 Sup. Ct. 1125, 38 L. ed. 1047; *In re Interstate Commerce Com.*, 53 Fed. 476.

37. *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377. Compare *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, 2 L. ed. 242, in which it is held that there is a limited power.

In *People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 2 N. E. 615, the court referring to *Kilbourn v. Thompson*, *supra*, said: "The reasoning and authorities upon which this decision is based convince us that it is incontestable."

As to authority of Massachusetts Legislature, see *Burnham v. Morrissey*, 14 Gray 226. In Indiana, see *Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 113.

In Missouri, see *Lowe v. Summers*, 69 Mo. App. 637, 648.

In New York, see *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 857.

In Ohio, see *Ex parte Dalton*, 44 Ohio St. 142, 5 N. E. 136, 58 Am. Rep. 802.

In South Carolina, see *Ex parte Parker*, 74 S. C. 466, 55 S. E. 122.

Power of Parliament.—"That the power to punish for contempt has been exercised by the House of Commons in numerous instances is well known to the general student of history, and is authenticated by the rolls of the Parliament. And there is no question but that this has been upheld by the courts of Westminster Hall. Among the most notable of these latter cases are the judgments of the Court of King's Bench, in *Brass Crosby's Case* (3 Wils., 188), decided in the year 1771; *Burdett v. Abbott* (14 East, 1), in 1811, in which the opinion was delivered by Lord Ellenborough, and in the case of *Sheriff of Middlesex* (11 Ad. & E., 273), in 1840. Opinion by Lord Denman, Chief Justice. . . . While there is, in the adjudged cases in the English courts, little agreement of opinion as to the extent of this power, and the liability of its exercise to be inquired into by the courts, there is no difference of opinion as to its origin. This goes back to the period when the bishops, the lords and the knights and burgesses met in one body, and were, when so assembled, called the High Court of Parliament. They were not only called so, but the assembled Parliament exercised the highest func-

case, where each house of congress sits as a court of judicature.³⁸

The Congress of the United States has enacted legislation making the refusal to appear or testify before either house or a committee thereof a misdemeanor punishable by fine and imprisonment,³⁹ and its power to do so has been sustained.⁴⁰ The facts of the report and certificate need not be set out in the indictment.⁴¹

State Legislatures.—There is some question as to whether such authority is inherent in the state legislatures in those states where the common law of England prevails.⁴² But whether that be the fact

tions of a court of judicature, representing in that respect the judicial authority of the King in his Court of Parliament. While this body enacted laws, it also rendered judgments in matters of private right, which, when approved by the King, were recognized as valid. Upon the separation of the Lords and Commons into two separate bodies, holding their sessions in different chambers, and hence called the House of Lords and the House of Commons, the judicial function of reviewing by appeal the decisions of the courts of Westminster Hall passed to the House of Lords, where it has been exercised without dispute ever since. To the Commons was left the power of impeachment and, perhaps, others of a judicial character, and jointly they exercised, until a very recent period, the power of passing bills of attainder for treason and other high crimes which are in their nature punishment for crime declared judicially by the High Court of Parliament of the Kingdom of England. It is upon this idea that the two Houses of Parliament were each courts of judicature originally, which, though divested by usage, and by statute, probably, of many of their judicial functions, have yet retained so much of that power as that enables them, like any other court, to punish for contempt of these privileges and authority, that the power rests." *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377.

38. *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *In re Gunn*, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519.

39. U. S. Rev. St. 102, 23 St. at L. 60; 2 Fed. St. Ann. 239; *In re Chapman*, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. ed. 1154.

"The facts upon being reported are certified under the seal of the Senate

or House to the district attorney of the District of Columbia who is required to bring the matter before the grand jury for their action. U. S. Rev. St., §104; *In re Chapman*, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. ed. 1154.

40. *In re Chapman*, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. ed. 1154.

"That Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosures of evidence . . . cannot admit of serious question." *Chapman v. United States*, 5 App. Cas. (D. C.) 122, 130, approved in *In re Chapman*, 166 U. S. 661, 671, 17 Sup. Ct. 677, 41 L. ed. 1154.

41. *In re Chapman*, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. ed. 1154.

Matters of Defense.—"When the facts are reported to the particular House, the question or questions may undoubtedly be withdrawn or modified or the presiding officer directed not to certify; but if such a contingency occurs, or if no report is made or certificate issued, that would be matter of defence." *In re Chapman*, 166 U. S. 661, 667, 17 Sup. Ct. 677, 41 L. ed. 1154.

42. *People v. Keeler*, 99 N. Y. 463, 473, 2 N. E. 615. And see *People v. Webb*, 5 N. Y. Supp. 855, 23 N. Y. St. 324.

In *Ex parte Parker*, 74 S. C. 466, 55 S. E. 122, it was held that the legislature could confer upon its committee appointed to examine into the affairs of the dispensary—a public enterprise—power to punish for contempt a contumacious witness. The court explained its reasons thus: "After the decision of the Supreme Court of the United States in the case of *Kilbourn v. Thompson*, 103 U. S. 183, some doubt seems to have arisen as to the right

or not, it is within the province of the legislature to declare that it has the power to punish for contempt,⁴³ and such legislation is not in contravention either of the state or federal constitution.⁴⁴

Statute of Limitations.—The time within which a contempt is punishable by criminal prosecution for the crime will be affected by the statute of limitations governing the grade of offense fixed by the statute,⁴⁵ but the general power of a court to punish for a contempt is not affected by lapse of time.⁴⁶

Parties.—When the proceeding is resorted to for the purpose of vindicating the power and dignity of the court, this question is unimportant,⁴⁷ but it is controlling when the proceeding is instituted for remedial purposes, such as the violation of an injunction. In such a case the proceeding must be prosecuted by one having a substantial right or substantial interest in the order or judgment claimed to be

of Congress or even of a State Legislature in seeking such information to imprison contumacious witnesses. In that case, it is true, the right of a committee of the House of Representatives to imprison a witness for refusing to answer was denied, but the case presented peculiar features. The committee was not appointed and was not conducting its investigation under a statute or resolution of the Congress but of only one branch of the legislative department, which undertook to confer upon it the power to send for persons and papers. The investigation related to a particular claim of the Federal Government, the status of which, having been already fixed by a settlement, could not have been altered by legislation. And in the view of the Court the question propounded to the witness involved merely an inquiry into the private affairs of the citizen in a matter outside of the domain of the legislative department and within the jurisdiction of the judicial department; the court holding in this connection that the judicial power residing in the British House of Commons was not conferred on the Congress by the Constitution, and hence precedents from the English courts sustaining the power of a committee of the House of Commons to punish for contempt were not applicable. Distinguishing the case of *Kilbourn v. Thompson*, in some of the features above mentioned, the Supreme Court of the United States subsequently held that a committee of the Senate had the right under a resolution of that body

to require a broker to answer whether any Senator had employed the firm of which he was a member to buy or sell shares of stock the price of which might be affected by the Senate's action. The investigation having been instituted to inquire into charges made in newspapers of bribery of Senators, the court held the subject-matter of the inquiry was within the range of the constitutional powers of the Senate. *In re Chapman*, 166 U. S. 661. The case now under consideration is much stronger than the Chapman case. In the first place, it is to be observed the Congress possesses no powers of legislation except those conferred by the Constitution of the United States, while the General Assembly is invested with all the legislative power of the State except that denied by the Constitution."

43. *People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 473, 2 N. E. 615.

Where certain acts are enumerated in the statute as offenses, such acts are the only ones which either House can punish. *People ex rel. McDonald v. Keeler*, *supra*.

44. *People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 2 N. E. 615.

45. *Gordon v. Com.*, 141 Ky. 461, 133 S. W. 206; *In re Hay Foundry & Ironworks*, 22 App. Div. 87, 47 N. Y. Supp. 802.

46. *In re Hay Foundry & Ironworks*, 22 App. Div. 87, 47 N. Y. Supp. 802.

47. *People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038.

violated, and he must also show that he has in some way been injured thereby.⁴⁸

Proceedings for civil contempt are between the original parties and are instituted and tried as part of the main cause,⁴⁹ but proceedings at law for criminal contempt are between the public and the defendant and are not a part of the original cause.⁵⁰

One who is not a party to the proceeding in which an injunction order is issued, and who had no opportunity to be heard when the injunction order was issued cannot be punished for violating such order,⁵¹ though there is authority that where one has knowledge of the existence of a general injunction order and violates it, he may be punished for contempt, regardless of whether or not he is a party to the proceeding.⁵²

Corporations.—Corporations other than municipal corporations are liable to be punished for a contempt of court.⁵³

48. *People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038.

Merely alleging a violation of a forbidden act is insufficient. *People v. Diedrich*, *supra*.

49. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. ed. 797. Compare *Hayes v. Fischer*, 102 U. S. 121, 26 L. ed. 95, in which the court intimates that a civil contempt is independent of and separate from the original suit.

In New York the proceeding is special, and is independent of the action or special proceeding in which it may be taken. The rights of parties and rules of law are the same as in actions where the same issues are involved. *In re Depue*, 185 N. Y. 60, 77 N. E. 798. See also *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *Moschill v. Boor*, 66 Hun 557, 21 N. Y. Supp. 683; *People ex rel. Grant v. Warner*, 51 Hun 54, 3 N. Y. Supp. 768.

In Alabama a civil contempt proceeding "is not a part of the main case, but is collateral to it, a proceeding in itself." This is based on the ruling in *Hogan v. Alston*, 9 Ala. 627. *Ex parte Dickens*, 162 Ala. 272, 50 So. 218.

Violation of Injunction.—In Wisconsin, Iowa, Connecticut and Wyoming the proceeding is in the action in which the violated injunction issued. *My Laundry Co. v. Schmeling*, 129 Wis. 597, 109 N. W. 540; *Ferguson v. Wheeler*, 126 Iowa 111, 101 N. W. 638; *Gorham v. New Haven*, 82 Conn. 153, 72 Atl. 1012; *Porter v. State*, 16 Wyo. 131, 92 Pac. 385.

Separate docketing unnecessary when

one is charged with violating injunction; if it is separately docketed the shorthand notes of testimony in one case may be used as the "written evidence" required by statute in the other. *Hatlestad v. Court*, 137 Iowa 146, 114 N. W. 628.

50. U. S.—*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 445, 31 Sup. Ct. 492, 55 L. ed. 797. Ill.—*Oster v. People*, 192 Ill. 473, 61 N. E. 439. Pa.—*Passmore Williamson's Case*, 26 Pa. 9, 67 Am. Dec. 374. S. C. *State v. Nathans*, 49 S. C. 199, 27 S. E. 52.

In most of the jurisdictions announcing the rule that the proceeding to punish for contempt is distinct from the main cause the cases are in the nature of criminal contempts, though no statement is made of a different rule being applicable in the different classes of contempt. N. H.—*State v. Matthews*, 37 N. H. 450. Vt.—*Ex parte Langdon*, 25 Vt. 680. W. Va.—*McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. 227; *Ruhl v. Ruhl*, 24 W. Va. 279.

51. *Ex parte Tinkum*, 54 Cal. 201; *Banter v. Superior Court*, 6 Cal. App. 195, 91 Pac. 749.

52. *O'Brien v. People*, 216 Ill. 354, 75 N. E. 108; *Mears, Slayton Lumb. Co. v. District Council*, 156 Ill. App. 327.

53. U. S.—*Cary Mfg. Co. v. Flexible Clasp Co.*, 108 Fed. 873, 47 C. C. A. 118. Cal.—*Golden Gate, etc. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628. Ill.—*Franklin Union v. People*, 220 Ill. 355, 77 N. E. 176 (*distinguishing* *Sercomb v. Catlin*, 128 Ill. 556, 21

Public Officers are not exempt for punishment for contempt of court either by law or on the ground of public policy.⁵⁴

N. E. 606); *Chicago Typo. Union v. Barnes & Co.*, 134 Ill. App. 11; *Hughson v. People*, 91 Ill. App. 396. **Mo.** *Fiedler v. Bambrick Bros. Const. Co.* (Mo. App.), 142 S. W. 1111. **N. Y.** *Mayor v. New York & S. I. Ferry Co.*, 64 N. Y. 622; *People v. Albany, etc. R. Co.*, 12 Abb. Pr. 171; *Matter of Realty Corporation*, 123 App. Div. 797, 108 N. Y. Supp. 551; *Manhattan Elec. L. Co. v. Harlem Lighting Co.*, 18 N. Y. Supp. 371, 44 N. Y. St. 169. **Can.**—*In re Bolton*, 23 Ont. L. R. 390, 18 Ont. W. R. 795. See, however, *Marson v. City of Rochester*, 112 App. Div. 51, 97 N. Y. Supp. 881, *affirmed*, 185 N. Y. 602, 78 N. E. 1106, that a municipal corporation engaged in a municipal work violating a court order subject to punishment for contempt.

In *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159, it was pointed out that the property of a corporation might be taken to compensate for a private wrong or to punish for a public wrong.

"Having in mind this form of service on corporations as adopted by the common law courts, those courts as well as the courts of equity had no trouble in enforcing a fine levied on the corporation for contempt and it was accordingly held that proceedings by way of contempt would lie against corporations as well as individuals. In the case of individuals the process is by attachment of the person followed by a fine or imprisonment or both. In the case of a corporation the process in equity was by writ of sequestration; in the courts of law *distringas* issued as an original process, to be followed, if necessary by an alias and pluries, until justice be done. See *London v. Lynn*, 1 H. Black. Reps. 206, loc. cit. 209, and note 'b,' page 209; *Spokes v. Banbury Local Board of Health*, 11 Jurist (N. S.) part I, 1010; *McKim v. Odom*, 3 Bland (Md.) 407, loc. cit. 425, *et seq.*; *West Jersey Traction Co. v. Camden*, 58 N. J. Law, 536, loc. cit. 540, 37 Atl. 578. It is true that in this last cited case as well, possibly, in other above or hereafter referred to, the state or the crown was a party and the prosecutor for the fine,

but so far as concerns the amenability of a corporation to citation for contempt, there is no difference; the only distinction arising over the mode of procedure and the party in whose name the action must be brought and prosecuted." *Fiedler v. Bambrick Bros. Const. Co.* (Mo. App.), 142 S. W. 1111.

President Proper Party to Proceeding.—In a proceeding to punish a corporation for contempt in filing a bond with fictitious sureties, the president who executed the bond is a proper party. *Matter of Westminster Realty Corp.*, 123 App. Div. 797, 108 N. Y. Supp. 551. See also as to power to punish an officer of a corporation. *State v. Cutler*, 13 Kan. 131.

Punishment of Corporation Incapable of Being Sued.—A corporation that is not capable of being sued is not capable of committing a contempt (*Small v. American Fedn. of Musicians*, 5 Ont. L. R. 456, 2 Ont. W. R. 278), but the individual members who have been active in its management may be punished for a contempt committed by the organization (*Patterson v. District Council*, 31 Pa. Super. 112; *Hynes v. Fisher*, 4 Ont. (Can.) 78).

54. Judge.—*In re Breen*, 30 Nev. 164, 93 Pac. 997.

District Attorney.—*In re Stewart*, 118 La. 827, 43 So. 455; *In re Maestretti*, 30 Nev. 187, 93 Pac. 1004.

Jailor.—*Boone v. Riddle*, 27 Ky. L. Rep. 828, 86 S. W. 978.

City Marshal.—*In re Wilk*, 155 Fed. 943.

Juror.—*Crane v. Sayre*, 6 N. J. L. 110; *Ex parte Hill*, 3 Cow. (N. Y.) 355.

Court Clerk.—**Ark.**—*State v. Simmons*, 1 Ark. 265. **Ga.**—*In Matter of Contempt of Two Clerks*, 91 Ga. 113, 18 S. E. 976. **Ill.**—*Ex parte Thatcher*, 7 Ill. 167. **N. M.**—*Territory v. Clancey*, 7 N. M. 580, 37 Pac. 1108.

Sheriff.—**Ark.**—*In re Lawson*, 3 Ark. 363. **Ga.**—*Hunter v. Phillips*, 56 Ga. 634. **N. Y.**—*In re Leggat*, 162 N. Y. 437, 56 N. E. 1009; 31 N. Y. Civ. Proc. 6. **S. C.**—*Rice v. McClintock*, *Dudley* 354; *Thomas v. Aitken*, *Dudley* 292. **Tex.**—*Sparks v. State*, 42 Tex.

III. PROCEEDINGS AGAINST PARTIES IN CONTEMPT. — A.

THE PROCEEDING IS SUI GENERIS. — A proceeding to punish for contempt is *sui generis*. It is in the nature of a criminal proceeding, though it is not such a proceeding strictly speaking. The fine and imprisonment which the court may inflict for a contempt are not intended as a punishment for crime committed in violation of the criminal law, and courts possessing no criminal jurisdiction have undoubtedly the power to punish for a contempt.⁵⁵ It is, however, re-

Crim. 374, 60 S. W. 246. **Wis.**—*State v. Brophy*, 38 Wis. 413.

55. **U. S.**—*Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. ed. 997; *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622; *In re Fellerman*, 149 Fed. 244; *United States v. Atchison*, etc. R. Co., 142 Fed. 176; *Goodrich v. United States*, 42 Fed. 392. **Alaska.**—*United States v. Richards*, 1 Alaska 613. **Cal.**—*In re McCarty*, 154 Cal. 534, 98 Pac. 540; *Hutton v. The Superior Court*, 147 Cal. 156, 81 Pac. 409; *Reymert v. Smith*, 5 Cal. App. 380, 90 Pac. 470. **Conn.**—*McCarthy v. Hugo*, 82 Conn. 262, 73 Atl. 778 (information and warrant proper through contempt committed in court's presence); *State v. Howell*, 80 Conn. 668, 69 Atl. 10, 57; *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650. **Ill.**—*Robinson v. People*, 129 Ill. App. 527; *O'Neill v. People*, 113 Ill. App. 195. **Ind.**—*Baldwin v. State*, 126 Ind. 24, 25 N. E. 820. **Ia.**—*Wells v. Given*, 126 Iowa 340, 102 N. W. 106; *Grier v. Johnson*, 88 Iowa 99, 55 N. W. 80. **Mont.**—*Dunlavy v. Doggett*, 38 Mont. 204, 99 Pac. 436; *State v. Clancy*, 30 Mont. 193, 76 Pac. 10. **Neb.**—*Crites v. State*, 74 Neb. 687, 105 N. W. 469. **N. J.**—*McClure v. Gulick*, 17 N. J. L. 340. **N. D.**—*State v. Harris*, 14 N. D. 501, 105 N. W. 621; *State v. Massey*, 10 N. D. 154, 86 N. W. 225. **Pa.**—*Com. v. Bell*, 145 Pa. 374, 22 Atl. 641, 644. **Tex.**—*Casey v. State*, 25 Tex. 381; *Taylor v. Goodrich*, 25 Tex. Civ. App. 109, 40 S. W. 515; *Ex parte Robertson*, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. Rep. 207. **Va.**—*Baltimore & Ohio R. Co. v. Wheeling City*, 13 Gratt. 40. **W. Va.**—*Ex parte Mylius*, 61 W. Va. 405, 56 S. E. 602; *Ruhl v. Ruhl*, 24 W. Va. 279. **Can.**—*In re O'Brien*, 16 Can. Sup. 197.

In Kentucky a civil contempt "is rather to be looked upon as a civil proceeding for the benefit of the other party, although in name a contempt of court." *City of Newport v. New-*

port Light Co., 92 Ky. 445, 17 S. W. 435, 13 Ky. L. Rep. 532.

"Proceedings for contempt are not criminal cases within the meaning of the Constitution of the United States or of this state." *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071.

Object of Proceeding.—Proceedings in contempt have a double object. "They may be punitive, to vindicate the authority of the court or judge, and inflict exemplary punishment. They may also be remedial, not so much to punish a past violation of the court's orders as to compel obedience to an order for the time being resisted." *Nebraska Childrens Home Soc. v. State*, 57 Neb. 765, 78 N. W. 267.

"When the contempt consists of something done or omitted, in the presence of the court, tending to impede or interrupt its proceedings or lessen its dignity, or, out of its presence, in disregard or abuse of its process, or in doing some act injurious to a party protected by the order of the court, which has been forbidden by its order, the proceeding is punitive, and is inflicted by way of punishment for the wrongful act, and to vindicate the authority and dignity of the people, as represented in and by their judicial tribunals. . . . Cases of that character are clearly distinguished from cases where a party to a civil suit, having the right to demand that the other party do some act for his benefit and to his advantage in the litigation, obtains an order of the court commanding it to be done, and upon refusal, the court, by way of execution of its order, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit." In these cases the authority of the court though incidentally vindicated the proceeding is regarded as coercive merely and not in the public interest or to vindicate any public right, but its powers is called into exercise for

garded as a criminal proceeding so far as the rules of pleading are concerned.⁵⁶ Some courts have gone so far as to designate contempt of court as a "specific criminal offense."⁵⁷

Being criminal in its nature, presumptions and intendments in favor of conviction will not be indulged,⁵⁸ and it is held that where

the benefit of a private litigant. *Lester v. People*, 150 Ill. 408, 424, 23 N. E. 387, 37 N. E. 1004.

Resemblance to Criminal Proceeding. "While proceedings to attach for contempt which are punitive in their nature are sometimes spoken of as criminal, yet in many respects they are not strictly criminal cases, or subject to the rules of indictment, trial, sentence, and review, which apply to criminal cases strictly so called. Even in the latter class of cases it was said by the Supreme Court of the United States in *United States v. Wiltberger*, 5 Wheat. 76, 94 (5 L. ed. 37), that, 'though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature.'" *Plunkett v. Hamilton*, 136 Ga. 72, 70 S. E. 781.

56. *Back v. State*, 75 Neb. 603, 106 N. W. 787. And as to venue, *State v. Court*, 24 Mont. 33, 60 Pac. 493.

"Where an alleged contempt has been committed without the presence of the judge at chambers, there is no step essential to a proper accusation and plea in an ordinary criminal case which can safely be omitted from the proceeding." *Reymert v. Smith*, 5 Cal. App. 380, 90 Pac. 470.

57. *New Orleans v. New York Mail S. S. Co.*, 20 Wall. (U. S.) 392, 22 L. ed. 354; *Cosby v. Superior Court*, 110 Cal. 52, 42 Pac. 460; *Ex parte Gould*, 99 Cal. 360, 33 Pac. 1112, 37 Am. Rep. 57; *Reymert v. Smith*, 5 Cal. App. 380, 90 Pac. 470. See also *Butler v. Fayerweather*, 91 Fed. 458, 33 C. C. A. 625; *Gould v. Sessions*, 67 Fed. 163, 14 C. C. A. 366, 35 U. S. App. 281.

An adjudication in contempt has been held to be a conviction. *Ex parte Kearney*, 7 Wheat. (U. S.) 38, 5 L. ed. 391; *Butler v. Fayerweather*, 91 Fed. 453, 33 C. C. A. 625; *Crosby's Case*, 3 Wils. 188, 95 Eng. Reprint 1005.

58. *U. S.—United States v. Atchison*, etc. B. Co., 142 Fed. 176. Cal.

Batchelder v. Moore, 42 Cal. 412; *Ex parte Shortridge*, 5 Cal. App. 371, 90 Pac. 478; *Reymert v. Smith*, 5 Cal. App. 380, 90 Pac. 470. Ill.—*Kanter v. Clerk*, 108 Ill. App. 287. Mo.—*Ex parte Shull*, 221 Mo. 623, 121 S. W. 10. Neb.—*Crites v. State*, 74 Neb. 687, 105 N. W. 469; *Hydock v. State*, 59 Neb. 296, 80 N. W. 902. S. D.—*State v. Sweetland*, 3 S. D. 503, 54 N. W. 415.

"It is settled here as elsewhere, that proceedings of this character are in their nature criminal, and presumptions will not be indulged against a defendant, but in his favor. *State v. Rockwood* (1902) 159 Ind. 94, 64 N. E. 592; *Whittem v. State* (1871) 36 Ind. 196; *Hawes v. State* (1898) 46 Neb. 149, 64 N. W. 699; *Phillips v. Welch* (1876) 11 Nev. 187. The charge constituting the offense must be specifically made, and jurisdiction must affirmatively appear in the charge, and will not be aided by presumptions. *State v. Rockwood*, *supra*; *Worland v. State* (1882) 82 Ind. 49; *McConnell v. State* (1874) 46 Ind. 298; *Hawthorne v. State* (1895) 45 Neb. 871, 64 N. W. 359; *Hawes v. State*, *supra*; *State v. Root* (1896) 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568; *State v. Sweetland* (1893) 3 S. D. 503, 54 N. W. 415; *Young, et al. v. Cannon, et al.* (1880) 2 Utah 560; *Wyatt v. People* (1892) 17 Colo. 252, 28 Pac. 961; *Herdman v. State* (1898) 54 Neb. 626, 74 N. W. 1097." *State v. Branner* (Ind.), 93 N. E. 70.

No Presumption That Clerk of Court Knew Contents of Order Filed.—In *Dines v. People*, 39 Ill. App. 565, it was held that in proceedings against a clerk of court for contempt for destroying certain ballots in his custody, in violation of an order of the court to preserve them, the prosecution must show that he wilfully intended to disobey, or obstruct, the order of the court, and hence that no presumption will be indulged that he knew the contents of the order when he filed it, although such clerk might be presumed to know the orders and proceedings of

the contempt is committed out of the presence of the court, the usual presumptions in favor of the accused in criminal cases will prevail.⁵⁹

Contempts as Civil and Criminal.—But it is also said that contempt proceedings may be divided into two classes: those which are criminal in their nature and those which are designated purely civil remedies.⁶⁰

the court of which he was clerk, in so far as any person might be damaged by reason of his ignorance.

No Presumption of Actual Knowledge of Injunctive Order.—Judge Lochren in *Dowagiac Mfg. Co. v. Minnesota M. P. P. Co.*, 124 Fed. 736, held that where an injunctive order has been ordered but not issued, in order to convict a person for its violation, it must be shown clearly that the offender had knowledge of the order for the injunction, in such a way that it can be held that he understood it, and with such knowledge wilfully violated it; a presumption of actual knowledge cannot be indulged in, in a proceeding for contempt.

59. **U. S.**—*Garrigan v. United States*, 163 Fed. 16, 89 C. C. A. 494. **N. H.** *Bates' Case*, 55 N. H. 325. **N. Y.** *Harris v. Clark*, 10 How. Pr. 415. **S. D.** *State v. Edwards*, 15 S. D. 382, 89 N. W. 1011. **W. Va.**—*State v. Ralph-snyder*, 34 W. Va. 352, 12 S. E. 721.

In *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580, it was said that the offense of contempt being criminal in its nature, both the charge, and the finding and judgment of the court must be strictly construed in favor of the accused.

60. **Ala.**—*Ex parte Dickens*, 162 Ala. 272, 50 So. 218. **Ill.**—*O'Brien v. People*, 216 Ill. 354, 368, 75 N. E. 108; *Lester v. People*, 150 Ill. 408, 423, 23 N. E. 387, 37 N. E. 1004. **Ky.**—*Gordon v. Com.*, 141 Ky. 461, 133 S. W. 206; *French v. Com.*, 30 Ky. L. Rep. 98, 97 S. W. 427; *Wages v. Com.*, 13 Ky. L. Rep. 925.

Lord Chancellor Hardwicke in *Roach v. Garden*, 2 Atk. 471, 26 Eng. Reprint 683, known as *The St. James Evening Post Case*, speaks of three different sorts of contempt. "One kind of contempt is scandalizing the court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in causes here. There may be, also, a contempt of this court, in prejudicing mankind against persons before the cause is heard."

There is a clear distinction both upon principle and by the authorities "between that class of cases where it is sought to vindicate the authority or dignity of the court, and those where the proceeding is remedial, and intended to compel the doing or omission of an act necessary to the administration of justice in enforcing some private right." *Lester v. People*, 150 Ill. 408, 423, 23 N. E. 387, 37 N. E. 1004. See also: **Ga.**—*Howard v. Durand*, 36 Ga. 346; *Cobb v. Block*, 34 Ga. 162. **Ill.**—*Buck v. Buck*, 60 Ill. 105; *Ex parte Bollig*, 31 Ill. 88, 96. **Me.**—*Androscoggin & K. R. Co. v. Androscoggin R. Co.*, 49 Me. 392. **Nev.** *Phillips v. Welch*, 11 Nev. 187. **N. Y.** *Robins v. Gorham*, 25 N. Y. 588; *Hawley v. Bennett*, 4 Paige 163; *People v. Compton*, 1 Duer 512. **Pa.**—*Tome's Appeal*, 50 Pa. 285. **W. Va.**—*Ruhl v. Ruhl*, 24 W. Va. 297.

Punishment as Showing Classification.—"It is not the fact of punishment but rather its character and purpose that often serves to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the

When the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, the proceeding is punitive or criminal, and the penalty is inflicted by way of punishment for the wrongful act and to vindicate the authority and dignity of the people, as represented by their judicial tribunals.⁶¹ This class of contempts has been further

court's order. For example: If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. Unless these were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to the opposite party than in contempt of the court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said in *In re Nevitt*, 117 Fed. Rep. 451, 'he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do. On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience. It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental ben-

efit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*." *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 421, 442, 443, 31 Sup. Ct. 492, 55 L. ed. 797.

61. U. S.—*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 448, 31 Sup. Ct. 492, 55 L. ed. 797; *Clay v. Waters*, 178 Fed. 385, 101 C. C. A. 645; *Wasserman v. United States*, 161 Fed. 722, 88 C. C. A. 582; *Merchants Stock, etc. Co. v. Board of Trade*, 187 Fed. 398; *In re Rice*, 181 Fed. 217. Conn.—*McCarthy v. Hugo*, 82 Conn. 262, 73 Atl. 778; *Church v. Pearne*, 75 Conn. 350, 53 Atl. 955. Ill.—*O'Brien v. People*, 216 Ill. 354, 368, 75 N. E. 108. Ky.—*Gordon v. Com.*, 141 Ky. 461, 133 S. W. 206; *French v. Com.*, 30 Ky. L. Rep. 98, 97 S. W. 427; *Wages v. Com.*, 13 Ky. L. Rep. 925. Mass.—*Hurley v. Com.*, 188 Mass. 443, 74 N. E. 677. Mo.—*In re Clark*, 208 Mo. 121, 106 S. W. 990; *Crow v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624. N. Y.—*People ex rel. Munsel v. Court of Oyer & Terminer*, 101 N. Y. 245, 4 N. E. 259; *Matter of Jones*, 126 App. Div. 112, 110 N. Y. Supp. 565; *People v. Newburger*, 98 App. Div. 92, 90 N. Y. Supp. 740; *People v. O'Brien*, 39 Misc. 110, 79 N. Y. Supp. 904. N. D.—*State v. McGahey*, 12 N. D. 535, 97 N. W. 865. Okla.—*Ex parte Gudenoge*, 2 Okla. Crim. 110, 100 Pac. 39. Wyo.—*Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464, 53 Pac. 299.

The New York code defines criminal contempt as follows: "A court of record has power to punish for a criminal contempt, a person guilty of either of the following acts, and no others: 1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to

subdivided into two grades: (1) Those that are committed in the face of the court, or direct contempts; and (2) those that are committed out of the court, or constructive contempts.⁶²

Punishable as Statutory Crimes.—In many jurisdictions the penal statutes provide that certain acts which they speak of as criminal contempts are punishable under the penal law, and in those cases the

interrupt its proceedings, or to impair the respect due to its authority. 2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings. 3. Wilful disobedience to its lawful mandate. 4. Resistance wilfully offered to its lawful mandate. 5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory. 6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein." Code Civ. Proc., §8.

In proceedings to punish for criminal contempt at least, a mere preponderance of evidence is not sufficient (*In re Buckley*, 69 Cal. 1, 10 Pac. 69; *State ex rel. Boston & M. Co. v. Clancey*, 30 Mont. 193, 76 Pac. 10); the rule of reasonable doubt being applicable (*U. S.—Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 444, 21 Sup. Ct. 492, 55 L. ed. 797. *Mont.—State ex rel. Boston & M. Co. v. Clancey*, *supra*. *N. J.—Barnett F. Co. v. Crowe* (N. J. Eq.), 74 Atl. 964. *N. Y.—Potter v. Low*, 16 How. Pr. 549. *W. Va. State v. Davis*, 50 W. Va. 100, 40 S. E. 331), as well as the rules of presumption of innocence and that a man cannot be compelled to testify against himself (*U. S.—Gompers v. Bucks Stove & Range Co.*, *supra*; *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746; *Sabin v. Fogarty*, 70 Fed. 482; *United States v. Jose*, 63 Fed. 951; *King v. Ohio R. Co.*, 7 Biss. 529, 14 Fed. Cas. No. 7,800. *Ga. Drakeford v. Adams*, 98 Ga. 722, 25 S. E. 833. *W. Va.—State v. Davis*, 50 W. Va. 100, 40 S. E. 331).

62. *City of Newport v. Newport Light Co.*, 92 Ky. 445, 17 S. W. 435; *Bridgewater v. Beaver Val. Tr. Co.*, 27 Pa. Co. Ct. 328. See *supra*, I.

For illustrations of acts committed

in the presence of the court, see *In re Savin*, Petitioner, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. ed. 150; *McCarthy v. Hugo*, 82 Conn. 262, 73 Atl. 778; *State v. Smith*, 49 Conn. 376.

The Indiana "statute marks the distinction between contempts of a purely criminal character, affecting the orderly conduct of the business of the courts, and their lawful process, and those 'for the enforcement of civil rights and remedies.' Burns' Ann. St. 1908, §§1040-1049; *Perry v. Pernet*, 165 Ind. 67, 74 N. E. 609; *Thistlethwaite v. State*, 149 Ind. 319, 49 N. E. 156; *Baldwin v. State*, 126 Ind. 24, 25 N. E. 820." *State v. Branner* (Ind.), 93 N. E. 70.

Authorities Reviewed.—In *People v. Wilson*, 64 Ill. 195, 225, the court said: "In 2 Hawkins, 220, contempts are classified, as contempts in the face of the court, and contemptuous words or writings concerning the court. Again, they are termed ordinary or extraordinary. The latter consists of abusive and scandalous words respecting the court. *Bouvier's Inst.* vol. 4, 385. According to *Blackstone*, book 4, 285, they may be committed either in the face of the court, or 'by speaking or writing contemptuously of the court or judges acting in their judicial capacity.' This court has defined them to be, direct, such as are offered in the presence of the court, while sitting judicially, or constructive, such, though not in its presence, as tend by their operation to obstruct and embarrass or prevent the due administration of justice. *Stuart v. The People*, 3 Scam. 395. Bishop thus defines constructive contempts: 'According to the general doctrine, any publication, whether by parties or strangers, which concerns a cause pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or reflects on the tribunal or its proceeding, or on the parties, the jurors or the counsel, may be

rules relating to criminal proceedings apply, and except for purposes of illustration are not treated herein.⁶³

Civil Contempts.—This class is remedial, as where the parties to a civil suit, having the right to demand that the other party do some act for their benefit, obtain an order from a proper tribunal commanding the act to be done, and upon refusal the court, by way of executing its orders, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit.⁶⁴

visited as a contempt.' Vol. 2, sec. 26."

63. Cal. Penal Code, §166; *Ex parte* Karlson (Cal.), 117 Pac. 447; French v. Com., 30 Ky. L. Rep. 98, 97 S. W. 427; *Wages v. Com.*, 30 Ky. L. Rep. 925; New York Penal Law §600; Judiciary Law, art. XIX.

64. U. S.—*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 448, 31 Sup. Ct. 492, 55 L. ed. 797; *Merchants Stock, etc. Co. v. Board of Trade*, 187 Fed. 398; *In re Rice*, 181 Fed. 217; *Clay v. Waters*, 178 Fed. 385, 101 C. C. A. 645; *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622. Ala.—*Ex parte* Dickens, 162 Ala. 272, 50 So. 218. Colo.—*Zobel v. People*, 49 Colo. 142, 111 Pac. 846. Ill.—*O'Brien v. People*, 216 Ill. 354, 368, 75 N. E. 108. Ind.—*Rooker v. Bruce*, 171 Ind. 86, 90, 85 N. E. 351. Ky.—*Gordon v. Com.*, 141 Ky. 461, 133 S. W. 206; *French v. Com.*, 30 Ky. L. Rep. 98, 97 S. W. 427; *Wages v. Com.*, 13 Ky. L. Rep. 925. Mo.—*Crow v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624. N. Y.—*People v. Court of Oyer & Terminer*, 101 N. Y. 245, 4 N. E. 259; *People v. O'Brien*, 39 Misc. 110, 78 N. Y. Supp. 904. Okla.—*Ex parte* Gudenoge, 2 Okla. Crim. 110, 100 Pac. 39. Utah.—*Davidson v. Munsey*, 29 Utah 181, 80 Pac. 743. Wyo.—*Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464, 53 Pac. 299. Can.—*Copeland-Chatterson Co. v. Systems Co.*, 16 Ont. L. R. 481, 11 Ont. W. R. 762.

"In this class of cases, while the authority of the court will be incidentally vindicated, its power has been called into exercise for the benefit of a private litigant and not in the public interest, merely. If imprisonment is ordered, it is not as a punishment, but to the end that the other party to the suit may obtain a remedy for the advancement of his own private interest and rights which he could not otherwise maintain." *O'Brien v. Peo-*

ple, 216 Ill. 354, 75 N. E. 108, *citing* *Loven v. People*, 158 Ill. 159, 42 N. E. 82; *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004; *People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038; *Leopold v. People*, 140 Ill. 552, 30 N. E. 348; *Crook v. People*, 16 Ill. 534.

The New York code makes the following contempts punishable civilly: Any "neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced," in either of the following cases: (1) By an attorney or other officer of the court selected to perform a ministerial service, for misbehavior or lawful neglect, or for disobedience to a lawful mandate of the court appointing him. (2) For putting in fictitious bail or surety. (3) For the non-payment of a sum, directed by the court to be paid in a case where by law no execution for the collection thereof can be issued, or for any other disobedience to a lawful mandate of the court. (4) For rescuing property in the custody of an officer without authority; for unlawfully detaining or preventing, or disabling, a witness, or party to an action while going to, remaining at, or returning from, the trial; and for any other unlawful interference with the proceedings. (5) Where a witness refuses to answer questions, or to be sworn, or refusing or neglecting to obey a subpoena. (6) For improper conduct while acting as juror. (7) For unlawfully acting as a judge or judicial officer after a cause has been removed from the court's jurisdiction. (8) In any other case, where an attachment or other proceeding to punish for a contempt, has been usually adopted to enforce a civil remedy of a party to an action or proceeding. N. Y. Code Civ. Proc., §14.

The California Code (C. C. P., §1209)

B. PROCEDURE.—1. Matters Relating to the Application.—a. Criminal Contempt.—(L) Direct Contempt.—When the act of contempt is committed in the immediate presence of the court, it may act of its own motion without any charge, formal or otherwise, being presented, without evidence, and solely upon facts within its own knowledge.⁶⁵

defines civil contempts. *Ex parte Karlson* (Cal.), 117 Pac. 447.

In **Kentucky**, there is no statute defining contempt. *French v. Com.*, 30 Ky. L. Rep. 98, 107, 97 S. W. 427.

Distinction Between Civil and Criminal Contempts.—"The main line of distinction between criminal and civil contempts is that the one is an offense against public justice, the penalty for which is essentially punitive, while the other is an invasion of private right, the penalty for which is redress or compensation to the suitor. But we also pointed out that this distinction, while marked and obvious, was not complete and perfect, since behind criminal contempts often stood some trace of private rights, and in civil contempts was occasionally to be found the element of punishment merely, as distinguished from the bare enforcement of a remedy." *King v. Barnes*, 113 N. Y. 476, 21 N. E. 182. See also *People v. Court of Oyer & Terminer*, 101 N. Y. 245, 4 N. E. 259.

"In the case of civil rights and remedies, we do not doubt that in courts of general jurisdiction, the strictness is not required that obtains in common law, or criminal contempts, and that in such cases the charge is sufficient when it is charged that there was an order, or judgment, and its violation. In this class of cases the evidence may be heard, while in criminal or common-law contempts, the defendant is punished or discharged, upon the return. *Burns' Ann. St.*, 1908, §1048; *Stewart v. State* (1894), 140 Ind. 7, 39 N. E. 508; *Anderson v. Indianapolis Co.* (1904), 34 Ind. App. 100, 72 N. E. 277, and cases there cited; *Ex parte Ah Men* (1888), 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; *Ex parte Fong Yen You* (1888), 19 Pac. 500; *Silvers v. Traverse* (1891), 82 Iowa 52, 47 N. W. 888, 11 L. R. A. 804; *Sweeney v. Traverse* (1891), 82 Iowa 720, 47 N. W. 889; *King v. Carpenter* (1888), 48 Hun 617, 2 N. Y. Supp. 121; *Andrew v. Andrew* (1889), 62 Vt. 495, 20 Atl.

817; *Curtis v. Gordon* (1890), 62 Vt. 340, 20 Atl. 820; *State v. Allen* (1896), 14 Wash. 684, 45 Pac. 644." *State v. Branner* (Ind.), 93 N. E. 70.

Refusal To Pay Over Money Civil Contempt.—"An attachment for contempt for disobedience of an order to pay money is a civil execution for the benefit of the injured party, though carried on in the form of a criminal process for contempt of the authority of the court." *Barnes v. Chicago Typographical Union*, 232 Ill. 402, 83 N. E. 932; *Buck v. Buck*, 60 Ill. 105.

Refusal of Attorney To Pay Money. An attorney may be punished as for a contempt for refusing to comply with an order of the court directing him to pay money into court. *In re Paschal*, 10 Wall. (U. S.) 483, 19 L. ed. 992.

65. **U. S.**—*Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. ed. 405. **Ala.**—*Coleman v. Roberts*, 113 Ala. 323, 21 So. 449, 59 Am. St. Rep. 111, 36 L. R. A. 84. **Ark.**—*Harrison v. State*, 35 Ark. 458. **Cal.**—*Lambertson v. Superior Court*, 151 Cal. 458, 91 Pac. 100, 11 L. R. A. (N. S.) 619. **Conn.**—*Goodhart v. State*, 78 Atl. 853. **Ill.**—*Tolman v. Jones*, 114 Ill. 147, 28 N. E. 464. **Ind.**—*Holman v. State*, 105 Ind. 513, 5 N. E. 556; *Ex parte Wright*, 65 Ind. 504, 508; *Mahoney v. State*, 33 Ind. App. 655, 72 N. E. 151, 104 Am. St. Rep. 276. **Ia.**—*State v. Jordon*, 72 Iowa 377, 34 N. W. 285. **Kan.**—*State v. Anders*, 64 Kan. 742, 68 Pac. 668. **Ky.** *In re Woolley*, 11 Bush 95. **Me.**—*Androscoggin, etc., R. Co. v. Androscoggin R. Co.*, 49 Me. 392. **Mass.**—*Hurley v. Com.*, 188 Mass. 443, 74 N. E. 677. **Mich.**—*In re Wood*, 82 Mich. 75, 45 N. W. 1113. **Mo.**—*In re Clark*, 208 Mo. 121, 106 S. W. 990; *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79. **N. H.** *State v. Matthews*, 37 N. H. 453. **N. J.**—*In re Cheeseman*, 49 N. J. L. 115, 6 Atl. 513, 60 Am. Rep. 596. **Neb.** *Gordon v. State*, 73 Neb. 221, 102 N. W. 458; *Ogden v. State*, 3 Neb. (Unof.) 886, 93 N. W. 203. **N. Y.**—*Matter of*

When it is necessary to issue process to bring the offender before the court, such process as the circumstances of the case may require can issue. In some cases, as for failure to obey a subpoena, an attachment may issue, in the first instance, but its issuance is not an absolute requirement, and the court may in its discretion issue a citation or order to show cause.⁶⁶ A citation when timely made does not require an affidavit to support it.⁶⁷

Where the statute makes a contempt in the presence of the court a penal offense, proceedings may be by information and warrant.⁶⁸

Teitelbaum, 84 App. Div. 351, 82 N. Y. Supp. 387; *Barnes v. Albany Co. Ct. Sessions*, 82 Hun 242, 31 N. Y. Supp. 373, 63 N. Y. St. 821. N. C.—*In re Oldham*, 89 N. C. 23, 45 Am. Rep. 673; *State v. Woodfin*, 27 N. C. 199, 42 Am. Dec. 161. N. D.—*State v. Crum*, 7 N. D. 299, 74 N. W. 992. Okla. *Burke v. Territory*, 2 Okla. 499, 37 Pac. 829. Va.—*Burdett v. Com.*, 103 Va. 838, 48 S. E. 878, 68 L. R. A. 251, 262. W. Va.—*State v. Gibson*, 33 W. Va. 97, 10 S. E. 58. Wis.—*Emerson v. Huss*, 127 Wis. 215, 106 N. W. 518; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299.

The Indiana statute (Burns', 1901, §1023) provides that no written charge need be filed in direct contempts, but that the court or the reporter take down the remarks or other conduct constituting the contempt, together with any denial or answer that may be made thereto, and the court shall thereupon pronounce its judgment. *Mahoney v. State*, 33 Ind. App. 655, 72 N. E. 151, 104 Am. St. Rep. 276.

66. Ill.—*Ferriman v. People*, 128 Ill. App. 230, no information, affidavit or interrogatories are ever necessary to be filed for a contempt of this character. Kan.—*State v. Rose*, 78 Kan. 600, 97 Pac. 788. N. H.—*State v. Matthews*, 37 N. H. 450, an attachment may issue in the first instance for a constructive contempt.

May Proceed by Attachment in First Instance.—*State v. Matthews*, 37 N. H. 450; 4 Black. Com. 286.

Order to show cause or warrant of arrest may issue as court elects. *State v. Sieber*, 49 Ore. 1, 88 Pac. 313.

The court may, in the exercise of a sound discretion, dispense with the order to show cause and proceed by attachment in the first instance. *Ex parte Mason*, 16 Mo. App. 41, citing, U. S. *United States v. Bollman*, 1 Cranch C.

C. 373, 24 Fed. Cas. No. 14,622. Ga. *In re Stephens*, 1 Ga. 584. Ill.—*Petrie v. People*, 40 Ill. 334. N. J.—*State v. Ackerson*, 25 N. J. L. 209; *State v. Raborg*, 5 N. J. L. 628. Vt.—*Ex parte Langdon*, 25 Vt. 680.

In Oregon, an affidavit is a prerequisite to the institution of the proceeding. *State v. Sieber*, 49 Ore. 1, 88 Pac. 313.

Form of Attachment.—“When an attachment is issued to enforce an appearance or an answer, it should specify the suit in which it is issued; and the object of the process; or if the body of the writ be general, the name of the suit and the cause of the attachment should be indorsed upon it; . . . but when it is issued for contempt in disobeying an injunction, no specification or indorsement setting forth the cause of the proceeding is necessary.” *State v. Matthews*, 37 N. H. 450, 454. See also, *Matter of Vanderbilt*, 4 Johns. Ch. (N. Y.) 57.

67. U. S.—*Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. ed. 405. Cal.—*Lamberson v. The Superior Court*, 151 Cal. 458, 91 Pac. 100, 11 L. R. A. (N. S.) 619 (the filing of contemptuous affidavits is a contempt in the presence of the court); *McCormick v. Sheridan*, 20 Pac. 24. Colo.—*Hughes v. People*, 5 Colo. 436.

Compare In re Foote, 76 Cal. 543, 18 Pac. 678, in which, however, fifty days had elapsed from the time the alleged contumacious conduct occurred, and the order in contempt was made without notice of any kind, and it was held that through laches the court had lost jurisdiction.

68. *McCarthy v. Hugo*, 82 Conn. 262, 82 Atl. 778.

The Iowa statute “provides for the filing of an affidavit or information, and the issuance of a rule or warrant to secure the attendance of the alleged contemnor. Upon being brought in,

When the charge is direct contempt, the statement of the court as to what occurred must be treated as importing absolute verity and no counter statement as to the occurrence will be received.⁶⁹

Refusal To Obey Subpoena To Testify. — Where the contempt consists of a refusal to obey a subpoena, the application is based on the subpoena, and the return or affidavit of service.⁷⁰

(II.) **Indirect or Constructive Contempt.** — If the proceeding be for a civil, indirect or constructive criminal contempt, the offender must as a rule be brought before the court by a rule or some other sufficient process based on affidavit,⁷¹ it not being necessary that the application

the accused may, at his option, make a written explanation of his conduct under oath, which must be filed and preserved. If, upon the hearing, the court act upon evidence given by others, such evidence must be in writing, and be filed and preserved; if upon its own knowledge in the premises, a statement of the facts must be entered on the records, or be filed and preserved where the court keeps no record. If the accused be adjudged guilty, and is committed, the warrant must state the particular facts and circumstances on which the court acted, and whether the same was within the knowledge of the court or was proved by witnesses." *Drady v. Given*, 126 Iowa 345, 102 N. W. 115.

69. *Ferriman v. People*, 128 Ill. App. 230, 234, citing, 3 *ENCYCLOPEDIA OF EVIDENCE*, p. 446; *Holman v. State*, 105 Ind. 513, 5 N. E. 556.

70. *Ferriman v. People*, 128 Ill. App. 230.

71. *Ark.*—*York v. State*, 89 Ark. 72, 115 S. W. 948. *Cal.*—*In re McCarty*, 154 Cal. 534, 98 Pac. 540; *O'Neill v. Day*, 152 Cal. 357, 92 Pac. 856; *Ex parte Creely*, 8 Cal. App. 713, 97 Pac. 766. *Colo.*—*Kirby v. Chicago, R. I. & P. R. Co.*, 116 Pac. 150; *Stidger v. People*, 46 Colo. 49, 102 Pac. 745. *Conn.*—*Gorham v. New Haven*, 82 Conn. 153, 72 Atl. 1012. *Ill.*—*Flannery v. People*, 225 Ill. 62, 80 N. E. 60; *Franklin Union v. People*, 220 Ill. 355, 382, 77 N. E. 176; *Mears, Slayton Lumb. Co. v. District Council*, 156 Ill. App. 327. *Ind.*—*Rucker v. State*, 170 Ind. 635, 85 N. E. 356; *Saunderson v. State*, 151 Ind. 550, 52 N. E. 151. *Kan.*—*In re Nickell*, 47 Kan. 734, 28 Pac. 1076, 27 Am. St. Rep. 315. *Ky.*—*City of Newport v. Newport Light Co.*, 92 Ky. 445, 17 S. W. 435; *French v. Com.*, 30 Ky. L. Rep. 98,

97 S. W. 427. *La.*—*State ex rel. Stewart v. Reid*, 118 La. 827, 43 So. 455. *Mass.*—*Hurley v. Com.*, 188 Mass. 443, 74 N. E. 677. *Mich.*—*In re Wood*, 82 Mich. 75, 45 N. W. 1113. *Minn.*—*State v. Ives*, 60 Minn. 478, 62 N. W. 831. *Miss.*—*Durham v. State*, 97 Miss. 549, 52 So. 627. *Mo.*—*State v. Shepherd*, 177 Mo. 205, 76 S. W. 79; *Ex parte Mason*, 16 Mo. App. 41 (where the court explained at length the usual practice). *Mont.*—*State v. District Court*, 33 Mont. 115, 82 Pac. 450. *Neb.*—*Gordon v. State*, 73 Neb. 221, 102 N. W. 458. *Nev.*—*Ex parte Hedden*, 29 Nev. 352, 374, 90 Pac. 737; *Phillips v. Welch*, 12 Nev. 158. *N. H.*—*State v. Matthews*, 37 N. H. 450. *N. Y.*—*Mayor, etc., v. New York & S. I. Ferry Co.*, 64 N. Y. 622; *Dunlop v. Mulry*, 85 App. Div. 498, 83 N. Y. Supp. 477, 40 Misc. 131, 81 N. Y. Supp. 260 (notice of motion improper). *Tex.*—*Ex parte Foster*, 44 Tex. Crim. 423, 71 S. W. 593, 100 Am. St. Rep. 866, 60 L. R. A. 631. *Va.*—*Burdett v. Com.*, 103 Va. 838, 48 S. E. 878, 68 L. R. A. 251. *Wash.*—*State v. Pendergast*, 39 Wash. 132, 81 Pac. 324; *State v. Peterson*, 29 Wash. 571, 70 Pac. 71. *Wyo.*—*Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464, 53 Pac. 299.

And see *Hammond Lumb. Co. v. Sailors' Union*, 149 Fed. 577.

In Colorado, an affidavit substantially as provided for by §356, Rev. Code (§322, Mill's Ann. Code) must be filed before the court has jurisdiction to act. *Kirby v. Chicago, R. I. & P. R. Co. (Colo.)*, 116 Pac. 150; *Thomas v. People*, 14 Colo. 254, 23 Pac. 326, 9 L. R. A. 569.

In Indiana, the legislature, in prescribing the procedure for an indirect contempt, "has provided (§1047, Burns', 1908, §1012, R. S., 1881), that in all cases the person charged shall

be instituted by petition.⁷² Although if the contemnor be present in court, it is held that the court may dispense with the issuance of a rule.⁷³

It has been held that a proceeding to punish for other than direct contempt is a distinct and independent proceeding, as much so as a new suit, and necessitates the giving of notice of all proceedings.⁷⁴

When the proceeding is based on the violation of a court order, the papers on which the application is based must show upon their face the acts complained of as constituting the offense, and such acts

be entitled, before answering or punishment, to have served upon him a rule or order of the court clearly and distinctly setting forth the facts which are claimed as constituting the contempt, and specifying the time and place of such facts with such certainty as will inform the defendant of the nature and circumstance of the charge against him, and no such rule shall issue until the facts alleged therein shall have been brought to the knowledge of the court by an information duly verified by the oath of some responsible person." *Rucker v. State*, 170 Ind. 635, 639, 85 N. E. 356.

Under the Indiana statute the accuser must "clearly and distinctly state the facts relied on as the foundation of the proceeding, and, before he is entitled to a rule against the accused, he must, in his information, clearly show that the authority of the court has been assailed in some way tending to its prejudice, or to a harmful interference with the administration of justice." *Rucker v. State*, 170 Ind. 635, 639, 85 N. E. 356, citing, *Snyder v. State*, 151 Ind. 553, 52 N. E. 152; *State v. Rockwood*, 159 Ind. 94, 64 N. E. 592; *Cheadle v. State*, 110 Ind. 303, 11 N. E. 426, 59 Am. Rep. 199; *Worland v. State*, 82 Ind. 49; *McConnell v. State*, 46 Ind. 298.

In *Kentucky*, the practice is to proceed by rule. "It is not necessary that the rule should conform to the formalities of pleading as required where a prosecution is proceeding by indictment, but only that the rule, as well as the information upon which it is based, should specifically state the facts constituting the contempt charged." *French v. Com.*, 30 Ky. L. Rep. 98, 97 S. W. 427.

Order To Show Cause.—In *In re Shay* (Cal.), 117 Pac. 442, the proceeding was by order to show cause which set

out in full the facts upon which the proceedings were based.

Naming Several Witnesses in One Rule.—When the contempt charged consists of practically one transaction, and the acts were all means to the one end and so connected as to be inseparable, all the parties implicated may be joined in the one rule. *French v. Com.*, 30 Ky. L. Rep. 98, 102, 97 S. W. 427.

As to proceeding against parties jointly, see also, *In re Fellerman*, 149 Fed. 244.

Attachment.—"If the contempt be committed elsewhere than in the presence of the court, the process for bringing the offender before them for punishment is called an attachment." *State v. Matthews*, 37 N. H. 450.

Use of Ex Parte Affidavits.—*Ex parte* affidavits may be used in procuring the order to show cause if the affiants, on the return of the order, are offered for cross-examination. *Seastream v. New Jersey Exhibition Co.*, 69 N. J. Eq. 15, 59 Atl. 914.

The failure to base proceedings on an affidavit is waived by the contemnor being sworn and making answer to the contempt. *In re Odum*, 133 N. C. 250, 45 S. E. 569.

In the absence of a statutory provision requiring it, this does not require personal service of the papers or the application to be personally served on the alleged contemnor. *Pitt v. Davison*, 37 N. Y. 235, 241.

72. *Franklin Union v. People*, 220 Ill. 355, 382, 77 N. E. 176; *Mears, Slayton Lumb. Co. v. District Council*, 156 Ill. App. 327.

73. Ill.—*Oster v. People*, 192 Ill. 473, 61 N. E. 469, 56 L. R. A. 462. Wash.—*State v. Nicoll*, 40 Wash. 517, 82 Pac. 895. W. Va.—*State v. Hansford*, 43 W. Va. 773, 28 S. E. 791.

74. *State v. Matthews*, 37 N. H.

must come within the legal definition of contempt.⁷⁵ The affidavit upon which proceedings in constructive contempt are based is jurisdictional in its nature, and must clearly show a state of facts which give the court jurisdiction.⁷⁶

450; *State v. Sieber*, 49 Ore. 1, 88 Pac. 313.

75. **Cal.**—*Frowley v. Superior Court*, 158 Cal. 220, 110 Pac. 817; *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853. **Colo.**—*Kirby v. Chicago, R. I. & P. R. Co.*, 116 Pac. 150. **Ill.**—*MacKenzie v. MacKenzie*, 238 Ill. 616, 87 N. E. 848; *Franklin Union v. People*, 220 Ill. 355, 382, 77 N. E. 176 (when it is charged an order is violated the affidavit must show the particulars of the violation). **Ind.**—*State v. Branner*, 93 N. E. 70; *Rucker v. State*, 170 Ind. 635, 85 N. E. 356. **Ia.**—*Jordan v. Wapello County Circ. Ct.*, 63 Iowa 177, 28 N. W. 548. **Mich.**—*In re Toepel*, 139 Mich. 85, 102 N. W. 369; *Montgomery v. Palmer*, 100 Mich. 436, 59 N. W. 148. **Mont.**—*State v. District Court*, 37 Mont. 590, 97 Pac. 1032. **Neb.**—*Herdman v. State*, 54 Neb. 626, 74 N. W. 1097. **Nev.**—*Cline v. Langan*, 31 Nev. 239, 101 Pac. 553; *Lutz v. District Court*, 29 Nev. 152, 86 Pac. 445. **N. Y.**—*Dunlop v. Mulry*, 85 App. Div. 498, 83 N. Y. Supp. 477, 40 Misc. 131, 81 N. Y. Supp. 260. **N. D.**—*State v. Root*, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568. **Ore.**—*Trullinger v. Howe*, 113 Pac. 4; *State v. Sieber*, 49 Ore. 1, 88 Pac. 313 (affidavit must make out a *prima facie* case). **Pa.**—*Chew's Estate*, 3 W. N. C. 392. **S. D.**—*State v. Sweetland*, 3 S. D. 503, 54 N. W. 415. **Tenn.**—*Scott v. State*, 109 Tenn. 390, 71 S. W. 824. **Utah.**—*Young v. Cannon*, 2 Utah 560. **Wash.**—*State v. Peterson*, 29 Wash. 571, 70 Pac. 71. 76. *State v. Sweetland*, 3 S. D. 503, 54 N. W. 415, citing, *Batchelder v. Moore*, 42 Cal. 412. See also, *Colo. Thomas v. People*, 14 Colo. 254, 23 Pac. 326. **Ind.**—*McConnell v. State*, 46 Ind. 298. **Nev.**—*Phillips v. Welch*, 12 Nev. 158.

It is not enough to charge that a published article is in contempt of court. "The informant is required to exhibit a class of facts that will of themselves, from their ordinary meaning, establish the contempt." *Rucker v. State*, 170 Ind. 635, 642, 85 N. E. 356.

In California.—"It has been held by this court and other courts, with entire unanimity, that when the contempt is a constructive contempt, namely, committed without the presence of the court, the affidavit of facts forming the basis of judicial action must show upon its face a case of contempt; and, if it does not, then the court is wanting in jurisdiction, and the order of contempt is void." *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372.

"The affidavit or affidavits upon which the contempt proceeding is based constitute the complaint, and unless they, upon their face charge facts constituting a contempt, the court is without jurisdiction to proceed." It is immaterial in such a case what was shown "upon the hearing, or specified and found by the court in its decree adjudging the accused guilty of contempt. The proceedings are void *ab initio*." *Hutton v. Superior Court*, 147 Cal. 156, 81 Pac. 409.

In matrimonial actions, under the California statute, it is sufficient if the original order recite that the petitioner had the ability to pay the sum ordered to be paid by him, and it is not necessary for the affidavit initiating the contempt proceeding to also contain such allegation, it being sufficient to allege failure to comply with the order. *In re McCarty*, 154 Cal. 534, 98 Pac. 540. This rule is not limited to matrimonial actions, but is true of all cases of constructive contempt where obedience to an order is required. *Code Civ. Proc. (Cal.)*, §1211; *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853; *Hutton v. Superior Court*, 147 Cal. 156, 81 Pac. 409.

Allegation of Intent.—Upon a proceeding to punish for violating an order, it is essential to allege an intent to commit a forbidden act. "The absence of any allegation in this behalf renders the affidavit fatally defective, and the subsequent proceedings absolutely void." *Hutton v. Superior Court*, 147 Cal. 156, 81 Pac. 409.

Officers of Corporation.—Upon an application to punish the president and

Violation of Injunctive Order or Decree.—In order to predicate a contempt proceeding on an injunctive order or decree, the order must have been entered,⁷⁷ and must have been definite and certain in its provisions.⁷⁸

The affidavit is sufficient if it sets out the acts done in violation of the order and avers that the offender had knowledge of the terms and conditions of the order,⁷⁹ actual service of the order not being absolutely necessary.⁸⁰ And a violation may be punished though the party charged with such violation was not a party to the proceeding.⁸¹ It is not required that the facts be set out with the same particularity that would be required of an indictment, nor need a specific bill of particulars be filed.⁸² Personal knowledge of the facts by the affiant need not be shown where an affidavit is the basis of the

general manager of a corporation, as well as its vice-president and assistant general manager, an allegation in the affidavit, that "affiant further says that he is informed, and so alleged it to be a fact, that H. G. Otis is the president and general manager of the Times-Mirror Company, the publishers and printers of the said Los Angeles Daily Times, and that he was such president and general manager at all of the times herein mentioned, and that Harry Chandler is the vice-president and assistant general manager of said Times-Mirror Company, and that he was such vice-president and assistant general manager at all of the times herein mentioned," is not sufficient. "An officer of a corporation is not criminally answerable for any act of a corporation in which he is not personally a participant, and it does not follow as a legal conclusion that the manager or assistant manager of a corporation engaged in the publication of a daily newspaper acts at all times, or even at any time, as its editor. To make the petitioners liable in contempt for matter appearing in the Times, it was necessary to show, and, therefore essential to charge, that they personally caused, or, being in control, at least permitted, the publication of the articles in question." *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853.

Amendment.—An affidavit defective for want of certainty may be amended with court's consent (*Back v. State*, 75 Neb. 603, 612, 106 N. W. 787; *State v. Sieber*, 49 Ore. 1, 88 Pac. 313; *State*

v. Lavery, 31 Ore. 77, 49 Pac. 852); but not to affect jurisdictional matter (*Back v. State*, 75 Neb. 603, 106 N. W. 787).

77. *Ex parte Foster*, 44 Tex. Crim. 423, 71 S. W. 593, 100 Am. St. Rep. 866, 60 L. R. A. 631.

78. *State v. Dowdy*, 86 Ark. 140, 109 S. W. 1175.

79. Cal.—*Frowley v. Superior Court*, 158 Cal. 220, 110 Pac. 817; *Ex parte Ah Men*, 77 Cal. 198, 19 Pac. 380; *Hedges v. Superior Court*, 67 Cal. 405, 7 Pac. 767. Ia.—*Silvers v. Traverse*, 82 Iowa 52, 47 N. W. 888, 11 L. R. A. 804. Ore.—*State v. Sieber*, 49 Ore. 1, 9, 88 Pac. 313; *State v. Lavery*, 31 Ore. 77, 49 Pac. 852.

80. *O'Brien v. People*, 216 Ill. 354, 75 N. E. 108; *Mears, Slayton Lumb. Co. v. District Council*, 156 Ill. App. 327.

81. *O'Brien v. People*, 216 Ill. 354, 75 N. E. 108; *Mears, Slayton Lumb. Co. v. District Council*, 156 Ill. App. 327.

82. *Franklin Union v. People*, 220 Ill. 355, 382, 77 N. E. 176; *O'Brien v. People*, 216 Ill. 354, 368, 75 N. E. 108.

Bill of Particulars.—A person charged with contempt is not entitled to a specific bill of particulars. *O'Brien v. People*, 216 Ill. 354, 368, 75 N. E. 108.

In Nebraska, it is held that the rules of strict construction applicable in criminal proceedings govern. *Back v. State*, 75 Neb. 603, 613, 106 N. W. 787; *Herdman v. State*, 54 Neb. 626, 74 N. W. 1097.

proceeding,⁸³ unless the contrary be required by statute.⁸⁴ But some jurisdictions require that the material allegations must be positive and cannot be alleged on information and belief, even in the absence of a statute.⁸⁵

On an application to punish for an indirect contempt, a motion to discharge the rule, entered in the first instance, tests the sufficiency of the information upon which the rule was based.⁸⁶

b. *Civil Contempt*.—(L) **General Observations**.—(A.) **SERVICE OF ORDER ON WHICH CONTEMPT IS BASED**.—In order to punish a party for failure to comply with an order of court, it is necessary that such order should have been served on the alleged contemnor personally.⁸⁷ Appearance of the party in answer to the motion to punish for contempt is no waiver of the failure to make personal service of the order he is accused of violating.⁸⁸

(B.) **DEMAND FOR COMPLIANCE**.—It is also held that the affidavit must aver that a demand has been made on the contemnor requiring him

83. **Ariz.**—*Hughes v. Territory*, 10 Ariz. 119, 85 Pac. 1058, 6 L. R. A. (N. S.) 572. **Cal.**—*In re Acock*, 84 Cal. 50, 23 Pac. 1029. **Ia.**—*Jordan v. Circuit Court of Wapello County*, 69 Iowa 177, 28 N. W. 548. **Mont.**—*State v. District Court*, 37 Mont. 590, 97 Pac. 1032.

In **Oregon**, an affidavit made on information and belief has been held insufficient to confer jurisdiction. *State v. Conn*, 37 Ore. 596, 62 Pac. 289. See also, *State v. Sieber*, 49 Ore. 1, 88 Pac. 313. *Compare, State v. McKinnon*, 8 Ore. 487, where the affidavit was on information and belief, but no objection was interposed.

Waiver of Objection.—"The objection that the charge of a violation of the order upon which the rule issued was made on information and belief, supported only by an affidavit of the same character, comes too late, when the alleged contemnor, without raising that point, admits the act charged, and defends himself on the ground that the act was done in ignorance of the existence of the order. The exaction of positive allegations to support the rule to show cause is intended to protect the court from the improvident institution of contempt proceedings and useless investigation as to the breach of their orders which the proof may show were not violated. The reason of the rule ceases when the respondent answers, admitting the act charged, and the omission to make a positive charge in the beginning, is, therefore, not of

the slightest consequence in the subsequent phases of the prosecution." *In re Rice*, 181 Fed. 217, 220.

84. *Jordan v. Circuit Court of Wapello County*, 69 Iowa 177, 28 N. W. 548.

85. **Mich.**—*Russell v. Wayne Circ. Judge*, 136 Mich. 624, 99 N. W. 864; *In re Wood*, 82 Mich. 75, 45 N. W. 1113. **Neb.**—*Herdman v. State*, 54 Neb. 626, 74 N. W. 1097. **N. D.**—*State v. Heidt*, 127 N. H. 72; *State v. Newton*, 16 N. D. 151, 112 N. W. 52. **S. D.**—*Freeman v. Huron*, 8 S. D. 435, 66 N. W. 928. **Utah.**—*Young v. Cannon*, 2 Utah 560.

Where the supporting affidavits stating all the necessary facts are positive, the fact that the affidavit of the accuser is on information and belief is immaterial. *Davidson v. Munsey*, 29 Utah 181, 80 Pac. 743.

86. *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199; *McConnell v. State*, 46 Ind. 298.

87. *Tebo v. Baker*, 77 N. Y. 33; *Curtis v. Powers*, 130 N. Y. Supp. 914; *Grant v. Greene*, 121 App. Div. 756, 106 N. Y. Supp. 532.

88. *Curtis v. Powers*, 130 N. Y. Supp. 914. *Compare, Harris v. Harris*, 156 Ill. App. 336, holding that where the contemnor submitted himself to the jurisdiction of the court and was present personally and by counsel when the committal order was entered, the only question before the court is the validity of the order.

to comply with the order.⁸⁹ Personal service of notice of the application to punish has been held indispensable.⁹⁰ There is, however, authority that personal notification is not absolutely necessary, and in the absence of a statute specifying in what way service of the papers on application to punish for contempt must be made, service on his attorney has been held sufficient.⁹¹ In any event such objection is waived by the appearance of the alleged contemnor upon the motion without objection.⁹² It has, however, been held that where it appears that the contemnor failed to receive notice of the contempt proceedings or that copies of the papers on the proceedings were not served on him, the court is without jurisdiction and the order punishing for the contempt cannot be sustained.⁹³

(C.) NECESSITY OF EXHAUSTING OTHER REMEDIES. — It is not a prerequisite to the punishment of a party for contempt that the party in whose interest the contempt proceeding is instituted shall have exhausted all other remedies for making good the damage.⁹⁴

(II.) Proceeding by Petition. — Where the proceeding is instituted by petition the court may hear the sworn testimony of witnesses in open court for the purpose of determining whether the facts constituted a

89. *State v. Sieber*, 49 Ore. 1, '9, 88 Pac. 313; *State v. Downing*, 40 Ore. 309, 58 Pac. 863, 66 Pac. 917.

90. *Pitt v. Davison*, 37 N. Y. 235; *Curtis v. Powers*, 130 N. Y. Supp. 914.

91. *Pitt v. Davison*, 37 N. Y. 235.

The reason for this distinction is that in the proceeding to enforce a civil remedy, "the party in default has already had the opportunity of contesting his liability to perform what the proceeding seeks to compel him to perform, and such proceeding is, in effect, but an execution of the judgment or order against him. There is in the nature of the proceeding, as carried out in this case, no more reason for denouncing it as an infraction of the principle that no person shall be condemned unheard, than in every case where an execution may issue upon a judgment against the person of the defendant. Judgment in an action for tort, for example, is obtained against a defendant, whereby he is condemned to pay the plaintiff a specific sum of money. In order to compel him to pay the money, he is liable to arrest and imprisonment, and this, without any opportunity to show cause against it. It is the consequence of his non-payment of the money, which, after personal notice, and the opportunity to contest the claim, he has been adjudged to pay. He, therefore, is not condemned unheard. The exe-

cution against his person is in pursuance of the judgment which has been rendered against him by the court, after personal notice of the claim, and full opportunity to be heard against it." *Pitt v. Davison*, 37 N. Y. 235.

An objection that "in the order to show cause the defendant was required to show cause 'why an attachment should not be issued against him, and he be punished for his alleged contempt and misconduct in not having conveyed,' etc., while the statute does not authorize an order to show cause why an attachment should not issue, but only 'why he should not be punished for alleged misconduct,'" The defendant not having been misled, such objection is not material. *Pitt v. Davison*, 37 N. Y. 235.

92. *Curtis v. Powers*, 130 N. Y. Supp. 914.

93. *Mears, Slayton Lumb. Co. v. District Council of Chicago*, 156 Ill. App. 327.

94. *In re Goslin*, 95 App. Div. 407, 88 N. Y. Supp. 670, affirmed, 180 N. Y. 505, 72 N. E. 1142; *Rowley v. Feldman*, 84 App. Div. 400, 82 N. Y. Supp. 679; *People ex rel. Surety Co. v. Anthony*, 7 App. Div. 132, 40 N. Y. Supp. 279, affirmed, 151 N. Y. 620, 45 N. E. 1135; *Matter of Morris*, 10 N. Y. St. 50. See also, *Newell v. Hall*, 74 App. Div. 278, 77 N. Y. Supp. 610.

sufficient foundation on which to base a charge of contempt, and to award an attachment necessary to bring the contemnor before the court.⁹⁵

c. *Matter Applicable Generally.*—In both criminal and civil contempt proceedings, there must be allegation and proof that the defendant was guilty of contempt and a prayer that he be punished.⁹⁶

d. *Entitling Proceeding.*—The practice of entitling as a distinct proceeding is not universal.⁹⁷ Though the prosecution is really an

95. *Oster v. People*, 192 Ill. 473, 61 N. E. 469.

96. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 448, 31 Sup. Ct. 492, 55 L. ed. 809.

It is not necessary to attach to the affidavit a copy of the order or judgment claimed to be violated. *State v. Walker*, 78 Kan. 680, 97 Pac. 862.

97. Cal.—*Ex parte Ah Men*, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263.

Ia.—*Dermedy v. Jackson*, 147 Iowa 620, 125 N. W. 228, title not material. Mass.—*Winslow v. Nayson*, 113 Mass. 411. N. Y.—*Typothetae of New York v. Union No. 6*, 117 N. Y. Supp. 144. Vt.—*Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817.

See *Hake v. People*, 230 Ill. 174, 82 N. E. 561, for rule in chancery.

“Though sometimes entitled in the name of the People *ex rel.*, etc., it may properly be in the names of the parties to the original bill.” *People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038; *People ex rel. Young v. Craft*, 7 Paige (N. Y.) 325.

If instituted against one not a party to the suit preliminary proceedings should be entitled as of that suit, and later papers, if guilt established, as in a suit by the government. *Employer's T. Co. v. Teamster's Joint Council*, 141 Fed. 679. It is otherwise where the contempt is the act of a party to the cause. In such a case it is a criminal misdemeanor and the proceeding is independent of the action in which the writ issued. *Bullock, etc., Co. v. Westinghouse, etc., Co.*, 129 Fed. 105, 63 C. C. A. 607. But it is not material, in such a case, how the proceeding is entitled. *Robinson v. People*, 129 Ill. App. 527; *Hughes v. Territory*, 10 Ariz. 119, 85 Pac. 1058, 6 L. R. A. (N. S.) 572. Should be entitled in name of people. *Kanter v. Clerk*, 108 Ill. App. 287; *Burdette v. Munger*, 144 Ill. App. 164. *Contra*,

Manning v. Mercantile Securities Co., 242 Ill. 584, 90 N. E. 238.

Where the proceeding is for the purpose of punishing for an act committed out of the presence of the court and for the purpose and benefit of a private litigant, the application for the attachment may be made and filed in the original cause, though the contempt proceeding will be a distinct case criminal in its nature, and may properly be docketed and carried on as such. *Lester v. People*, 150 Ill. 408, 424, 23 N. E. 387, 37 N. E. 1004, *citing*, *New Orleans v. New York Mail S. S. Co.*, 20 Wall. (U. S.) 387, 392, 22 L. ed. 354; *Ex parte Kearney*, 7 Wheat. (U. S.) 38, 42, 5 L. ed. 391; *Ingraham v. People*, 94 Ill. 428; *Cartwright's Case*, 114 Mass. 230.

“It is urged by the appellant that the court below was without jurisdiction, because the proceedings as instituted were not in the name of the territory, but were entitled, ‘In the Matter of the Petition of Albert Steinfeld for an Order Declaring L. C. Hughes Guilty of Criminal Contempt.’ The record shows that the proceedings were commenced by a petition so entitled, and were carried on under such title, through the proceedings until the order of attachment was issued, which order and the subsequent judgment were entitled, ‘The Territory of Arizona against L. C. Hughes.’ In the absence of statute or rule of court, there seems to be no uniform practice in the matter in the various jurisdictions. Generally, the proceedings, at least, after the attachment or order to show cause has issued, seem to be entitled to the name of the people. We incline to the belief that the better form is to entitle the proceedings, ‘In the Matter of the Proceedings against _____ for Contempt of Court,’ rather than to entitle them in the name of the territory; but the

incident of the principal suit, the practice is to entitle and file the papers in the original case.⁹⁸ A proceeding for a criminal contempt is more appropriately prosecuted in the name of the people.⁹⁹ The question, however, has been said to be unimportant,¹ and the improper entitling of the cause will not change the nature or character of the proceedings and render that criminal which was otherwise a civil proceeding, or *vice versa*.² Nor is a defect in the title of the cause jurisdictional.³ And like all questions of irregularity in process or

matter of the title of the petition or of the proceedings is unimportant, and not one that affects the jurisdiction of the court. . . . *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445." *Hughes v. Territory*, 10 Ariz. 1058, 85 Pac. 1058, 6 L. R. A. (N. S.) 572.

In *Oregon*, contempt proceedings "must be prosecuted in the name of the state or in its name on the relation of a private party. *B. & C. Comp.*, §667." *State v. Sieber*, 49 Ore. 1, 88 Pac. 313.

In *Wyoming*, while it is held preferable to entitle a contempt proceeding "in the cause or proceeding out of which it arose," the court declines to say that in the absence of a statute as to how the proceeding should be entitled, it cannot be brought on the relation of a party or in the name of the state. *Porter v. State*, 16 Wyo. 131, 92 Pac. 385. See also, *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464, 474, 53 Pac. 299.

98. *Ga.*—*Falls City Mfg. Co. v. Athens Coca-Cola Bottling Co.*, 130 Ga. 559, 61 S. E. 230. *Ill.*—*Manning v. Mercantile Securities Co.*, 242 Ill. 584, 90 N. E. 238; *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375. *Ia.*—*Ferguson v. Wheeler*, 126 Iowa 111, 101 N. W. 638. *Mass.*—*Cartwright's Case*, 114 Mass. 230. *S. C.*—*State v. Nathans*, 49 S. C. 199, 27 S. E. 52. *S. D.*—*Freeman v. Huron*, 8 S. D. 435, 66 N. W. 928.

99. *Manning v. Mercantile Securities Co.*, 242 Ill. 584, 90 N. E. 238; *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004; *Kanter v. Clerk of Circuit Court*, 108 Ill. App. 287, 302; *Stearnes v. Joy*, 41 Ill. App. 157, 163; *Rawson v. Rawson*, 35 Ill. App. 505; *Cartwright's Case*, 114 Mass. 230.

In *Oster v. People*, 192 Ill. 473, 478, 61 N. E. 469, the court said: "It

should have been, as it was, prosecuted in the name of the People of the State of Illinois."

"The petition was not entitled '*United States v. Samuel Gompers, et al.*,' or '*In re Samuel Gompers, et al.*,' as would have been proper, and according to some decisions necessary, if the proceedings had been at law for criminal contempt. This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. . . . Inasmuch, therefore, as proceedings for civil contempt are a part of the original cause, the weight of authority is to the effect that they should be entitled therein. But the practice has hitherto been so unsettled in this respect that we do not now treat it as controlling, but only as a fact to be considered along with others as was done in *Worden v. Searls*, 121 U. S. 25, 7 Sup. Ct. Rep. 814, 30 L. ed. 857, in determining a similar question." *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. ed. 797, 807.

1. *Ill.*—*Manning v. Mercantile Securities Co.*, 242 Ill. 584, 90 N. E. 238; *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375. *Ky.*—*Arnold v. Com.*, 80 Ky. 300, 44 Am. Rep. 480. *Mass.*—*Cartwright's Case*, 114 Mass. 230.

2. *Lester v. People*, 150 Ill. 408, 427, 23 N. E. 387, 37 N. E. 1004.

3. *Ariz.*—*Hughes v. Territory*, 10 Ariz. 119, 85 Pac. 1058, 6 L. R. A. (N. S.) 572. *Mass.*—*Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159. *Wyo.*—*Porter v. State*, 16 Wyo. 131, 92 Pac. 385.

method of obtaining jurisdiction are waived by voluntary appearance without objection.⁴ And when the record fails to show that the question was presented to the court below, it cannot be presented to the court on review.⁵

2. The Return and Appearances.—*a. Return of Process.*—Where the attachment is issued to enforce an appearance or answer, or for not paying costs, or not obeying an order or decree, the respondent is to be brought into court by the officer.⁶ Generally, however, such officer may take bail or a bond for the appearance of the respondent at the return day, or to abide the order of the court.⁷

b. Appearances.—The usual practice is to require the accused to appear in person,⁸ though an appearance by attorney has been held sufficient.⁹ In the subsequent proceedings he may be represented by attorney.¹⁰

c. Fixing Bail for Further Appearance.—Though a party be present in court when the rule is entered, and there be, therefore, no necessity for an attachment, the court may require that bail be given for his further appearance.¹¹

3. Interrogatories.—*a. Necessity.*—By statute in some jurisdictions interrogatories specifying the facts and circumstances alleged against the contemnor and requiring his answer thereto must be filed.¹²

The contemnor may waive this requirement, however.¹³ In absence of a waiver, the failure to comply with the statute is fatal to the proceeding.¹⁴

4. *Porter v. State*, 16 Wyo. 131, 92 Pac. 385; *Ex parte Bergman*, 3 Wyo. 396, 26 Pac. 914.

5. *Porter v. State*, 16 Wyo. 131, 92 Pac. 385.

6. *State v. Matthews*, 37 N. H. 450; *People v. Tefft*, 3 Cow. (N. Y.) 340.

7. *State v. Matthews*, 37 N. H. 450; *People v. Tefft*, 3 Cow. (N. Y.) 340.

8. In *Oregon*, the statute (B. & C. Comp., §868) requires that the warrant of arrest shall direct whether or not the person charged may be let to bail, and if so, to indicate the amount, or to direct that he be held without bail. *State v. Sieber*, 49 Ore. 1, 88 Pac. 313.

9. *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Vertner v. Martin*, 10 Smed. & M. (Miss.) 103.

10. *Gordan v. Buckles*, 92 Cal. 481, 28 Pac. 490; *Ex parte Gordon*, 92 Cal. 478, 28 Pac. 489, 27 Am. St. Rep. 154.

11. *Watrous v. Kearney*, 79 N. Y. 496.

12. *Oster v. People*, 192 Ill. 473, 61 N. E. 469.

13. *Matheany v. Kent Circuit Judge*, 142 Mich. 628, 106 N. W. 147; *Lattimore v. Barmore*, 81 Mich. 592, 46 N.

W. 1; *Twp. of Noble v. Aasen*, 10 N. D. 264, 86 N. W. 742 (unless the offense be admitted).

If a mere question of law is presented no interrogatories are necessary. *Mich.*—*Smith v. Waalkes*, 109 Mich. 16, 66 N. W. 679. *N. J.*—*State v. Ackerson*, 25 N. J. L. 209. *N. Y.*—*People v. Anthony*, 7 App. Div. 132, 40 N. Y. Supp. 279. *Wis.*—*State v. Brophy*, 38 Wis. 413.

13. *Matheany v. Kent Circuit Judge*, 142 Mich. 628, 106 N. W. 147.

By filing an answer without objection, stating all the facts and circumstances on which a full hearing was had. *U. S.*—*In re Savin*, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. ed. 150. *N. Y.*—*Clapp v. Lathrop*, 23 How. Pr. 423. *Pa.*—*Hummel & Bishoff's Case*, 9 Watts 416.

Compare, however, *Twp. of Noble v. Aasen*, 10 N. D. 264, 86 N. W. 742, holding that an appearance without objection is not a waiver.

By Submission of Affidavits.—*Matter of Westminster Realty Corp.*, 123 App. Div. 797, 108 N. Y. Supp. 551.

14. *Matheany v. Kent Circuit Judge*, 142 Mich. 628, 106 N. W. 147; *Lattimore*

When the answer is not regarded as sufficiently definite as to the "factum" of the contempt, interrogatories may be filed, to which more specific answers are required.¹⁵

b. *Time for Filing.*—The time within which interrogatories are to be filed may be fixed by the court.¹⁶

c. *Scope.*—Interrogatories should be so framed as to elicit answers from the defendant as to the facts and circumstances of the contempt, and must be limited to the offense set forth in the papers on which the application is based.¹⁷

d. *When Interrogatories Unnecessary.*—When the proceeding to punish is by order to show cause, no interrogatories are necessary,¹⁸ nor need interrogatories be filed in a proceeding to punish the contemnor for failure to obey a subpoena.¹⁹

4. *Answer or Papers in Opposition.*—a. *Nature of.*—The contemnor may present his case by affidavit, stating his excuses,²⁰ or he

v. Barmore, 81 Mich. 592, 46 N. W. 1; Twp. of Noble v. Aasen, 10 N. D. 264, 86 N. W. 742.

15. Oster v. People, 192 Ill. 473, 61 N. E. 469.

Amendments of interrogatories may be allowed to explain an ambiguity, or to call out a more specific answer. State v. Matthews, 37 N. H. 450; People v. Brown, 6 Cow. (N. Y.) 41; Herring v. Tylee, 1 Johns. Cas. (N. Y.) 31. But new matter cannot be introduced in this way. Herring v. Tylee, *supra*.

16. Herring v. Tylee, 1 Johns. Cas. (N. Y.) 31.

17. U. S.—Parkhurst v. Kinsman, 2 Blatchf. 76, 18 Fed. Cas. No. 10,759. N. Y.—Brown v. Andrews, 1 Barb. 227. N. D.—State v. Harris, 14 N. D. 501, 105 N. W. 621.

18. Mayor v. New York & S. I. Ferry Co., 64 N. Y. 622 (none need be filed prior to a final adjudication upon the alleged contempt); Pitt v. Davison, 37 N. Y. 235, *citing*, Brush v. Lee (ms. opinion, case decided June Term, 1867). See, however, Oster v. People, 192 Ill. 473, 477, 61 N. E. 469, which was begun by order to show cause.

Necessity for Interrogatories.—It was contended that the attachment is illegal, "because it was founded on conviction without an examination on interrogatories. To this objection several answers occur: 1. It does not appear from the attachment, whether there was such an examination or not; nor does the law or usage require that

the whole proceedings which led to the conviction, should be recited in the attachment. 2. If we recur to the conviction, or order for the attachment, it appears that Mr. Yates refused to answer the complaint, 'although regularly required so to do;' and I think such refusal to answer, is not only a waiver of the right of being examined on the interrogatories, but an admission that the complaint was well founded. 3. That the chancellor had a right to dispense with such examination, if in his judgment the proof by affidavits is sufficient in itself, and of such credit, as that a denial by the party accused, under oath, would not countervail the affidavits. (King v. Vaughan, Doug. 516, 4 Bl. Com. 284.) 4. We are not now deliberating on an appeal from chancery. We must confine ourselves to the record brought here by the writ of error. The only question is, whether the judgment of the supreme court is right; and, of course, we have no more power to examine the proceedings which led to the conviction, or the grounds of the adjudication in chancery, than the supreme court had. If there was no essential defect on the face of the attachment, and it purported to be an attachment for a contempt, we are bound to presume that the conviction on which it issued was regular and well founded." Yates v. Lansing, 9 Johns. (N. Y.) 395, 419.

19. Ferriman v. People, 123 Ill. App. 230.

20. U. S.—*In re Johnson, etc.*, 'Co., 151 Fed. 207, 80 C. C. A. 259. Neb.

may demand that interrogatories be filed for him to answer.²¹ If the alleged contempt is denied the prosecutor may compel answers to interrogatories which are intended to elicit a fuller statement of the facts and circumstances constituting the alleged contempt.²²

Vague and uncertain statements will be disregarded. The facts must be alleged with certainty.²³

b. *Effect of Answer.*—In some jurisdictions it is held that when

Emery v. State, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124. N. H.—*State v. Matthews*, 37 N. H. 450. N. Y.—*Clark v. Bininger*, 75 N. Y. 344. N. D.—*State v. Crum*, 7 N. D. 299, 74 N. W. 992; *State v. Root*, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568. Tex.—*State v. Crow*, 24 Tex. 12. W. Va.—*Hebb v. County Court*, 48 W. Va. 279, 37 S. E. 676.

Formal answer may be filed if defendant so elects. *Hammond L. Co. v. Sailors' Union*, 149 Fed. 577.

The Iowa statute "does not say that the written explanation filed by the accused, if in effect a denial, shall operate to preclude any further inquiry on the part of the court. Nor does it say that the method of procedure provided shall have application to one class of contempts, but not to another. If such had been intended, it would have been easy enough to have said so. Moreover, the mandatory provision that the evidence must be taken in writing and preserved is general and it admits of no exceptions. Such provision of itself, as we think, contemplates a trial, and there could be no trial save upon a denial of guilt. A construction of the statute conformably to the contention of plaintiff would lead to our saying that in the case of criminal contempts the requirement goes no farther than to make necessary the taking and preserving of the evidence in those cases only where the accused either stands dumb or fails to move for his discharge. Having legislated upon the subject generally, and there being no provision that a person accused may try himself, we think it was intended that the court should in all cases proceed to determine the essential facts of the charge put in issue by the answer." *Drady v. Given*, 126 Iowa 345, 102 N. W. 115.

Notice of Place Where Court Is Held.—It cannot be claimed by a contemnor that the proceedings were void

because the proceedings were held at the court house, whereas for some time preceding the court had been held elsewhere. By a reasonable effort he could have found the court and he was bound to take notice of its place of sitting. *Jordan v. Wapello County Circuit Court*, 69 Iowa 177, 28 N. W. 548.

Effect of Modification of Order on Which Proceeding Is Based.—Where an order on which the contempt proceeding is based was modified subsequent to initiating the proceeding, the original order and not the modified order controls. *Rowley v. Feldman*, 84 App. Div. 400, 82 N. Y. Supp. 679.

Preliminaries When Payment of Money Is Basis of Proceedings.—In New York under a statute to bring a party into contempt for disobedience of an order or judgment requiring the payment of money, it is not sufficient that the order or judgment be served upon him, and he be made fully acquainted with its effect, but in addition thereto, a compliance with the order or judgment must be explicitly demanded by a party who has the right to make such demand. *Sutton v. Sutton*, 130 N. Y. Supp. 368, *citing*, *Lorton v. Seaman*, 9 Paige (N. Y.) 609; *In re Ockershausen*, 59 Hun 200, 13 N. Y. Supp. 396; *McComb v. Weaver*, 11 Hun (N. Y.) 271.

21. U. S.—*United States v. Duane*, Wall. Sr. 102, 25 Fed. Cas. No. 14,937. Mich.—*Russell v. Judge*, 136 Mich. 624, 99 N. W. 864. N. H.—*State v. Matthews*, 37 N. H. 450.

No interrogatories are necessary to be filed where the contempt consists of failure to obey a subpoena. *Ferri-man v. People*, 128 Ill. App. 230.

22. *State v. Matthews*, 37 N. H. 450; *State v. Harris*, 14 N. D. 501, 105 N. W. 621.

Discretionary with court to serve interrogatories. *In re Savin*, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. ed. 150.

23. *Clark v. Bininger*, 75 N. Y. 344.

the contemnor is attached for contempt of court for a criminal offense and files a sworn answer, this is sufficient to purge him of the alleged contempt, may be taken as true and the defendant discharged.²⁴

5. Verification.—*a. Generally.*—At common law the information on which the proceedings were based did not require verification, and in jurisdictions where the proceedings are based upon and follow the common law procedure no verification is required,²⁵ though there is authority requiring verification in all cases except where the proceeding is summary, and in some jurisdictions the statute so provides.²⁶

Whether the papers in reply be answer or affidavit, verification is necessary.²⁷

b. When Re-Verification Necessary.—If the affidavit on which the proceeding is based be amended it must be re-verified.²⁸

6. Trial and Hearing.—*a. Right to Hearing.*—In all cases the

24. *O'Brien v. People*, 216 Ill. 354, 369, 75 N. E. 108.

Limitation of Rule.—"This rule applies only where the proceeding is brought to vindicate the law or the dignity of the court, and does not apply to acts treated as contempts, for the enforcement of orders and decrees as part of a remedy sought to be enforced." *O'Brien v. People*, 216 Ill. 354, 369, 75 N. E. 108, citing, *Loven v. People*, 158 Ill. 159, 42 N. E. 82.

25. *People v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912. And see, *Hurley v. Com.*, 188 Mass. 443, 74 N. E. 677.

The Colorado courts observe a distinction between proceedings to punish for criminal contempts, which they hold is to be pursued under the common law procedure, wherein a verification is not required and civil contempts which are punished under the civil code where a verification is required. *People v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912, 117 Am. St. Rep. 951, 6 L. R. A. (N. S.) 572. See also, *In re Nickell*, 47 Kan. 734, 28 Pac. 1076, as to rule in Kansas.

"One cannot object to a verification of a complaint or information after he has been arraigned and pleaded not guilty, unless such plea has been withdrawn; and an objection of that kind, made for the first time in a motion for a new trial, comes too late." *Emery v. State*, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124, per Barnes, J.

26. *Colo.*—*People v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912;

Thomas v. People, 14 Colo. 254, 23 Pac. 326. *Kan.*—*In re Nickell*, 47 Kan. 734, 28 Pac. 1076, 27 Am. St. Rep. 315. *Mass.*—*Hurley v. Com.*, 188 Mass. 443, 74 N. E. 677. *N. Y.*—*People v. Court of Sessions*, 82 Hun 242, 31 N. Y. Supp. 373.

A petition must be verified by affidavit. *Flannery v. People*, 225 Ill. 62, 69, 80 N. E. 60.

"In an indirect contempt . . . the facts constituting such contempt are issuable before the offended court, to be determined as a general rule, from the verified pleadings." *Rucker v. State*, 170 Ind. 635, 639, 85 N. E. 356.

Sufficiency of Affidavit.—The affidavit attached to the petition was alleged to be defective in that it stated that the affiant verily "believes" the same to be true. "It does state that the affiant knows the contents thereof, and we think the objection that he 'believes,' etc., exceedingly technical, especially in view of the fact that the defendants appeared and answered the objection by way of a general denial, making no objection whatever to the sufficiency of the petition." *Flannery v. People*, 225 Ill. 62, 69, 80 N. E. 60.

27. *People v. Wilson*, 64 Ill. 195. And see, *Rucker v. State*, 170 Ind. 635, 85 N. E. 356.

Verified return to rule accepted as true if not challenged. *State v. Far-num*, 73 S. C. 193, 53 S. E. 85.

28. *Back v. State*, 75 Neb. 603, 106 N. W. 787; *State v. Sieber*, 49 Ore. 1, 88 Pac. 313; *State v. Lavery*, 31 Ore. 77, 49 Pac. 852.

person charged with contempt is entitled to a hearing before judgment is rendered.²⁹ But it has been held that the court need not hear evidence on part of contemnor where his answer contains admissions and affirmative matter admitting his guilt.³⁰

b. *Criminal Contempts.*—(I.) *Summary Action.*—A criminal contempt committed in the immediate view and presence of the court may be punished summarily,³¹ but where a criminal contempt is charged which is not punishable summarily, a reasonable time to make a defense must be given.³²

(II.) *Failure To Obey Subpoena.*—After a contemnor is brought into court on an attachment for failure to obey a subpoena he may answer the rule under oath either orally or in writing, as he chooses; and being in the nature of a criminal contempt his answer must be accepted and acted on as true, except in so far as it may contradict the records of the court, or the facts that transpired in the presence of the court.³³

c. *Constructive Contempt.*—Where the contempt is committed out of the immediate view and presence of the court, contemnor is entitled to be heard in his defense,³⁴ but he is not entitled as matter of right

29. U. S.—*In re Cole*, 144 Fed. 392, 75 C. C. A. 330; *In re Davison*, 143 Fed. 673. Cal.—*In re Foote*, 76 Cal. 543, 18 Pac. 678; *Reymert v. Smith*, 5 Cal. App. 380, 90 Pac. 470. Colo.—*Stidger v. People*, 46 Colo. 49, 102 Pac. 745. Conn.—*Welch v. Barber*, 52 Conn. 147, 52 Am. Rep. 567. Ga.—*Wheeler v. Thomas*, 57 Ga. 161. Ill.—*Steele v. Hohenadel*, 141 Ill. App. 201. Ind.—*Whittem v. State*, 36 Ind. 196. Ia.—*Gibson v. Hutchinson*, 148 Iowa 139, 126 N. W. 790; *State v. District Court*, 124 Iowa 187, 99 N. W. 712. Kan.—*State v. Anders*, 64 Kan. 742, 68 Pac. 668. La.—*Fellman v. Mercantile F. & M. Ins. Co.*, 116 La. 733, 41 So. 53; *State v. Judges Civil Dist. Ct.*, 32 La. Ann. 1256. Minn.—*State v. Ives*, 60 Minn. 478, 62 N. W. 831. Mo.—*Glover v. American Casualty Ins. Co.*, 130 Mo. 173, 32 S. W. 302. N. J.—*Holt's Case*, 55 N. J. L. 384, 27 Atl. 909. N. Y.—*Slater v. Merritt*, 75 N. Y. 268; *Albany City Bank v. Schermerhorn*, 9 Paige 372, 38 Am. Dec. 551. Ohio.—*Post v. State*, 14 Ohio C. C. 111, 7 Ohio Cir. Dec. 257. Tenn.—*Rutherford v. Metcalf*, 5 Hayw. 58. Tex.—*Crow v. States*, 24 Tex. 12. Utah.—*United States v. Church of Jesus Christ*, 6 Utah 9, 21 Pac. 503. Vt.—*Ward v. Ward*, 70 Vt. 430, 41 Atl. 435. W. Va.—*Hebb v. Tucker County Court*, 48 W. Va. 279, 37 S. E. 676.

Failure to give accused hearing will

make the judgment void. Kan.—*Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571. La.—*State v. Judges Civil Dist. Ct.*, 32 La. Ann. 1256. N. J.—*Holt's Case*, 55 N. J. L. 384, 27 Atl. 909. 30. *Bloom v. People*, 23 Colo. 416, 48 Pac. 519.

31. *Langdon v. Wayne Circ. Judge*, 76 Mich. 358, 368, 43 N. W. 310; *New York Code Civ. Proc.*, §10.

32. *New York Code Civ. Proc.*, §10; *People v. Court of Oyer & Terminer*, 27 How. Pr. (N. Y.) 14.

"The conviction of a citizen of a criminal offense without service on him of a formal statement of the charge against him and an opportunity to plead and answer such charge would be an anomaly in the law of criminal procedure. That a contempt proceeding is summary in its character is a reason why greater care should be taken in pursuing the steps required to reach a conviction, rather than a reason why certain steps necessary to the ordinary criminal proceeding should be omitted or overlooked." *Reymert v. Smith*, 5 Cal. App. 380, 90 Pac. 470.

33. *Ferriman v. People*, 128 Ill. App. 230, citing, 3 *ENCYCLOPEDIA OF EVIDENCE*, 446.

34. U. S.—*United States v. Carroll*, 147 Fed. 947. Cal.—*Reymert v. Smith*, 5 Cal. App. 380, 90 Pac. 470. Ia.—*Drady v. Court*, 126 Iowa 345, 102 N.

to have counsel heard in his behalf.³⁵ If contemnor relies upon an excuse only, he should appear in his own proper person and not by his attorney.³⁶

d. *Trial by Jury*.—The right to trial by jury has never existed in contempt proceedings, the court proceeding summarily.³⁷ In some

W. 115. **La.**—Fellman v. Mercantile Ins. Co., 116 La. 733, 41 So. 53; State v. Judges Civ. Dist. Ct., 32 La. Ann. 1256. **Mich.**—Steller v. Steller, 25 Mich. 159. **Minn.**—State v. Willis, 61 Minn. 120, 63 N. W. 169. **Mo.**—*Ex parte* Clark, 208 Mo. 121, 106 S. W. 990; *Ex parte* Mason, 16 Mo. App. 41. **Nev.**—*Ex parte* Hedden, 29 Nev. 352, 90 Pac. 737. **N. Y.**—*In re* Nejez, 54 Misc. 38, 104 N. Y. Supp. 505. **Tex.**—*Ex parte* Terrell (Tex. Crim.), 95 S. W. 536. **Vt.**—Ward v. Ward, 70 Vt. 430, 41 Atl. 435. **W. Va.**—*Ex parte* Mylius, 61 W. Va. 405, 56 S. E. 602. See McCaully v. United States, 25 App. Cas. (D. C.) 404.

Welch v. Barber, 52 Conn. 147, 52 Am. Rep. 567, held, where defendant was charged with contempt in having applied for a postponement on the ground of a feigned illness, and answered that he was ill and unable to attend court, that he should not have been judged and condemned in his absence. The court said that "where the act is equivocal, and may or may not be a contempt, and it is necessary to examine witnesses, in order to determine that question, the party must be present, and has a right to be heard."

Divorce Action.—Buckley v. Perrine, 55 N. J. Eq. 514, 36 Atl. 1088.

35. *Ex parte* Hamilton, 51 Ala. 66, for violating injunction, the court proceeding upon the theory that the contempt proceeding was not a criminal prosecution. To the contrary, see Whittem v. State, 36 Ind. 196.

36. People v. Freer, 1 Caines (N. Y.) 518.

37. **Ark.**—Neel v. State, 9 Ark. 259, 50 Am. Dec. 209. **Ia.**—Jones v. Mould, 151 Iowa 599, 132 N. W. 45; Drady v. Given, 126 Iowa 345, 353, 102 N. W. 115. **Mich.**—*In re* Chadwick, 109 Mich. 588, 67 N. W. 1071. **Minn.**—State v. Becht, 23 Minn. 411. **Miss.**—*Ex parte* Hickey, 4 Smed. & M. 751, 783. **Mo.**—State v. Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624.

Under the Iowa statute, it is sufficient to serve a rule to show cause, and

the court is not bound to make an arrest before proceeding if the person charged fail to obey the rule. On the return day of the rule the court may even in the absence of the contemnor take the evidence and have it reduced to writing and preserved and filed, as such a proceeding is not an *ex parte* proceeding. Jordan v. Circuit Court of Wapello County, 69 Iowa 177, 28 N. W. 548.

In Illinois, the legislature passed an act in 1893, "providing for a trial by jury in all cases where a judgment was to be satisfied by imprisonment. (Laws of 1893, p. 96.) In the case of Barclay, 184 Ill. 471, we decided that this act did not apply to the case of proceedings for contempt of court, where it was sought to coerce defendant into the performance of the duty which the court had ordered him to perform. (See, also, People v. Kipley, 171 Ill. 44; United States v. Debs, 158 U. S. 564.) These authorities are decisive of the question here raised, and hold that the defendants in such a proceeding as this are not entitled to a trial by jury." O'Brien v. People, 216 Ill. 354, 370, 75 N. E. 108.

Constitutionality of Act for Trial by Jury.—In Carter v. Com., 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310, in passing an act providing for jury trial, the court said: "Reading the Constitution of the state in the light of the decisions of eminent courts which we have consulted, we feel warranted in the following conclusions: That in the courts created by the Constitution there is an inherent power of self-defense and self-preservation; that this power may be regulated, but cannot be destroyed, or so far diminished as to be rendered ineffectual, by legislative enactment; that it is a power necessarily resident in, and to be exercised by, the court itself, and that the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury; that, while the legislature has the power to regulate the jurisdiction of circuit, county, and corporation courts, it can-

jurisdictions, however, the legislature has limited the punishment to be imposed upon a summary proceeding, and has provided for the intervention of a jury, to ascertain the fine or imprisonment proper to be inflicted, the court then giving judgment according to the verdict.³⁸ But such a statute has been held not to apply to a court having no authority to impanel a jury, and notwithstanding the statute such court has the unrestricted power, uncontrolled and unregulated by statute, to punish for direct or constructive contempt by fine or imprisonment, or both.³⁹

e. *Trial by Referee*.—A reference to a master or commissioner may be ordered, and he may report the proofs, but not his opinion of them.⁴⁰

f. *Necessity for Incriminating Evidence*.—(I.) **Direct Contempt**. Where the contempt is committed in the immediate view and presence of the court, contemnor may be convicted without any evidence, save what may be gathered by the exercise of the sense of hearing and seeing on part of the court,⁴¹ but an order must be made

not destroy, while it may confine within reasonable bounds, the authority necessary to the exercise of the jurisdiction conferred."

Procedure Upon Interrogatories. "After the respondent appears upon a rule to show cause, or is brought up on attachment, he may submit his contempt to the court upon his own answer in the form of an affidavit, or he may demand of the prosecutor to file interrogatories for him to answer. The usual course when the alleged misconduct is denied, is for the court to allow the prosecutor to file interrogatories intended to elicit a full statement of all the facts and circumstances of the alleged contempt. These may be filed in court, and the respondent's answers thereto taken by the clerk and reported by him to the court, who may proceed in a summary manner to decide the question of the guilt of the accused; or, a master or commissioner may be appointed, before whom the interrogatories may be filed, and who will take down and report to the court the respondent's answers thereto, with such other testimony as either the respondent or the prosecutor may desire to have taken. *Heming v. Tyler*, 1 Johns. Cases 31; *People v. Brown*, 6 Cowen 41; *People v. Ball*, 5 Cowen 415; *Hollingworth v. Dame*, Wallace 78." *State v. Matthews*, 37 N. H. 450, 455.

38. *French v. Com.*, 30 Ky. L. Rep. 98, 97 S. W. 427; *State v. Frew*, 24 W. Va. 416, 465.

39. *State v. Frew*, 24 W. Va. 416, 465.

40. *State v. Matthews*, 37 N. H. 450; *Albany City Bank v. Schermerhorn*, 9 Paige Ch. (N. Y.) 372.

41. **U. S.**—*Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. ed. 405. **Ala.** *Easton v. State*, 39 Ala. 551, 87 Am. Dec. 49. **Cal.**—*People v. Turner*, 1 Cal. 152. **Ind.**—*Ex parte Wright*, 65 Ind. 504; *Whittem v. State*, 36 Ind. 196. **Kan.**—*State v. Henthorn*, 46 Kan. 613, 26 Pac. 937. **Mich.**—*In re Wood*, 82 Mich. 75, 45 N. W. 1113. **Neb.**—*Crites v. State*, 74 Neb. 687, 105 N. W. 469.

Statement of matters that occurred in presence of judge in open court imports verity. *Mahoney v. State*, 33 Ind. App. 655, 72 N. E. 151.

Record must state the facts; conclusion not enough. *Crites v. State*, 74 Neb. 687, 105 N. W. 469; *Ogden v. State*, 3 Neb. (Unof.) 886, 93 N. W. 203.

Verified answer may condemn. *Ferriman v. People*, 128 Ill. App. 230.

Power of Summary Punishment Must Be Prudently Exercised.—The court in *State v. Ives*, 60 Minn. 478, 62 N. W. 831, said, in speaking of contempts committed in the immediate view and presence of the court: "They are punishable summarily by order of the presiding judge, who takes judicial notice of such contempts, acts upon his own motion, and upon facts within his own knowledge based upon the words or acts of the accused, or both, said or done

reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt and that he be punished as therein prescribed.⁴²

(II.) **Constructive Contempt.**—But where the contempt was committed beyond the immediate view and presence of the court, and contemnor denies that he committed the acts constituting the alleged contempt, or insists that his acts were not contemptuous, the court should hear evidence and determine contemnor's guilt or innocence from such evidence.⁴³

in his presence or hearing. No formal trial is necessary. The court simply makes an order without proof, reciting what occurred in its presence or hearing, adjudging the person proceeded against guilty, and fixing his punishment. Gen. St. 1894, §6157. This is an arbitrary power, born of necessity, which must be exercised with great prudence and always limited to cases of direct contempts."

An insulting manner in connection with indecent language may make a contempt. *Holman v. State*, 105 Ind. 513, 5 N. E. 556.

Rule as to Contemptuous Misbehavior. The court in *In re Savin*, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. ed. 150, in speaking of contemptuous misbehavior in the presence of the court, said that "It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts, and punish the offender without further proof, and without issue or trial in any form.' *Ex parte Terry*, 123 U. S. 289, 309: whereas, in cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286. But this difference in procedure does not affect the question as to whether particular acts do not, within the meaning of the statute, constitute misbehavior in the presence of the court."

42. *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372.

43. **U. S.**—*In re Cole*, 144 Fed. 392,

75 C. C. A. 330; *United States v. Carroll*, 147 Fed. 947; *In re Davison*, 143 Fed. 673. **Conn.**—*Sherwood v. Sherwood*, 32 Conn. 1. **Ind.**—*Whittem v. State*, 36 Ind. 196. **La.**—*State v. Court*, 112 La. 182, 36 So. 315. **Neb.**—*Gordon v. State*, 73 Neb. 221, 102 N. W. 458.

The fact that the scope of the order is too great or too indefinite, is no excuse for not complying with the portion that is certain and definite. *Clark v. Burke*, 163 Ill. 334, 45 N. E. 235, *affirming* 62 Ill. App. 252; *Berkson v. People*, 154 Ill. 81, 39 N. E. 1079, *affirming* 51 Ill. App. 102; *Tolman v. Jones*, 114 Ill. 147, 28 N. E. 464; *Kanter v. Clerk of Circuit Court*, 108 Ill. App. 287, 300.

Necessity for Incriminating Evidence. In *Ex parte Kilgore*, 3 Tex. App. 247, the court said: "The final judgment was rendered without the introduction of any evidence to prove the allegations in the complaint. The parties were charged with disobeying and disregarding a writ of *certiorari*. There should certainly have been some evidence of that fact before they could have been adjudged guilty of its commission. An affidavit made by a party at interest would not, of itself, simply be sufficient to establish the fact; and more especially are we induced to adopt this conclusion when, as in the present case, the parties offered in a sworn statement to purge themselves of supposed contempt, and denied most positively and emphatically that they had violated or disregarded the orders or writs of the court in the manner set out in the affidavit."

In speaking of the statutory procedure in cases of constructive contempt, the court in *State v. Ives*, 60 Minn. 478, 62 N. W. 831, said: "When the accused is brought before the court, or appears in response to the order, the

Such proceeding is based on an affidavit of the facts constituting the contempt, or a statement of the facts if they occurred before a referee, arbitrator or other judicial officer.⁴⁴

(III.) **Common Law Rule as to Defenses.**—At common law the filing of a denial under oath in a court of law operated to purge the contemnor of the offense,⁴⁵ his answer being conclusive,⁴⁶ without con-

court proceeds to hear the case without a jury. In doing so it cannot act upon facts within its own knowledge, or information obtained outside of the orderly course of the trial, or upon the affidavit upon which the warrant issued, for it is not competent evidence against the accused upon his trial. It must proceed to investigate the charge by examining him, and the witnesses for and against him; and upon the evidence so taken the court must determine whether the person proceeded against is guilty of the contempt charged. Gen. St. 1894, §§6166, 6167."

Customary Procedure.—The court in *Bates' Case*, 55 N. H. 325, said that probably the customary procedure in contempts committed in *facie curiae* is to punish summarily, after such hearing as the presiding judge may deem just and necessary, but where the offense is not so committed in the presence of the court, the case is ordinarily governed by the analogies of criminal procedure, and proofs upon both sides may be taken, and the determination made from a consideration of the whole evidence. The court in elaborating further said that it seemed to be more appropriate, and at the same time safe enough for the protection of the court, to adhere as closely as possible to the plan and method of criminal procedure, applying the same rules of evidence and presumption of law, except as to the matter of a jury trial.

On Commitment of Executor.—A commitment of an executor for contempt in failing to pay over money, as ordered on approval of his final report, cannot be made without evidence of the demand required by the statute to be made. *Blake v. People*, 161 Ill. 74, 43 N. E. 590.

44. *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372. See also *supra*, III, B, 1, b.

45. *U. S.*—*United States v. Duane*, Wall. Sr. 102, 25 Fed. Cas. No. 14,997; *United States v. Dodge*, 2 Gall. 313, 25 Fed. Cas. No. 14,975. III.—*Oster v. People*, 192 Ill. 473, 61 N. E. 469. Ind.

Stewart v. State, 140 Ind. 7, 39 N. E. 508; *Haskett v. State*, 51 Ind. 176; *State v. Earl*, 41 Ind. 464. Ia.—*Drady v. Court*, 126 Iowa 345, 102 N. W. 115. N. Y.—*People v. Few*, 2 Johns. 290. N. C.—*In re Moore*, 63 N. C. 397. Pa. *Thomas v. Cummins*, 1 Yeates 40. Eng. *Saunders v. Melhuish*, 6 Mod. 73, 87 Eng. Reprint 831, 4 Black. Com. 286.

"The main complaint in this record is that the court had no right to take testimony to prove the charges alleged in the petition, after appellants had answered under oath denying the charges. It is contended that the answer under oath of the contemnors entitled them to a discharge, and that the matter could not be inquired into further. It seems to have been the ancient common law rule, now wisely departed from by most modern authorities, that, where a person was charged with constructive contempt of court, and made answer to the contempt proceedings on oath, if by his oath he cleared himself of the contempt, he was discharged. Under these older cases, no testimony could be taken by the court to disprove the answer under oath, but it must be taken as true, and the contemnor discharged; the only recourse being that he might be subsequently prosecuted for perjury, if he swore falsely. We do not feel warranted in following these older cases upon this subject, and see no reason why a court should be precluded from questioning the truth of the answer made in a proceeding of contempt against a party, by taking testimony to prove that the answer is untrue. To hold this would be to hamper the courts in the administration of the law. We adhere to the rule which is adopted by the Supreme Court of the United States in a very recent case on this subject—the case of the *United States v. Shipp*, 203 U. S. 563, 51 L. ed. 319, 27 Sup. Ct. Rep. 165." *O'Flynn v. State*, 89 Miss. 850, 43 So. 82, 9 L. R. A. (N. S.) 1119.

46. *U. S.*—*United States v. Anonymous*, 21 Fed. 761, and authorities

sidering the weight of evidence, or the credibility of what was sworn in the answer,⁴⁷ though he was liable to be subsequently prosecuted for perjury if his answer was false.⁴⁸ But in a court of equity the answer or affidavits were rebuttable by affidavits on the part of the prosecution.⁴⁹

Rule in Federal Courts.—The common law rule just stated has been held to be the rule applicable in the federal courts with reference to criminal constructive contempts.⁵⁰

In some state courts also this rule has been followed.⁵¹

cited therein. **Ill.**—*Oster v. People*, 192 Ill. 473, 61 N. E. 469. **Ind.**—*Burke v. State*, 47 Ind. 528.

Attempting to bribe a juror—oral evidence not heard to contradict affidavit in denial. *Welch v. People*, 30 Ill. App. 399. And see *State v. Earl*, 41 Ind. 464, to the same effect.

47. *Stewart v. State*, 140 Ind. 7, 39 N. E. 508.

48. *Stewart v. State*, 140 Ind. 7, 39 N. E. 508; *Burke v. State*, 47 Ind. 528; *Rex v. Sims*, 12 Mod. 511, 88 Eng. Reprint 1484, 4 Black. Com. 288.

"In a prosecution for contempt, where the act complained of is in itself a contempt of court, a denial on oath of its commission raises an issue of fact for trial, and does not entitle the accused to an acquittance." *Emery v. State*, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124.

"Where the charge of contempt of court is set forth in an information in positive and direct terms, the statement by the public prosecutor, in his verification thereto, 'that the allegations and charges in the within information are true, as he verily believes,' does not render such information void." *Emery v. State*, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124.

49. **U. S.**—*Employers' T. Co. v. Teamsters' Joint Council*, 141 Fed. 679; *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451; *United States v. Anonymous*, 21 Fed. 761. **Ill.**—*O'Brien v. People*, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219; *Loven v. People*, 158 Ill. 159, 42 N. E. 82. **Ind.**—*Stewart v. State*, 140 Ind. 7, 39 N. E. 508; *Anderson v. Indianapolis, etc. Co.*, 34 Ind. App. 100, 72 N. E. 277. **N. Y.** *Smith v. Smith*, 23 How. Pr. 134.

Affidavits *pro* and *con* will be heard as well as any other legal evidence. *Hake v. People*, 230 Ill. 174, 82 N. E.

561. So in a bankruptcy court. *In re Fellerman*, 149 Fed. 244.

50. *United States v. Carroll*, 147 Fed. 947; *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451. *Contra*, *Schweer v. Brown*, 130 Fed. 328, 64 C. C. A. 574; *In re Lasky*, 163 Fed. 99, and cases cited. See *In re Johnson, etc. Co.*, 151 Fed. 207, 80 C. C. A. 259.

No application where overt acts personally done. *United States v. Shipp*, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. ed. 319.

51. *Oster v. People*, 192 Ill. 473, 479, 61 N. E. 469; *People v. Diederich*, 141 Ill. 665, 30 N. E. 1038; *Stewart v. State*, 140 Ind. 7, 39 N. E. 508.

Rule that disavowal of imputed intent relieves party applies only where intention to injure constitutes gravamen of offense. *In re Gorham*, 129 N. C. 481, 40 S. E. 311. No application where overt acts personally done. *Emery v. State*, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124. In Mississippi it will not purge constructive contempt. *O'Flynn v. State*, 89 Miss. 850, 43 So. 82, 9 L. R. A. (N. S.) 1119. See as favoring rule of discharge under affidavit: **Ill.**—*Early v. People*, 117 Ill. App. 608. **Ind.**—*Fishback v. State*, 131 Ind. 304, 30 N. E. 1088; *Anderson v. Indianapolis, etc. Co.*, 34 Ind. App. 100, 72 N. E. 277. **Kan.**—*State v. Vincent*, 46 Kan. 618, 620, 26 Pac. 939; *State v. Henthorn*, 46 Kan. 613, 26 Pac. 937. **Neb.**—*Rosewater v. State*, 47 Neb. 630, 66 N. W. 640; *Percival v. State*, 45 Neb. 741, 64 N. W. 221, 50 Am. St. Rep. 568. **S. C.**—*Hay v. Far-num*, 73 S. C. 193, 53 S. E. 85.

Contra: **Ill.**—*Sloan v. People*, 115 Ill. App. 84. **La.**—*Marvin v. Court*, 126 Iowa 355, 102 N. W. 119; *Drady v. Court*, 126 Iowa 345, 102 N. W. 115. **Mass.**—*Globe N. Co. v. Com.*, 188 Mass. 449, 453, 74 N. E. 682. **Mich.**—*In re Chadwick*, 109 Mich. 588, 67 N. W. 1071.

(IV.) **Counter Affidavits Are Evidence, Not Pleading.** — It has been held that the counter affidavits used in such preliminary proceedings are not pleadings, but evidence,⁵² and that the issues in contempt proceedings are questions of fact.⁵³

(V.) **Judicial Notice.** — The court can take judicial notice of its own orders or actions in the matter out of which the alleged contempt arose,⁵⁴ or of the facts constituting the contempt where the contempt

Mont.—Territory *v. Murray*, 7 Mont. 251, 15 Pac. 145. **Neb.**—Mackay *v. State*, 60 Neb. 143, 82 N. W. 372. **Nev.** *In re Chartz*, 29 Nev. 110, 85 Pac. 352, 5 L. R. A. (N. S.) 916. **N. C.**—*In re Young*, 137 N. C. 552, 50 S. E. 220. **S. C.**—*Battle v. Cape Fear Lumb. Co.*, 72 S. C. 322, 51 S. E. 873. **Tenn.**—*Coleman v. State*, 121 Tenn. 1, 113 S. W. 1045.

"Plaintiff in error insists that the contempt here involved is a criminal and not a civil contempt and that upon the filing of his sworn answer purporting to deny the truth of the matters alleged in the information or petition he was entitled to be discharged. An exhaustive discussion and review of the authorities relating to the distinction between criminal and civil contempt will be found in *Hake v. People*, 230 Ill. 174. It is there held that where the proceeding is in a court of equity the contempt is civil and is punished as an incident to the enforcement of orders and decrees made in furtherance of the remedy sought. The contempt in the case at bar arises from the alleged violation by plaintiff in error of the order of a court entered in a proceeding in equity and is clearly a civil contempt wherein a court is authorized to hear evidence offered by the respective parties upon the issues made by the petition or information. In each of the cases of *O'Brien v. The People*, 216 Ill. 354; *Franklin Union v. The People*, 220 Ill. 355; *Flannery v. The People*, 225 Ill. 62; *Hake v. The People*, 230 Ill. 174, and *Barnes v. Typographical Union*, 232 Ill. 402, which involve the violation by certain persons of so called 'strike injunctions,' the contempt proceedings were held to be civil and not criminal, and the practice and procedure applicable to civil contempts, prevailed. Conceding that the sworn answer filed by the plaintiff in error constituted a full denial of the facts alleged in the information or petition, it did not operate to purge

him of the alleged contempt and the court properly heard the evidence of witnesses for the purpose of determining that question." *People v. Kizer*, 151 Ill. App. 6, 13.

In Iowa statute gives contemnor right to file explanation before he is found guilty. *State v. Court*, 124 Iowa 187, 99 N. W. 712.

52. **N. H.**—*State v. Matthews*, 37 N. H. 450. **N. Y.**—*Matter of Depue*, 185 N. Y. 60, 77 N. E. 798. **Ore.**—*State v. McKinnon*, 8 Ore. 487.

53. *State v. McKinnon*, 8 Ore. 487. "The overwhelming weight of authority is that in such cases they were not entitled to a jury trial." *O'Flynn v. State*, 89 Miss. 850, 43 So. 82, 9 L. R. A. (N. S.) 1119.

54. **Cal.**—*Ex parte Ah Men*, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263. **Ill.**—*Hake v. People*, 230 Ill. 174, 82 N. E. 561; *Ferriman v. People*, 128 Ill. App. 230 (citing 3 *ENCYCLOPEDIA OF EVIDENCE* 442). **Ia.**—*Bunting v. Powers*, 144 Iowa 65, 120 N. W. 679; *Ferguson v. Wheeler*, 126 Iowa 111, 101 N. W. 638; *Jordan v. Circuit Court*, 69 Iowa 177, 28 N. W. 548. **Neb.**—*State v. Bee Pub. Co.*, 60 Neb. 282, 83 N. W. 204, 83 Am. St. Rep. 531, 50 L. R. A. 195. **Ore.**—*State v. Sieber*, 49 Ore. 1, 88 Pac. 313.

"In our judgment proceedings to punish contempt of an order or decree of the court are so far identified with the action in which the order or decree was entered that the court may take judicial notice thereof without proof or profert of the record. Such is the substance of our holding in *Jordan v. Circuit Court*, 69 Iowa 181, 28 N. W. 548, and *Ferguson v. Wheeler*, 126 Iowa 111, 101 N. W. 638. See, also, *State ex rel. Sanders v. Jones*, 20 Wash. 576, 56 Pac. 369; *State v. Porter*, 76 Kan. 411, 13 L. R. A. (N. S.) 462, 91 Pac. 1073; *State v. Thomas*, 74 Kan. 360, 86 Pac. 499. The case of *McGlasson v. Scott*, *supra*, is not an authority to the contrary. In that case the rule

was committed in its presence,⁵⁵ but not of acts occurring beyond its

as to judicial notice was neither mentioned nor discussed, but the holding there was simply to the effect that the existence of a decree could not be established by the production of an uncertified copy. Nor is the rule any less applicable where the decree in question was entered at a term of court presided over by a judge other than the one presiding in the contempt proceedings. The court remains the same without regard to the identity of the judge. Nor does the fact that the presiding judge may have no personal knowledge or remembrance of the decree which has been violated in any manner prevent the application of the rule of judicial notice, for in such case the court will take cognizance of the true state of the record by referring to the proper books, documents, and other sources of information." *Haaren v. Mould*, 144 Iowa 296, 122 N. W. 921, 24 L. R. A. (N. S.) 404, 407.

55. Ill.—*Ferriman v. People*, 128 Ill. App. 230, (citing *ENCYCLOPEDIA OF EVIDENCE* 442). Neb.—*In re Dunn*, 85 Neb. 606, 124 N. W. 120. Okla.—*Burke v. Territory*, 2 Okla. 499, 37 Pac. 829.

What Facts May Be Judicially Noticed.—In *Dines v. People*, 39 Ill. App. 565, which was a contempt proceeding against the clerk of court for destroying certain ballots in his custody in violation of an order of the court to preserve them, the court, in discussing what facts it could take judicial notice of, said: "Of what facts will a court take judicial notice? Of the signatures, of their own officers, their own judgments and orders, whether a bill of exceptions has been signed by the judge, and various other matters. The rule which seems to us to govern in the present case is thus laid down in *Wharton*, and approved in *Secrist v. Petty*, 109 Ill. 188: 'The doctrine is well recognized that a court will take judicial notice of the state of the pleadings, and the various steps which have been taken in a particular cause, and consequently the judge must take notice of his own official acts in the progress of such a case, and he therefore needs no proof to advise him of what he has done in it.' What are official acts? We think they are such only as would form part of the record. . . . We do not mean to be understood that

the court can only take judicial notice of such acts and proceedings as are actually recorded. Mere verbal orders may be given by the judge, which are never placed upon record, and for the disobedience of which one might be punished, as for contempt. But all such orders and proceedings could properly be placed upon the record of the court, if necessary, and usually would be, if proceedings in the nature of punishing for contempt were to grow out of them."

See *State v. Hudson Co. Elec. Co.*, 61 N. J. L. 114, 38 Atl. 818, where it was held that in contempt proceedings to punish a party for disobedience of a stay implied in a writ of *certiorari* the court would not take notice of the files in the *certiorari* suit without their being put in evidence, the two proceedings being distinct. See also *Oster v. People*, 192 Ill. 473, 61 N. E. 469, 53 L. R. A. 462, where the court refused to consider evidence introduced in a chancery proceeding out of which the contempt grew. "The answer, if true, acquits said Oster of the charge of contempt. The trial judge acted on the theory it was competent, on the hearing of the attachment for contempt, to consider the testimony which had been given before him on the hearing of the issues made under the petition of said Reynolds & Reynolds Company and others, as in denial of the answer or as original evidence in support of the charge of contempt, and adjudged such testimony warranted the judgment convicting Oster of the charge of contempt. The alleged acts of contempt occurred, if at all, out of the presence of the court. The purpose of the proceeding for contempt was not to enforce any act for the benefit of the creditors of the said firm or advance the private rights of any such creditor, but to vindicate the authority and dignity of the court. The proceeding was punitive, and for the purpose of punishing Oster. The penalty was not as a means to the end that Oster should be compelled to do or omit to do some act, but as punishment to him for an act already charged to have been done. The proceeding was criminal in its nature, was independent and distinct from the chancery proceeding in which Oster was appointed

presence,⁵⁶ nor of the existence of a prior but different contempt proceeding.⁵⁷

g. *Attacking Original Order.*—The contemnor may, on the application to punish for contempt, attack the power or authority of the court to issue the order, the violation of which is charged as constituting the contempt,⁵⁸ but cannot be heard to say that it is merely erroneous, or ambiguous, however flagrant it may appear to be, that being a collateral attack.⁵⁹

h. *Examination of Witnesses.*—(I.) *By Prosecution.*—Where upon examining the testimony on which the attachment or order to show cause is issued, together with the answer of the respondent, the court is not satisfied that the charge is sustained, the prosecutor may in addition bring witnesses to support it.⁶⁰ Where the power to examine witnesses does not exist, the failure to object, or the cross-examination of the witnesses by the contemnor, waives the defect.⁶¹

(II.) *By Respondent.*—The respondent may in addition to his own testimony in answer to the interrogatories presented to him, examine witnesses for the purpose of exculpating himself.⁶²

IV. **THE JUDGMENT.**—A. **JURISDICTIONAL FACTS.**—The judgment must set out the facts necessary to confer jurisdiction, as well as a finding that such acts constitute a contempt of court,⁶³ and must

receiver, and also, from the intervening petition filed in that proceeding by said Reynolds and Reynolds Company and others to recover the goods alleged to have been surreptitiously removed from the custody of the receiver."

Pertinent facts cognizable by use of senses may be judicially noticed if connected with the transaction. *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

56. *Ex parte York*, 89 Ark. 72, 115 S. W. 948; *In re Smith*, 52 Kan. 13, 33 Pac. 957. See *In re Providence J. Co.*, 28 R. I. 489, 68 Atl. 428, 17 L. R. A. (N. S.) 582. Compare *In re Shay* (Cal.), 117 Pac. 442, where the acts complained of came to the notice of the court through a publication in the newspapers.

The court cannot judicially know that there was an abusive publication and who was responsible. *Holt's Case*, 55 N. J. L. 384, 27 Atl. 909.

57. *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

58. **U. S.**—*Fischer v. Hayes*, 6 Fed.

63. **Ill.**—*Flannery v. People*, 225 Ill. 62, 80 N. E. 60; *Franklin Union v. People*, 220 Ill. 355, 77 N. E. 176; *O'Brien v. People*, 216 Ill. 354, 363, 75 N. E. 108. **Ia.**—*Jordan v. Circuit*

Court of Wapello County, 69 Iowa 177, 28 N. W. 548.

Validity of subpoena, disobedience of which is charged may be attacked. *Ferriman v. People*, 128 Ill. App. 230, 236; *O'Hair v. People*, 32 Ill. App. 277.

59. *Flannery v. People*, 225 Ill. 62, 80 N. E. 60; *O'Brien v. People*, 216 Ill. 354, 366, 75 N. E. 108; *Clark v. Burk*, 163 Ill. 334, 45 N. E. 235; *Leopold v. People*, 140 Ill. 552, 30 N. E. 348.

60. *State v. Matthews*, 37 N. H. 450, 455.

61. *King v. Barnes*, 113 N. Y. 476, 21 N. E. 182.

Where there is no denial of the facts constituting the offense, no interrogatories are necessary. *People ex rel. Surety Co. v. Anthony*, 7 App. Div. 132, 40 N. Y. Supp. 279, *affirmed*, 151 N. Y. 620, 45 N. E. 1133.

62. *State v. Matthews*, 37 N. H. 450, 455; *Magennis v. Parkhurst*, 4 N. J. Eq. 433.

63. *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853; *Ex parte Carroll*, 100 Cal. xvii, 34 Pac. 518; *Ex parte Field*, 1 Cal. 187; *People v. Turner*, 1 Cal. 152.

A judgment not responsive to the order is void. *State v. Willis*, 61 Minn.

show on its face that the accused was present in court when the commitment was ordered.⁶⁴

B. FINDING FACTS.—A contempt committed in the presence of the court being triable summarily without process or pleadings of any kind,⁶⁵ a recital⁶⁶ and finding of facts constituting the contempt

120, 63 N. W. 169. See also *Jackson v. State*, 21 Tex. 668.

In New York there must first be an adjudication not only that the accused is guilty of a contempt of court, but that the act complained of "not only has a tendency to, but actually does, defeat, impair, impede or prejudice the rights or remedies of the party complaining." *Socialistic Co-op. Pub. Assn. v. Kuhn*, 51 App. Div. 583, 64 N. Y. Supp. 933, citing numerous local cases.

A Defective Record.—"In our opinion, the judgment cannot stand. The record shows three specifications against the accused: (1.) That he addressed insulting and menacing language to the court during the trial of a case. (2.) That he threatened opposing counsel with an assault. (3.) That he wilfully refused to obey the order of the court to take his place at the counsel table and be seated. It will be observed that the proceedings were conducted on theory that the contempt was committed in the presence of the court. While it has been held that a formal accusation is not necessary under such circumstances, it is undoubtedly essential that it should affirmatively appear on the face of the record with all the certainty of an indictment or information, that an offense had been committed. In our judgment, such fact does not thus appear in this case. The language, which the trial court held to be insulting and menacing, is not set out. It will not be claimed that an indictment or information, thus charging an analogous offense, would be good. Hence, the record, in that behalf, is insufficient to sustain a judgment of conviction." *Ogden v. State*, 3 Neb. (Unof.) 886, 93 N. W. 203.

64. *Ex parte Mylius*, 61 W. Va. 405, 56 S. E. 602, the proceeding being criminal.

65. *Johnson v. State*, 87 Ark. 45, 112 S. W. 143; *Ex parte Davies*, 73 Ark. 358, 84 S. W. 633.

66. *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853; *Overend v. Superior*

Court, 131 Cal. 280, 63 Pac. 372; *Ex parte Zeehandelaar*, 71 Cal. 238, 12 Pac. 259; *People v. Turner*, 1 Cal. 152; *In re Shortridge*, 5 Cal. App. 371, 90 Pac. 478.

"The sole question for our consideration herein is whether the court has the right to adjudge a party to be in contempt of court without in any manner making findings of fact showing as a matter of law that the party accused, was in fact guilty of contempt. A similar question arose in the case of *In re Deaton*, 105 N. C. 59, 11 S. E. 244, wherein a party had been adjudged guilty of contempt for acts not committed in the presence of the court; and in relation to the point before us the court said: 'It is the duty of the court in passing sentence for contempt when committed in the presence of the court, though no appeal lies, to spread its findings of fact upon the record. Code, §650. The reasons therefor are given in *State v. Mott*, 49 N. C. 449, cited above. For a stronger reason, they should be set out in this class of contempts in which the party is entitled to have the matter reviewed by an appeal. The judgment of the mayor, as set out in the record, is fatally defective as to the allegation of publishing grossly inaccurate accounts of judicial proceedings, in that it does not set out and recite in what the publication consisted. It is true that in the notice to show cause a certain article is charged and set out as published by the respondents. But in the judgment there is no specific finding that such article was published by the defendant, nor, if a part, what was proven. It can only be inferred. This is not sufficient. The article must be set out in the judgment, and its publication, and the intent with which it was published, must be found as facts by the court.' In North Carolina there is no statute requiring findings in contempt proceedings where the contempt charged was not committed in the presence of the court, and in our own state we have no such provision, but in this

should be contained in the judgment,⁶⁷ and the facts set forth must be sufficient to show contempt within the meaning of the law without the aid of intendments and presumptions.⁶⁸ But it has been

state we have, in reference to contempt proceedings in justice court, a provision of our statute very similar to the North Carolina statute (Code, §650, *supra*); our section being section 89 of the Revised Justice Code, and reading as follows: 'When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily; to that end an order must be made, reciting the facts as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed.' And we may well say that, in conformity with the spirit of this statute and in view of the unusual nature of contempt proceedings, and, further, in order to carefully guard the rights of our citizens, no court should render any judgment punishing one for contempt of such court without either by separate findings of fact or by incorporating findings in the judgment itself clearly and specifically find the facts upon which the judgment of the court is based. In the case of *People ex rel. Field v. Turner*, 1 Cal. 152, the Supreme Court of that state, after considering this question quite fully and showing the reasons why such findings should be made, said: 'We think it follows from the distinctions above considered that the final order of the court, by which a party is adjudged to have been guilty of a contempt, should always show upon its face the facts upon which the exercise of the power is based, and the adjudication made. This is certainly the general, if not the uniform, practice.' It is true in that case that there was absolutely no findings in the judgment, but we think that, even if there were some findings, unless such findings were sufficient to warrant the conclusion of the court, the judgment could not stand, and it must be conceded that in the case at bar, where there were no findings, either to the effect that appellant was financially able to obey the order of the court, or that he had wilfully and intentionally rendered himself unable to obey such order, there was insufficient to warrant the judgment. It is true that in a later

California case—*Ex parte Henshaw*, 73 Cal. 486, 15 Pac. 110—the Court found that no findings of the court were necessary, and distinguished the *Turner* Case, but an examination of said case shows that as a matter of fact the court virtually made complete findings.' *Hoffman v. Hoffman* (S. D.), 127 N. W. 478.

67. *Johnson v. State*, 87 Ark. 45, 112 S. W. 143; *Meeks v. State*, 80 Ark. 579, 98 S. W. 378; *Ex parte Davies*, 73 Ark. 358, 84 S. W. 633; *In re Odum*, 133 N. C. 250, 45 S. E. 569 (finding of facts must be filed and the judgment based on the findings); *Ex parte Summers*, 27 N. C. 149.

A statement of facts in a judgment that finds "that the petitioner, in response to the order to show cause, made in open court certain statements set out in the judgment, and finds that by the use of such language he committed a contempt," is sufficient. *Ex parte Davies*, 73 Ark. 358, 84 S. W. 633.

The recital of facts which must be contained in the order adjudicating the contempt is similar to the recital of facts which must be contained in an affidavit for constructive contempt. Mere conclusions are not sufficient, for the facts recited must prove the contempt. *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372; *In re Shortridge*, 5 Cal. App. 371, 90 Pac. 478.

68. *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853; *Ex parte Hoar*, 146 Cal. 132, 79 Pac. 853; *Batchelder v. Moore*, 42 Cal. 412; *In re Shortridge*, 5 Cal. App. 371, 90 Pac. 478.

Where the alleged contemnor was the attorney for one of the parties in the proceeding pending before the court, "the mere statement that he interrupted the proceedings without stating what he did does not comply with the plain mandate of the law that the facts must be stated. . . . Every interruption of the proceedings of the court is not a contempt, nor unlawful, nor necessarily improper. Many interruptions are lawful and proper. Every time an attorney in the performance of his duty objects to a question asked a witness, or objects to any

held that the failure to recite in the judgment the facts constituting the contempt does not render the judgment void,⁶⁹ and that a judgment sufficiently sets forth the cause for which the final order is entered, if there appears upon the face of the order the general object and purpose of the proceeding, together with the finding of the court,⁷⁰ the judgment being construed in connection with the moving papers.⁷¹

other proceeding in the action, he may be said to interrupt the proceedings. The particular circumstances of the interruption—the concrete facts constituting the interruption—must set forth in order that the commitment shall show upon its face and without the aid of presumptions that the accused has been guilty of a contempt. The only interruption set forth—the only concrete fact set forth—is that, while a witness was being examined the petitioner addressed the court, and continued to do so after being admonished to take his seat. What he said to the court is not stated, and no circumstances are set forth which will enable us to say without the aid of intentment and presumption that his remarks were not perfectly proper in themselves, and strictly within the line of his duty as an officer of the court and the attorney for one or both of the parties to the action then pending before the court.” *In re Shortridge*, 5 Cal. App. 371, 377, 90 Pac. 478.

Judgment Must Show Question. Where a witness is adjudged guilty of contempt for refusing to answer a question, “the reviewing court cannot . . . presume that the question that the witness refused to answer was pertinent and proper, but it must be shown to be so on the face of the commitment.” *Ex parte Shortridge*, 5 Cal. App. 371, 90 Pac. 478. An omission of this character is jurisdictional and will require the annulment of a judgment in contempt. *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372.

69. *Ala.*—*Easton v. State*, 39 Ala. 551, 87 Am. Dec. 49. *Ark.*—*Ex parte Chastain*, 94 Ark. 558, 127 S. W. 973; *Ex parte Davies*, 73 Ark. 358, 84 S. W. 633. *Cal.*—*Ex parte Henshaw*, 73 Cal. 486, 15 Pac. 110. *Md.*—*Ex parte Maulsby*, 13 Md. 625. *W. Va.*—*State v. Miller*, 23 W. Va. 801.

Remedy on Failure To Recite Facts. The accused “should have asked the court to recite the facts in the judg-

ment and in the event of refusal, the facts could have been brought into the record by bill of exceptions.” *Ex parte Chastain*, 94 Ark. 558, 127 S. W. 973. See also *State v. Miller*, 23 W. Va. 801.

70. *Fisher v. Hayes*, 7 Fed. 96; *Kanter v. Clerk of Circuit Court*, 108 Ill. App. 287, 302.

Imposition of Fine.—“The trial court adjudged ‘that the defendants Brown and Bennett, E. Brown & Del. Bennett be fined in the sum of \$300 each and the costs of the prosecution.’” Held to be a fine against the two copartners who alone compose the firm, and does not impose an additional fine against the partnership. *Brown v. Powers*, 146 Iowa 729, 125 N. W. 833.

While the court should state in its judgment “the facts constituting the contempt,” the absence of such statement does not render the judgment void. *Ex parte Chastain*, 94 Ark. 558, 127 S. W. 973 (in which the recital “on account of language and conduct in open court” was sustained); *Ex parte Davies*, 73 Ark. 358, 84 S. W. 633; *Ex parte Summers*, 27 N. C. 149.

If a more complete recital is desired than is set forth in the judgment, a request therefor should be made, and in the event of refusal the facts could be brought into the record by bill of exceptions. *Ex parte Chastain*, 94 Ark. 558, 127 S. W. 973.

See, however, *Kanter v. Clerk of Circuit Court*, 108 Ill. App. 287, 304, where the contemnors were each fined \$500, and by the terms of the order they were each committed to jail until his fine was paid, “or until he and they and each of them be otherwise released pursuant to law.” Such concluding phrase was held so erroneous as to require a reversal of the judgment.

71. *Cal.*—*Ex parte Henshaw*, 73 Cal. 486, 494, 15 Pac. 110, statement that by reason of the acts and conduct stated and specified in the affidavit, sufficient. *Minn.*—*State v. District Court*, 113

C. CERTAINTY AND DEFINITENESS. — A judgment in contempt proceedings like all other judgments must be specific and certain, determining the rights recovered or the penalties imposed. It must be readily understandable and be capable of performance.⁷² It should

Minn. 304, 129 N. W. 583. **Tex.**—*Ex parte* Cash, 50 Tex. Crim. 623, 99 S. W. 1118, 9 L. R. A. (N. S.) 304.

A recital that the defendant is "adjudged to stand in contempt of this court as alleged in the petition" is sufficient without setting out such facts therein. *Clay v. Waters*, 178 Fed. 385, 101 C. C. A. 645.

"In *Ex parte* Kearby, 35 Tex. Crim. Rep. 634, 34 S. W. 962, it was held by this court that the *factum* of contempt should be set out in the judgment. However, that was a case of contempt in the presence of the court. Here the matter is different. It is a contempt proceeding originating in a civil suit, and, in accordance with the authorities, we understand the moving papers can be looked to, to help out some defect amounting to an irregularity in the judgment. *Ex parte* Smith, 40 Tex. Crim. Rep. 179, 49 S. W. 396. So, if it be conceded that the mere adjudication in the body of the order of the court for contempt for violating the injunction is not sufficient, the moving papers, as indicating the particular character of violation, may be looked to, which in this case was the sale of a railroad ticket in violation of the order of the court." *Ex parte* Cash, 50 Tex. Crim. 623, 99 S. W. 1118, 9 L. R. A. (N. S.) 304.

"It is further said the order adjudging Franklin Union No. 4 guilty of contempt was insufficient. The order referred to the petition and the affidavits filed in its support, and in apt terms adjudged Franklin Union No. 4 guilty of a violation of the injunction, setting out the manner of its violation and adjudging it to be in contempt, and imposed upon it a fine of \$1,000. In *Fisher v. Hayes*, 6 Fed. 63, Mr. Justice Blatchford says (page 70): 'It is objected that the order of February 17, 1880, decrees only "that the defendant is adjudged to have committed the contempt alleged," without reciting further the offence of which he is guilty. It is insisted that this was necessary; and, further, that the order should have recited that the de-

fendant had disobeyed a lawful order of the court, and was guilty of a contempt of court in so doing. The contempt alleged is set forth with sufficiently particularity in the affidavits on which the motion for attachment was founded and in the report of the referees. All the proceedings and the various orders are sufficiently connected together by reference and recital to identify "the contempt alleged," without the necessity of reciting at length in the order the particulars of the previous proceedings.' We think the order adjudging Franklin Union No. 4 guilty of contempt and assessing the fine against it of \$1,000 sufficient." *Franklin Union No. 4 v. People*, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1001, 1016.

72. *People v. Pirfenbrink*, 96 Ill. 63.

Necessary Facts.—"The order, upon a conviction for a contempt of this description, should be drawn up in proper form; reciting the substance of the alleged misconduct, the adjudication of the court that the accused had been guilty of the contempt, and that such misconduct was calculated to and did impair, defeat, impede and prejudice the rights or remedies of the prosecutor, or of the parties in the cause; and imposing a fine sufficient to indemnify them and to satisfy the costs and expenses. Where anything further remains to be done by the party guilty of the contempt, the order should also specify particularly what he is to do, and the manner in which it is to be done, to entitle him to his discharge upon the payment of the fine imposed. And where the fine embraces several particulars, as where a part is for the loss or injury sustained by the contempt, and a part to satisfy the costs and expenses of the proceedings, the amount of each should be specified. The order should also direct to whom the fine is to be paid, or what is to be done with such fine when paid, etc.; so that the order, and the process of commitment founded thereon, may show the nature of the conviction, and what the defendant is to do to entitle himself to

be so definite and certain as to the term of imprisonment that the officer to whom it is directed is informed thereby with certainty as to when he is to set at liberty the subject of the order.⁷³ A judgment in the alternative is void.⁷⁴ A judgment that orders the committal of the defendant until the further order of the court is void.⁷⁵

D. PARTIAL INVALIDITY.—Partial invalidity of the judgment does not render the whole judgment a nullity.⁷⁶ Where the statute prescribes the punishment and limits the term of imprisonment on failure to pay the fine, the judgment will not be reversed, where the statutory limitation has not been observed, but the appellate court may

a discharge from his imprisonment." *Albany City Bank v. Schermerhorn*, 9 Paige's Ch. (N. Y.) 372, 379.

Void Condition.—A judgment containing the following language: "The execution of this judgment is to be suspended during the pleasure of the court; but whenever the court, or one of the judges thereof, so directs, execution and warrant of commitment are to issue," is null and void. *State v. Voss*, 80 Iowa 467, 45 N. W. 898.

All the presumptions favor the judgment of the court. *Ex parte Davies*, 73 Ark. 358, 84 S. W. 633.

"But it is said that the judgments in contempt are uncertain. Each recites that all the material averments in the affidavits are found to be true by the district court; and it is now said that it is uncertain what averments were considered material. But this criticism is hypercritical. Had the trial court omitted the word 'material,' we would not feel disposed to interfere or criticize the judgments; for it appears to us that the evidence would justify a finding that every averment of disobedience has been proven. It is true that the court stated at the conclusion of the hearing that the evidence failed to show that Bailey had sought to exercise all the duties of police captain and had been refused; but this statement is not necessarily inconsistent with the finding made. In order to prove the charges it was not necessary for Bailey to show that he had sought to exercise all the duties of the office of police captain and had been refused. The evidence in support of the specific acts of contempt set forth is overwhelming. It surpasses the bounds of credulity to say that Bailey was restored to all the rights, privileges and duties of the office of police captain, as defined in section 133 of the ordi-

nances of the city of Helena." *State v. District Court*, 41 Mont. 369, 109 Pac. 434.

Not by Habeas Corpus.—*State ex rel. Cary v. Langum*, 112 Minn. 121, 127 N. W. 465, citing *State v. Riley*, 109 Minn. 434, 124 N. W. 11.

73. *Harris v. Harris*, 156 Ill. App. 336; *Kanter v. Clerk of Circuit Court*, 108 Ill. App. 287.

An order which provided that the contemnor "be committed to the common jail of Cook county, there to remain, charged with said contempt for the term of six months or until he pay the sum of one hundred and fifty-six dollars, or until released by due process of law," includes by reasonable construction the direction for such discharge upon payment of the sum therein directed to be paid. The court said: "There is no escaping the plain and apparent fact that the amount found due is a certain sum, and the imprisonment to be endured is for a certain term in case of non-payment, and just as plainly to end upon payment at any time after imprisonment commences." *Harris v. Harris*, 156 Ill. App. 336.

"I do hereby adjudge," is just as much the sentence of the court as if it were written "The court does hereby adjudge," or "It is hereby adjudged." *Kanter v. Clerk of Circuit Court*, 108 Ill. App. 287, 302.

74. *Turner v. Smith*, 90 Mich. 309, 51 N. W. 282. See also *Donnoly v. People*, 38 Mich. 756; *Brownbridge v. People*, 38 Mich. 751; *In re Deaton*, 105 N. C. 59, 11 S. E. 244.

75. *People v. Pirfenbrink*, 96 Ill. 68; *King v. James*, 5 Barn. & Ald. 894, 7 E. C. L. 292.

76. *Overend v. San Francisco Superior Court*, 131 Cal. 280, 63 Pac. 372; *Ex parte Henshaw*, 73 Cal. 486, 15 Pac. 110.

order the modification and correction of the judgment so as to make it conform to the statute.⁷⁷

E. ABILITY TO COMPLY.—It is held that the judgment need not allege the offender's ability to comply,⁷⁸ though there is authority to the contrary.⁷⁹

F. FILING EVIDENCE.—When the proceeding is heard upon oral testimony, the evidence itself and not the substance thereof should be embodied in the record.⁸⁰

In some states the statute requires that before the order of commitment can be entered, the evidence must be properly filed and made matter of record, and that a violation of the rule will result in the annulment of the commitment.⁸¹ But it has never been held that an error on the part of the court in this regard will oust the court of its jurisdiction of the defendant or the subject-matter of the proceedings.⁸²

G. AUTHORITY TO REOPEN.—In jurisdictions where there are no specific terms of court, the court has no power after rendition of judgment to enter another and different judgment, but must enforce the original judgment according to its terms, so far as it is capable of enforcement,⁸³ but where there are such terms it is held that a court has general power over the judgment during the term at which it is made.⁸⁴ But such jurisdiction does not exist after such term has expired.⁸⁵

V. THE PUNISHMENT.—**A. GENERAL AUTHORITY.**—Statutes limiting the penalty which may be imposed for contempt⁸⁶ have been

77. *People v. Pirfenbrink*, 96 Ill. 68 (nor can a defendant be discharged on habeas corpus when the judgment is merely erroneous); *Jordan v. Circuit Court of Wapello County*, 69 Iowa 177, 183, 28 N. W. 548 (where the court ordered the contemnor to be imprisoned until the fine be paid, and the statute provided that the imprisonment on failure to pay a fine should not exceed 150 days).

The California Code (C. C. P. §1222) provides that the judgment of the court or judge made in cases of contempt is final and conclusive. *People v. Latimer* (Cal.), 117 Pac. 1051.

78. *In re Strong*, 111 App. Div. 281, 97 N. Y. Supp. 459, the evidence may be examined to ascertain that fact.

79. *Ex parte Overend*, 122 Cal. 201, 54 Pac. 740; *Adams v. Haskell*, 6 Cal. 316, 65 Am. Dec. 517.

80. *Meeks v. State*, 80 Ark. 579, 98 S. W. 378.

81. *Seidlitz v. Benham* (Iowa), 132 N. W. 370.

82. *Seidlitz v. Benham* (Iowa), 132 N. W. 370.

83. *In re Barry*, 94 Cal. 562, 29 Pac. 1109; *Barry v. Superior Court*, 91 Cal. 486, 27 Pac. 763.

Nunc Pro Tunc Order.—Omissions of what was actually done but not entered may be supplied by entry of an order *nunc pro tunc*, but such order cannot modify an order made previously or to take the place of an order intended to be made but omitted. *Ex parte Buskirk*, 72 Fed. 14, 18 C. C. A. 410.

84. *Fischer v. Hayes*, 6 Fed. 63, citing *Ex parte Lange*, 18 Wall. (U. S.) 163, 21 L. ed. 872.

85. *Fischer v. Hayes*, 6 Fed. 63, citing *Bank of United States v. Moss*, 6 How. (U. S.) 31, 12 L. ed. 331; *The Bank v. Labitut*, 1 Woods (U. S.) 11, 1 Fed. Cas. No. 842.

86. In Connecticut the statute limits the penalty for contempts committed in the presence of the court. *McCarthy v. Hugo*, 82 Conn. 262, 78 Atl. 778; *Welch v. Barber*, 52 Conn. 147.

In Kentucky the statute limits the punishment that may be imposed by the court, but if in its opinion the

held to be constitutional and a legitimate subject for legislative control.⁸⁷

The court, after finding the defendant guilty of contempt, may postpone the punishment.⁸⁸

But when punishment is imposed for a criminal contempt, the power of the court to further punish for the same act and offense is exhausted.⁸⁹ In the class of cases where the penalty inflicted is coercive, the party can only absolve himself by complying with the order, and the court may impose further penalties until there be full compliance.⁹⁰

B. IMPRISONMENT.—Contempts committed in the presence of the court or to compel obedience to an order or judgment of the court may as a general rule be punished by imprisonment, if it be within the power of the contemnor to perform.⁹¹

contempt is one demanding greater punishment than lies in its power to inflict, it may have a jury hear the truth of the matter and leave it to them to impose such punishment as they may deem commensurate with the offense. "As in any other case of trial by jury the verdict will not be disturbed unless flagrantly against the evidence or the result of passion or prejudice." In this case a fine of \$5,000.00 was imposed. *French v. Com.*, 30 Ky. L. Rep. 98, 107, 97 S. W. 427.

Nature of Punishment.—The court may punish contempt on the part of an attorney by disbarment (*In re Maestretti*, 30 Nev. 187, 93 Pac. 1004; *In re Breen*, 30 Nev. 164, 93 Pac. 997 [judgment of disbarment against a judge of the circuit court and suspension against a district attorney was rendered in the above cases]), or indefinite suspension (*In re Dunn*, 85 Neb. 606, 124 N. W. 120). See also Disbarment of Attorneys, 3 Stand. Proc. 863.

The offender may be directed to fill up a ditch so as to restore conditions as they existed before the violation of the order of the court. *State v. District Court*, 113 Minn. 304, 129 N. W. 583.

87. *Jordan v. Circuit Court of Wapello County*, 69 Iowa 177, 182, 28 N. W. 548.

88. *Saal v. South Brooklyn R. Co.*, 122 App. Div. 364, 106 N. Y. Supp. 996.

89. *Lester v. People*, 150 Ill. 408, 425, 28 N. E. 387, 37 N. E. 1004.

90. *Lester v. People*, 150 Ill. 408, 425, 23 N. E. 387, 37 N. E. 1004.

Power To Comply.—If it be within

the power of a party to comply with the order of the court, his refusal to comply therewith is a contempt of the court and he may be imprisoned until he purges himself of the contempt by complying with the order. A statute, however, which would authorize the imprisonment of a party without reference to his power to comply with the order is unconstitutional. *Hurd v. Hurd*, 63 Minn. 443, 65 N. W. 723.

91. **U. S.**—*Delgado v. Chavez*, 140 U. S. 586, 11 Sup. Ct. 874, 35 L. ed. 578, affirming 5 N. M. 646, 25 Pac. 948. **Ala.**—*Ex parte Walker*, 25 Ala. 81. **Cal.**—*Dewey v. Merced County Superior Court*, 81 Cal. 64, 22 Pac. 333; *Ex parte Latimer*, 47 Cal. 131. **Ga.**—*Ryan v. Kingsberry*, 89 Ga. 228, 15 S. E. 302; *Carlton v. Carlton*, 44 Ga. 216. **Ill.**—*People v. Zimmer*, 238 Ill. 607, 87 N. E. 845; *Barclay v. Barclay*, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351. **Ind.**—*Perry v. Pernet*, 165 Ind. 67, 74 N. E. 609. **Ia.**—*Eikenberry v. Edwards*, 67 Iowa 619, 25 N. W. 832, 56 Am. Rep. 360. **Kan.** *In re Burrows*, 33 Kan. 675, 7 Pac. 148. **Md.**—*Buckingham v. Peddicord*, 2 Bland 447. **Mass.**—*Frankel v. Frankel*, 173 Mass. 214, 53 N. E. 398, 70 Am. St. Rep. 266. **Mich.**—*Carnahan v. Carnahan*, 143 Mich. 390, 107 N. W. 73, 114 Am. St. Rep. 660. **Minn.**—*State v. Becht*, 23 Minn. 411. **Mo.**—*Ex parte Renshaw*, 6 Mo. App. 474. **Neb.**—*In re Button*, 83 Neb. 636, 120 N. W. 203, 23 L. R. A. (N. S.) 1173. **N. J.**—*Frank v. Herold*, 64 N. J. Eq. 371, 51 Atl. 774. **N. Y.**—*People v. Fancher*, 2 Hun 226. **N. C.**—*Williamson v. Pender*, 127 N. C. 481, 37 S. E. 495. **Ohio.**—*In re Concklin*, 5 Ohio C. C. 78. **R. I.**—*Jas-*

C. FINE OR IMPRISONMENT.—It is an established principle of the common law that where a fine is imposed, that is the punishment ordered, and the commitment is but an incident.⁹² And where the statute provides that the punishment imposed may be a fine not exceeding a stated amount, or imprisonment not exceeding a specific length of time, or by both such fine and imprisonment, the court may nevertheless provide where a fine is imposed, that upon failure to pay the fine the contemnor be committed to jail until such fine is paid, as for instance, "at the rate of one day's imprisonment for each two dollars of said fine."⁹³

tram v. McAuslan, 29 R. I. 390, 71 Atl. 454. **S. C.**—*Kennesaw Mills Co. v. Walker*, 19 S. C. 104. **S. D.**—*State v. Knight*, 3 S. D. 509, 54 N. W. 412; 44 Am. St. Rep. 809. **Utah.**—*Ex parte Harris*, 5 Utah 5, 5 Pac. 129. **Va.** *Lane v. Lane*, 4 Hen. & M. 437. **W. Va.** *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413. **Wis.**—*In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299. **Wyo.** *Ex parte Bergman*, 3 Wyo. 396, 26 Pac. 914. **Can.**—*Reg. v. Ellis*, 32 N. Bruns. 561; *Todd v. Pearlstein*, 10 Ont. W. R. 471.

Issuance of Attachment.—An attachment in contempt will issue only in a case where the facts are undisputed and clear. *In re Savin*, Petitioner, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. ed. 150; *Bridgewater v. Beaver Val. Tr. Co.*, 27 Pa. Co. Ct. 328.

Attachment.—The court may also punish contempt by attachment. *Bridgewater v. Beaver Val. Tr. Co.*, 27 Pa. Co. Ct. 328; *In re A. B.*, 3 Manitoba 316.

"An attachment is a strong arm of the law—something that reaches out and takes hold. It partakes somewhat of the nature of a summary conviction, and formerly could be enforced for almost any breach that was brought before a court without a jury. But later legislation, which abolished imprisonment for debt, and the rulings since that time, has largely changed all proceedings under attachment and limited the court's powers. The strong arm of the law, like attachment, will only be issued and resorted to by the court when the case before it fully warrants the court's interference, and that interference upon its own judgment without a trial by jury. In other words, the court will only use this strong element of the law when it is satisfied that the emergency de-

mands it, because it is a writ of emergency, and in no case where there is any dispute as to the facts can the party against whom the rule is granted be attached without having a right to be heard and the question passed upon by twelve of his peers." *Bridgewater v. Beaver Val. Tr. Co.*, 27 Pa. Co. Ct. 328.

92. **U. S.**—*New Orleans v. New Orleans & M. Steamship Co.*, 20 Wall. 387, 392, 22 L. ed. 354; *Ex parte Watkins*, 7 Pet. 568, 575, 8 L. ed. 786; *United States v. Hudson*, 7 Cranch 32, 3 L. ed. 259; *Fischer v. Hayes*, 6 Fed. 63, 71. **Cal.**—*Ex parte Karlson*, 117 Pac. 447. **Ill.**—*Kanter v. Clerk of Circuit Court*, 108 Ill. App. 287, 304. **Mass.** *Harris v. Com.*, 23 Pick. 280. **N. Y.** *Son v. People*, 12 Wend. 344; *Kane v. People*, 8 Wend. 203. **Eng.**—*Dunn v. The Queen*, 12 Q. B. 1030, 64 E. C. L. 1031, 116 Eng. Reprint 1155.

Terms of Punishment.—The court instead of imposing a fine or imprisonment may direct that the contemnor do or refrain from doing or pursuing a particular course of conduct, as for instance, where a suspended attorney was charged with violating the order of suspension, the court ordered that "the respondent shall at once, and throughout the remainder of the period of his suspension, discontinue his sign as an attorney at law upon his office, and shall cease to use any stationery whereon his name appears as an attorney at law; that he shall not undertake any legal service of a nature usually performed by members of the bar, and that he shall most carefully refrain from holding himself out to the public in any manner as an attorney at law." *In re Lizotte*, 32 R. I. 386, 79 Atl. 960.

93. *Ex parte Karlson* (Cal.), 117 Pac. 447, approving *Ex parte Crittenden*,

The general rule, under the present practice, is that in the absence of a prohibitive statute the court may insert in the judgment the alternative direction that the contemnor be imprisoned until the fine be paid or until the order of the court be complied with.⁶⁴

D. COLLATERAL DISABILITIES.—The weight of authority as now expressed is that a defendant is entitled to be heard in his defense and defend himself from plaintiff's attack, though he may be in contempt of court;⁶⁵ but the court may order that affirmative action on

62 Cal. 534, and explaining *In re Tyler*, 64 Cal. 434, 1 Pac. 384.

The court in *Ex parte Karlson*, *supra*, quotes from *Dodge v. State*, 24 N. J. L. 455, that "the usual form of the common law judgment is that the prisoner stand committed until the fine is paid," cites *Hathcock v. State*, 88 Ga. 91, 13 S. E. 959; *McMeekin v. State*, 48 Ga. 335; *Brock v. State*, 22 Ga. 98; *Harris v. Com.*, 23 Pick. (Mass.) 280; *In re Newton*, 39 Neb. 760, 58 N. W. 436; *State v. Manning*, 14 Tex. 402; *Rex v. Waddington*, 1 East 166, 102 Eng. Reprint 56, and holds that "the provision of the Code of Civil Procedure that courts may punish a contempt by imposing a fine is consistent with this rule of the common law as to the method of enforcing its payment."

The California statute (C. C. P. §1007) that "an order for the payment of money may be enforced by execution against property, is merely a cumulative remedy . . . but there is nothing indicating an intent to make it exclusive or to take away the common law power to enforce a fine by imprisonment." *Ex parte Karlson* (Cal.), 117 Pac. 447.

94. U. S.—*Fischer v. Hayes*, 6 Fed. 63, 19 Blatchf. 13. Cal.—*Matter of Tyler*, 64 Cal. 434, 1 Pac. 384. Ill.—*Newton v. Locklin*, 77 Ill. 103. Ia.—*Lampher v. Dewell*, 56 Iowa 153, 9 N. W. 101. Kan.—*In re Burrows*, 33 Kan. 675, 7 Pac. 148. Mich.—*Latimer v. Barmore*, 81 Mich. 592, 46 N. W. 1. Nev.—*Ex parte Sweeney*, 18 Nev. 74, 1 Pac. 379. N. J.—*Crane v. Sayre*, 6 N. J. L. 110. N. M.—*In re Sloan*, 5 N. M. 590, 25 Pac. 930. N. Y.—*Stephenson v. Hanson*, 67 How. Pr. 305, 6 N. Y. Civ. Proc. 43; *In re Morris*, 45 Hun 167. Tex.—*Edrington v. Pridham*, 65 Tex. 612; *Ex parte Robertson*, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. Rep. 207. Utah.—*Ex parte Whitmore*, 9 Utah 441,

35 Pac. 524. Wis.—*Jos. Schlitz Brew. Co. v. Washburn Brew. Assn.*, 122 Wis. 515, 100 N. W. 832. Wyo.—*Fischer v. McDaniel*, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 971.

95. U. S.—*Warner v. Godfrey*, 186 U. S. 365, 22 Sup. Ct. 852, 46 L. ed. 1203; *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215. Cal.—*Summerville v. Kelliher*, 144 Cal. 155, 77 Pac. 839; *Younger v. Superior Court*, 136 Cal. 682, 69 Pac. 485; *Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 152. Mont.—*Harley v. Montana Ore P. Co.*, 27 Mont. 388, 71 Pac. 407; *State v. Clancy*, 24 Mont. 359, 61 Pac. 987. N. Y.—*Maran v. Maran*, 137 App. Div. 348, 122 N. Y. Supp. 9. Eng.—*King v. Bryant*, 3 Myl. & C. 191, 40 Eng. Reprint 897; *Halldane v. Eckford*, L. R. 7 Eq. 425. And see the following cases: Colo.—*Greig v. Ware*, 25 Colo. 184, 55 Pac. 163. Ind.—*Citizens' Nat. Bank v. Alexander*, 34 Ind. App. 596, 73 N. E. 279. Ia.—*Baily v. Baily*, 69 Iowa 77, 28 N. W. 443. B. I.—*Hazard v. Durant*, 11 R. I. 195.

In *Hovey v. Elliott*, 167 U. S. 409, 444, 17 Sup. Ct. 841, 42 L. ed. 215, it was said that the question whether a court "in the exercise of its power to punish for a contempt of court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defense" was not involved in the case. The court proceeded: "The demonstration of the unsoundness of the contention that courts of equity have claimed and exercised the power to suppress an answer and thereupon render a decree *pro confesso*, which results from the foregoing review of the authorities, is strengthened by the reflection that if such power obtained, then the ancient common-law doctrine of 'outlawry,' and that of the

his part in the case be stayed;⁹⁶ nor will he be heard upon any matter in which he seeks the favor of the court until the contempt is purged.⁹⁷

E. DISPOSITION OF FINE.—The power of the court to direct the payment of all or part of the fine to a complainant in an application for contempt has been frequently recognized, and such a direction incorporated in the judgment.⁹⁸ The disposition of the fine has also been made the subject of statute.⁹⁹ But it has been held that unless there be a statute authorizing it, a judgment cannot direct the appropriation of a fine imposed for a contempt of court, to the party injured by the act constituting the contempt or who prosecutes the proceeding for the contempt.¹

F. PUNISHMENT AS CONSTITUTING IMPRISONMENT FOR DEBT.—Imprisonment for debt is prohibited by almost all state constitutions, but imprisonment for failure to pay over money as required by a court order is for the contempt and is not imprisonment for debt,²

continental systems as to 'civil death,' would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen." It was thereupon held that the supreme court of the District of Columbia erred in disregarding the answer.

96. *Maran v. Maran*, 137 App. Div. 348, 122 N. Y. Supp. 9; *Harney v. Harney*, 110 App. Div. 20, 96 N. Y. Supp. 905; *Sibley v. Sibley*, 76 App. Div. 132, 78 N. Y. Supp. 843.

97. **U. S.**—*Hovey v. Elliott*, 167 U. S. 409, 424, 17 Sup. Ct. 841, 42 L. ed. 215, wherein the early English cases are discussed. **Mass.**—*Campbell v. Justices of Superior Court*, 187 Mass. 509, 73 N. E. 659, 69 L. R. A. 311. **N. Y.** *Johnson v. Pinney*, 1 Paige Ch. 646, 19 Am. Dec. 459; *Field v. Chapman*, 13 Abb. Pr. 320, 330; *Krom v. Hogan*, 4 How. Pr. 225. **Tenn.**—*Gant v. Gant*, 10 Humph. 464, 53 Am. Dec. 736. **Va.** *Fisher v. Fisher*, 4 Hen. & M. 484. **Can.**—*Clark v. Campbell*, 15 Ont. Pr. 338.

A motion to vacate the injunction upon which the contempt proceeding is based will be entertained. *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 242; *Endicott v. Mathis*, 9 N. J. Eq. 110.

98. **U. S.**—*Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 108 Fed. 873, 48 C. C. A. 118, citing a number of federal cases. **Ill.**—*Chicago Typo. Union v. Barnes*, 134 Ill. App. 11. **Ky.**—*Bush v. Chenault*, 12 Ky. L. Rep. 249. **Mich.**—*Chapel v.*

Hull, 60 Mich. 167, 26 N. W. 874. **N. Y.** *In re Goslin*, 95 App. Div. 407, 83 N. Y. Supp. 670, *affirmed*, 180 N. Y. 505, 72 N. E. 1142. **S. C.**—*Lorick v. Motley*, 69 S. C. 567, 48 S. E. 614. **Tenn.**—*Robins v. Frazier*, 5 Heisk. 100. **Wash.**—*State v. North Shore Boom Co.*, 55 Wash. 1, 103 Pac. 426, 107 Pac. 196. **Wis.**—*My Laundry Co. v. Schmeling*, 129 Wis. 597, 109 N. W. 540.

99. *Langdon v. Wayne Circuit Judges*, 76 Mich. 358, 373, 43 N. W. 310.

An order imposing a fine and directing its payment to the clerk of the court on or before a specific day, and that in default thereof execution will issue, is not defective for failure to provide how the fine shall be disposed of. *Nelson v. London Guar. & Acc. Co.*, 132 Ill. App. 10.

1. *Barnes v. Chicago Typographical Union*, 232 Ill. 402, 83 N. E. 932; *Morris v. Whitehead*, 65 N. C. 637; *In re Rhodes*, 65 N. C. 518.

2. **Cal.**—*Ex parte Cohn*, 55 Cal. 193. **Ga.**—*Remley v. De Wall*, 41 Ga. 466. **Ia.**—*Eikenberry v. Edwards*, 67 Iowa 619, 25 N. W. 832. **Minn.**—*Hurd v. Hurd*, 63 Minn. 443, 65 N. W. 728; *State v. Becht*, 23 Minn. 411. **Vt.** *Leach v. Peabody*, 58 Vt. 485, 2 Atl. 737. **Wis.**—*In re Milburn*, 59 Wis. 24, 17 N. W. 965. **Can.**—*Pritchard v. Pritchard*, 18 Ont. 173.

In California it is necessary that it appear affirmatively that the party had the ability to pay. *Ex parte Joutsen*, 154 Cal. 540, 98 Pac. 391.

though it is held that an order committing an offender until he should pay the "amount of money equal to the coupons which have been detached and disposed of," is an imprisonment for debt and violates that constitutional provision.³

G. DOUBLE PUNISHMENT.— Punishment for a contempt does not bar criminal prosecution for the same offense.⁴ And where a person who has been punished directly by the tribunal against whom the contempt is committed, is also convicted under a statute making the act of contempt a crime, the former punishment is usually directed to be taken in mitigation in passing sentence upon the subsequent conviction.⁵

H. MODIFICATION OF PUNISHMENT.— The court may by order upon its own motion and without the consent or the request of the contemnor remit a portion of the punishment inflicted, nor is it required that notice thereof be given the contemnor.⁶ However, if the modification made it more onerous, he might justly complain of the want of notice.⁷

I. PLEA OF FORMER JEOPARDY.— Contempt of court is not a crime but is generally spoken of as *quasi* criminal; the constitutional provisions regarding pleas of former jeopardy or former adjudication apply only to charges of crime and have no application in contempt proceedings.⁸ It is, however, doubtful if an offender is brought before the court summarily, and there be an adjudication, whether such offender can be again cited to appear before the same court or justice to answer for the same contempt.⁹

3. *Ex parte* Dickens, 162 Ala. 272, 50 So. 218; *Ex parte* Hardy, 68 Ala. 303, 323.

4. Conn.—*State v. Howell*, 80 Conn. 668, 69 Atl. 1057. Ga.—*Bradley v. State*, 111 Ga. 168, 36 S. E. 630, 78 Am. St. Rep. 157, 50 L. R. A. 691. Mont.—*State v. Faulds*, 17 Mont. 140, 42 Pac. 285. N. Y.—Code Civ. Proc. §13.

"Contempts are never merged with statute offenses, without express words for that purpose." *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 417.

5. Cal. Penal Code, §658; *Ex parte* Karlson (Cal.), 117 Pac. 447; Code Civ. Proc. (Cal.) §13.

6. *Ex parte* Davies, 73 Ark. 358, 84 S. W. 633.

7. *Ex parte* Davies, 73 Ark. 358, 84 S. W. 633.

8. Conn.—*Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650. Ia.—*Jones v. Mould*, 151 Iowa 599, 132 N. W. 45. Minn.—*State v. Becht*, 23 Minn.

411. N. J.—*Brown v. Farley*, 38 N. J. Eq. 186.

Former Acquittal.—An acquittal on a criminal prosecution which had also been instituted has no effect on the power of the court to determine for itself what judgment should be rendered in a proceeding to punish for the same act as a civil contempt. *Brown v. Farley*, 38 N. J. Eq. 186.

9. *People ex rel. Choate v. Barrett*, 56 Hun 351, 9 N. Y. Supp. 321, *affirmed*, 121 N. Y. 678, 24 N. E. 1095.

Where the offender is brought before the judge who conducted an investigation in order to ascertain whether the facts required immediate action on the part of the court, the judge upon ascertaining the facts released the offender from custody, there is no determination of the proceeding, and such party may be thereafter cited to show cause why he should not be punished for contempt. *People ex rel. Choate v. Barrett*, 56 Hun 351, 9 N. Y. Supp. 321, *affirmed*, 121 N. Y. 678, 24 N. E. 1095.

VI. THE COMMITMENT.—In some jurisdictions a warrant of commitment issues upon the final order or judgment in contempt proceedings,¹⁰ while in others the final order adjudging the offender in contempt is referred to as the order of commitment.¹¹

The mandate of commitment must set forth the particular circumstances of the offense.¹²

The use of the phrase "until the further order of the court" in the commitment is not objectionable, and is as definitive as the nature of the case admits,¹³ long usage proving it to be both wise and safe.¹⁴

Amendment.—The court on review may direct the order of commitment to be amended so as to render it effective.¹⁵

VII. DISCHARGE.—**A. THE APPLICATION.**—An application for discharge before the time of commitment rests in the discretion of the court, and when it contains misleading and untrue statements its credibility is so impaired as to warrant the refusal of the application.¹⁶

B. IMPOSING CONDITIONS.—Reasonable conditions may be imposed upon the granting of the discharge as a condition therefor,¹⁷ and after accepting the benefit of the order, a party cannot on appeal attack one or more of the conditions imposed.¹⁸

10. *State v. Becht*, 23 Minn. 411; New York Code Civ. Proc. §§11, 2281.

In *Kansas* the commitment must be entitled "The State of Kansas," and be under the seal of the court from whence it issues, signed by the clerk and dated the day it issued. *In re Farr*, 41 Kan. 276, 21 Pac. 273.

11. *In re Shortridge*, 5 Cal. App. 371, 90 Pac. 478.

A stay of proceedings may be granted in the discretion of the court. *Moore v. Moore*, 141 App. Div. 533, 126 N. Y. Supp. 413.

12. *Langdon v. Wayne Circuit Judges*, 76 Mich. 358, 368, 43 N. W. 310; Code Civ. Proc. (N. Y.) §11; *Matter of Depue*, 185 N. Y. 60, 69, 77 N. E. 798; *People ex rel. Barnes v. Court of Sessions*, 147 N. Y. 290, 41 N. E. 700.

The omission of the word "fine" does not constitute an irregularity in either the order or the commitment. *Lawyers' Surety Co. v. Anthony*, 7 App. Div. 132, 40 N. Y. Supp. 279, affirmed, 151 N. Y. 620, 45 N. E. 1133; *People v. Grant*, 11 N. Y. St. 559.

Recital of Facts in Commitment. The recital of minor facts in the commitment, such as that the property which was ordered to be delivered was exempt from execution, is not required. *State v. Becht*, 23 Minn. 411.

A recital in the warrant of commitment that the accused "was tried

and convicted and sentenced to confinement in jail and the payment of a fine" is sufficient. *Walton v. Hobson*, Judge, 146 Iowa 703, 125 N. W. 803.

13. *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 419.

14. "I think it, however, a sufficient answer to say, that the precedents uniformly agree with the form of this attachment, in that respect, and that the established usage in all our courts, and in the *English* courts, distinctly traced back to the *Year Books*, also corresponds with it. This long usage proves that it is wise and safe." *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 420.

15. *Harris v. Harris*, 156 Ill. App. 336, where the order appealed from provided for a punishment by imprisonment "for the term of six months from the date hereof," and the court struck out the words "from the date hereof."

16. *In re Terry*, 36 Fed. 419; *Palmer v. Kelly*, 4 Sandf. Ch. (N. Y.) 575.

17. *N. J.*—*Krauss v. Krauss*, 74 N. J. Eq. 417, 70 Atl. 305. *N. Y.*—*In re Hablin*, 53 How. Pr. 501; *In re Steinert*, 29 Hun 301 (direction that fine be paid in installments). *Eng.*—*In re Davies*, 21 Q. B. D. 236, 37 W. R. 57. *Can.*—*Roberts v. Donovan*, 16 Ont. Pr. 456.

18. *Krauss v. Krauss*, 74 N. J. Eq. 417, 70 Atl. 305.

C. RELEASE BY PARDON.—It has been intimated that if an excessive fine or unusual punishment be inflicted there might be a recourse to the pardoning power,¹⁹ and the right of the executive to grant a pardon upon a conviction for contempt has been recognized by the courts,²⁰ though there is authority to the contrary.²¹

VIII. REVIEW.—A. GENERAL RULE.—It is a general rule founded on established principle and the necessity for the maintenance of the dignity of the court, that adjudications of contempt by courts of competent jurisdiction are final and will not be reviewed on appeal,²² nor can the judgment be attacked collaterally

19. *Ex parte* Karlson (Cal.), 117 Pac. 447.

This authority has been exercised in New York, 13 Harv. Law Rev. 614, 624, citing Public Papers of Gov. David B. Hill, 1891, p. 270.

20. *State v. Sauvinet*, 24 La. Ann. 119, 13 Am. Rep. 115; *Ex parte* Hickey, 4 Smed. & M. (Miss.) 751.

21. *Taylor v. Goodrich*, 25 Tex. Civ. App. 109, 40 S. W. 515.

The court in *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622, reviews at length the question whether or not the president has the pardoning power upon a committal for contempt. In so far as it affects criminal contempts the court declines to determine the question, it not being necessary to a decision of the pending application, but refers to the opinions of Attorney-General Gilpin in opinions of Attorney-General, Vol. 3, at page 622, and of Attorney-General Mason in Vol. 4, Opinions of Attorney-General, at p. 458, where such authority is affirmatively expressed, though the court in the *Nevitt* case differs with the opinions expressed on this question.

Referring to civil contempts, however, wherein a defendant is committed for refusing to pay a fine or obey an order made in a civil suit, it is held "that it does not fall within the pardoning power of the president, because it is not an execution of the criminal laws of the land; and that it is always within the power and subject to the modification, suspension, or discharge of the court which has made it, and of that court alone, either in the original case or in an appropriate auxiliary proceeding. Citing *In re Debs*, 158 U. S. 564, 596, 599, 15 Sup. Ct. 900, 39 L. ed. 1092; *City of New Orleans v. New York S. S. Co.*, 20 Wall.

387, 392, 393, 22 L. ed. 354; *Hendryx v. Fitzpatrick*, 19 Fed. 810."

22. U. S.—*Hayes v. Fischer*, 102 U. S. 121, 26 L. ed. 95; *New Orleans v. New York Mail S. S. Co.*, 20 Wall. 387, 22 L. ed. 354. Ala.—*Ex parte Hardy*, 68 Ala. 303; *Easton v. State*, 39 Ala. 551, 87 Am. Dec. 49. Ariz.—*Ex parte Brown*, 3 Ariz. 411, 77 Pac. 489. Ark.—*Beene v. State*, 22 Ark. 149. Cal.—*Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853. Compare *People v. Turner*, 1 Cal. 143, wherein it is said: "It would indeed be a monstrous proposition that a court could, by adjudging an innocent and legal act to be a contempt, thereby preclude the possibility of a review." Colo.—*Teller v. The People*, 7 Colo. 451, 4 Pac. 48. Conn.—*Goodhart v. State*, 73 Atl. 853; *Tyler v. Hamersley*, 44 Conn. 393, 26 Am. Rep. 471. Fla.—*Florida C. & P. R. Co. v. Williams*, 45 Fla. 295, 33 So. 991. Ga.—*Hayden v. Phinizy*, 67 Ga. 758. Ia.—*Ex parte Holman*, 28 Iowa 88, 5 Am. Rep. 159. Ky.—*City of Newport v. Newport Light Co.*, 92 Ky. 445, 17 S. W. 435. La.—*State v. Orleans Parish Civil Sheriff*, 32 La. Ann. 1225. Minn.—*Menage v. Lustfield*, 30 Minn. 487, 16 N. W. 398. Miss.—*Watson v. Williams*, 36 Miss. 331. Nev.—*Phillips v. Welch*, 11 Nev. 187. N. H.—*State v. Towle*, 42 N. H. 540. N. J.—*Seastream v. New Jersey Exhib. Co.*, 69 N. J. Eq. 15, 59 Atl. 914. N. M.—*Marman v. Barker*, 12 N. M. 451, 78 Pac. 531. N. Y.—*People v. Gilmore*, 88 N. Y. 626. N. C.—*In re Deaton*, 105 N. C. 59, 11 S. E. 244. Ore.—*State v. Gray*, 42 Ore. 261, 70 Pac. 904, 71 Pac. 978. Pa.—*In re Williamson*, 26 Pa. 9, 67 Am. Dec. 374. Tenn.—*Brizendine v. State*, 103 Tenn. 677, 54 S. W. 982. Tex.—*State v. Thurmond*, 37 Tex. 340; *Crow v. State*, 24 Tex. 12. Utah.—*Elliot v. Whitmore*,

upon habeas corpus proceedings or on certiorari to review such judg-

10 Utah 246, 37 Pac. 461. **Vt.**—*In re Cooper*, 32 Vt. 253; *Vilas v. Burton*, 27 Vt. 56. **W. Va.**—*Craig v. McCulloch*, 20 W. Va. 148. **Wis.**—*Williamstown v. Darge*, 71 Wis. 643, 38 N. W. 187. **Can.**—*Ellis v. Reg.*, 22 Can. Sup. 7; *Grant v. Grant*, 36 Nova Scotia 547.

This was the rule at common law. *Cooper v. People ex rel. Wyatt*, 13 Colo. 337, 352, 22 Pac. 790.

"The reason is that such adjudications, if they may be called such, are not judgments or awards in the nature of judgments." *Goodhart v. State (Conn.)*, 78 Atl. 853; *Tyler v. Hamersley*, 44 Conn. 393, 410, 26 Am. Rep. 471. See, however, *Butler v. Fayerweather*, 91 Fed. 458 (holding that such an adjudication is a final judgment); *Adair Bros. & Co. v. Gilmore*, 106 Ala. 436, 17 So. 544 (where the court entertained an appeal from an order refusing to commit for contempt. See also *infra*, VIII, F, 2.

In *Cooper v. People ex rel. Wyatt*, 13 Colo. 337, 353, 22 Pac. 790, the court after discussing the right of review in contempt by appeal, writ of error, habeas corpus, certiorari and prohibition, said: "Thus it will be seen that contempt orders and judgments are not ordinarily revisable for mere error, but may be set aside for want of jurisdiction of the court over the subject matter, over the defendant, or to render the particular order or judgment complained of." *Cooper v. People ex rel. Wyatt*, 13 Colo. 337, 353, 22 Pac. 790.

All the presumptions favor the judgment of the court. *Ex parte Davies*, 73 Ark. 358, 84 S. W. 633.

"Counsel for plaintiffs in error base their right to appeal from the judgment of the justice, upon §324 of the Criminal Code, which provides that: 'The defendant shall have the right to appeal from any judgment of a magistrate imposing fine or imprisonment under this chapter to the district court of the county.' They contend that a contempt proceeding before a justice of the peace is a misdemeanor and punishable as such, and that, therefore, §324 of the Criminal Code applies. In this we think counsel are in error. Plaintiffs in error were not proceeded against before the justice under 324 or any other section

of the Criminal Code. The proceeding against them was clearly under §357 of the Civil Code. The practice under these two sections is essentially different. Section 315 of the Criminal Code provides: 'In all cases where the magistrate shall have jurisdiction to try and sentence or finally discharge, as described in the preceding section, the charge made against the defendant shall be distinctly read to him, and he shall be required to plead thereto, which plea the magistrate shall enter upon his docket. If the defendant refuse to plead, the magistrate shall enter the fact, with a plea of "not guilty" in his behalf.' Under the Criminal Code, parties are arrested under a warrant issued upon a written complaint. In a contempt proceeding, such as the one under consideration, no written complaint is necessary. The court upon its own motion, or upon oral request of the prosecutor, when it is shown that a witness has been subpoenaed and has not appeared, may issue an attachment, commanding the sheriff, coroner, or constable of the county to arrest and bring the person named therein before the court at a time and place to be fixed in the attachment, 'to give his testimony, and answer for the contempt.' Under the Criminal Code, the defendant must be arraigned and be required to plead, and, if he stand mute, the court is required to enter a plea of not guilty in his behalf. Such is not the rule in a contempt proceeding. In such cases we have held that defendant in contempt, who refuses to plead, may be treated by the court as admitting the charges contained in the information. *Toozer v. State*, 5 Neb. (Unof.) 182, 97 N. W. 584. 'It is not necessary in a contempt proceeding that the defendant be formally arraigned.' *Nebraska Children's Home Society v. State*, 57 Neb. 765, 78 N. W. 267. 'As the proceeding is solely to protect public justice from obstruction, the accused is not entitled to trial by jury.' *Gandy v. State*, 13 Neb. 445, 14 N. W. 143. We have also held: 'An appeal, in the technical sense of the term, is a remedy which exists only by force of statute and within the limits defined by statute.' *Pollock v. School District No. 42*, 54 Neb. 171, 74 N. W. 393. 'The

ment.²³ There are, however, exceptions to this rule which must be taken into consideration.

B. EXCEPTIONS. — The rule is subject to the qualification that the conduct charged must be such that some degree of delinquency or misbehavior can be predicated upon it;²⁴ but the question whether or not the alleged offender really committed the act charged, is conclusively determined by the order or judgment of the court making the finding.²⁵

There are further exceptions to this rule, some jurisdictions holding that if the judgment entry showed error on its face the remedy was by *certiorari*, or, if the party was illegally imprisoned, by *habeas corpus*.²⁶

C. CONSTITUTIONAL RIGHT TO REVIEW. — The right to a review of contempt proceedings, regardless of the method, is purely statutory, and not of constitutional right, and the withholding of such review works no denial of any constitutional guaranty.²⁷

D. REVIEW OF CRIMINAL CONTEMPTS. — Where criminal contempts are "demeanors," the right to review is dependent upon whether the crime under which it is classified is appealable, and the rules gov-

right of appeal did not exist at common law. This right is purely a statutory one, and, unless expressly conferred, does not exist.' *State v. Bethea*, 43 Neb. 451, 61 N. W. 578. We find no provision in our statute for an appeal in a contempt proceeding." *Hanika v. State*, 84 Neb. 845, 128 N. W. 526.

23. *People v. Hackley*, 24 N. Y. 74.

24. *People v. Hackley*, 24 N. Y. 74.

"The findings of the judgment do not conclude a reviewing court from an examination of the record to determine the jurisdictional facts." *Reymert v. Smith*, 5 Cal. App. 380, 90 Pac. 470. See also *Blair v. Hamilton*, 32 Cal. 50.

"It cannot certainly be true that the decision of an inferior court adjudging a matter to be a contempt precludes all investigation as to the legality or proper authority of the court to make such an order; on the other hand, it must not be forgotten that in such matters when the court is acting within the sphere of its legitimate powers the appellate tribunal will not undertake to review the correctness of conclusions as to matters of fact or questions of mere procedure." *Ex parte Senior*, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133. See also *In re Dill*, 32 Kan. 668, 5 Pac. 39.

25. *People v. Hackley*, 24 N. Y. 74.

26. *Ex parte Dickens*, 162 Ala. 272, 50 So. 218 (in which the earlier cases are reviewed); *Easton v. State*, 39 Ala. 551, 87 Am. Dec. 49.

27. *Jones v. Mould*, 151 Iowa 599, 132 N. W. 45.

In Iowa there is no provision for an appeal from an adjudication in contempt proceedings, the method provided for a review being by writ of *certiorari*. *Seidlitz v. Benham* (Iowa) 132 N. W. 370; *Jones v. Mould*, 151 Iowa 599, 132 N. W. 45; *Brown v. Powers*, 146 Iowa 729, 125 N. W. 833; Iowa Code Proc. §4468. It is also held that the court may not alone review an order adjudicating a party guilty of contempt by *certiorari*, but also an order dismissing the complaint, and has authority to set aside such order of dismissal and to remand the matter to the trial court for further proceedings. *Jones v. Mould*, 151 Iowa 599, 132 N. W. 45, citing numerous local cases.

The proceedings for a review of the judgment are a part of the original proceedings. No notice is required by the statute, the parties being charged with the burden of ascertaining the status of the case in all its stages, and notice is not essential to the constitutionality of a statute conferring the right of appeal. *Jones v. Mould*, 151 Iowa 599, 132 N. W. 45.

erning the rights on such an appeal govern and not those relative to contempts.²⁸

E. REVIEW OF CONTEMPT FOR ENFORCEMENT OF CIVIL REMEDY. A contempt for the purpose of benefiting a private party or advancing his remedy, is upon principle and authority a purely civil proceeding and an appeal lies from the final order.²⁹

F. MODE OF REVIEW. — 1. Appeal. — a. Scope of Review. — Review by appeal from the judgment of contempt is the practice in some jurisdictions,³⁰ but upon such review some courts will not consider the question whether or not the contempt charged was committed, but will limit their review to whether the lower court had jurisdiction.³¹ In others, the question whether the punishment declared by the judgment complained of was illegally imposed or whether the punishment imposed was cruel or excessive will be reviewed.³² Some courts will, in addition, examine into whether or not the act for which the punishment was inflicted was legally susceptible of being a contempt,³³ but will not examine into the correctness of the judgment where

28. *French v. Com.*, 30 Ky. L. Rep. 98, 97 S. W. 427.

29. *Bessette v. Conkey*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. ed. 997. Ill. *Lester v. People*, 150 Ill. 408, 425, 22 N. E. 387, 37 N. E. 1004; *citing People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038; *Tolman v. Jones*, 114 Ill. 147, 28 N. E. 464; *Blake v. Blake*, 80 Ill. 523; *Walton v. Develing*, 61 Ill. 206. Mich. *Romeyn v. Caplis*, 15 Mich. 449. N. M. *Costella Land & Inv. Co. v. Allen*, 15 N. M. 528, 110 Pac. 847. E. I. — *Jastrain v. McAuslan*, 29 R. I. 390, 71 Atl. 454. Utah — *Ex parte Whitmore*, 9 Utah 441, 35 Pac. 524. Wis. — *Vilter Mfg. Co. v. Humphrey*, 132 Wis. 587, 112 N. W. 1095, 13 L. R. A. (N. S.) 591n. Wyo. *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464, 53 Pac. 299. Can. — *In re O'Brien*, 16 Can. Sup. 197.

30. *Edge v. Com.*, 139 Ky. 252, 129 S. W. 591 (*citing Turner v. Com.*, 2 Metc. (Ky.) 619; *Bickley v. Com.*, 2 J. J. Marsh (Ky.) 572); *State ex rel. Peterson v. Superior Court* (Wash.), 121 Pac. 836.

In *Kentucky* the statutory provision against appeal in contempt proceedings applies only to criminal contempt, civil contempt being looked upon as a civil proceeding. *City of Newport v. Newport Light Co.*, 92 Ky. 445, 17 S. W. 435, 13 Ky. L. Rep. 532.

"The fact that an appeal has been taken, instead of a writ of certiorari, or, after commitment, a writ of habeas corpus, by one or other of which meth-

ods review should have been sought, will not operate to enlarge the field of inquiry here. See *Re Wood*, 82 Mich. 75, 80, 81, 45 N. W. 1113." *Enterprise Foundry Co. v. Iron Moulders Union*, 149 Mich. 31, 112 N. W. 685, 13 L. R. A. (N. S.) 598.

31. *People v. O'Neil*, 47 Cal. 103; *Romeyn v. Caplis*, 17 Mich. 449, 455.

32. *Gordon v. Com.*, 141 Ky. 461, 133 S. W. 206; *French v. Com.*, 30 Ky. L. Rep. 98, 97 S. W. 427; *Newport v. Newport Light Co.*, 92 Ky. 450, 17 S. W. 435; *Turner v. Com.*, 2 Metc. (Ky.) 619; *Bickley v. Com.*, 2 J. J. Marsh. (Ky.) 572. And see *Cooper v. People ex rel. Wyatt*, 13 Colo. 337, 353, 22 Pac. 790.

33. U. S. — *In re Watts*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933; *Butler v. Fayerweather*, 91 Fed. 459, 33 C. C. A. 625. Conn. — *Goodhart v. State*, 78 Atl. 853; *McCarthy v. Hugo*, 82 Conn. 262, 73 Atl. 778; *State v. Howell*, 80 Conn. 668, 69 Atl. 1057; *Tyler v. Hamersley*, 44 Conn. 393, 26 Am. Rep. 471. N. Y. — *People v. Hackley*, 24 N. Y. 74. Can. — *In re O'Brien*, 16 Can. Sup. 197.

Leading Case. — *Burdett v. Abbot*, 14 East 1, 104 Eng. Reprint 501.

"When a judgment of contempt is entered against a party, the statements in the record must be taken as absolutely true." *Johnson v. State*, 87 Ark. 45, 112 S. W. 143; *Ex parte Davies*, 73 Ark. 358, 84 S. W. 633.

there was legal evidence sufficient to call for the exercise of such judgment.³⁴

b. *Parties to the Appeal.*—The judge presiding is in no case a proper party to the appeal, and if joined, the appeal will be dismissed as to him.³⁵

c. *Appeal by "The People."*—A proceeding to secure and enforce a civil remedy is not a criminal proceeding though it partakes of that nature, and is frequently entitled in the name of "The People," *ex rel.*; an appeal may be taken by either party to the proceeding.³⁶

2. *Writ of Error.*—A judgment in contempt being a final judgment or decree in that proceeding, is reviewable by writ of error at the instance of the party aggrieved,³⁷ though the proceeding in

34. *Mayor, etc. of New York v. New York & S. I. Ferry Co.*, 64 N. Y. 622.

35. *State v. Pendergast*, 39 Wash. 132, 81 Pac. 324.

36. *People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038.

In *Kentucky* where the punishment only can be examined into on appeal, there can be no appeal by the people. *Com. v. Richardson*, 136 Ky. 699, 125 S. W. 147.

37. *U. S.*—*Bessett v. Conkey*, 194 U. S. 324, 24 Sup. Ct. 665; 48 L. ed. 997; *Clay v. Waters*, 178 Fed. 385, 101 C. C. A. 645; *Butler v. Fayerweather*, 91 Fed. 458, 33 C. C. A. 625; *Gould v. Sessions*, 67 Fed. 163, 14 C. C. A. 366, 35 U. S. App. 281. *Colo.*—*In re Stidger*, 37 Colo. 407, 86 Pac. 219; *Aichele v. Johnson*, 30 Colo. 461, 71 Pac. 367; *In re Popejoy*, 26 Colo. 32, 55 Pac. 1083. *Ill.*—*People v. Healey*, 139 Ill. App. 363. *Mass.*—*Com. v. Hurley*, 188 Mass. 443, 74 N. E. 677. *Neb.*—*Hanika v. State*, 87 Neb. 845, 128 N. W. 523; *State v. Gandy*, 13 Neb. 445, 14 N. W. 143. *S. D.*—*State v. Knight*, 3 S. D. 509, 54 N. W. 412; *State v. Sweetland*, 3 S. D. 503, 54 N. W. 415. *W. Va.*—*Alderson v. Comrs.*, 32 W. Va. 640, 9 S. E. 868, 25 Am. St. Rep. 840, 5 L. R. A. 334.

See, however, *In re Debs*, 153 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092 (where a writ of error was refused upon the ground that the order of commitment was not a final judgment; but the contempt was for the violation of a preliminary injunction restraining the acts to enjoin which the suit was brought); *Cooper v. People ex rel. Wyatt*, 13 Colo. 337, 353, 22 Pac. 790 (where it is said that some courts

have held that a writ of error will not lie to a judgment for contempt).

In *Massachusetts* a writ of error will lie only when the offender is convicted of a contempt as a criminal offense, and then it is considered a judgment in a criminal case. *Com. v. Hurley*, 188 Mass. 443, 74 N. E. 677.

In *Connecticut* it is well established "that adjudications of contempt by courts of competent jurisdiction are final, and that writs of error will not lie to review them. *Tyler v. Hamersley*, 44 Conn. 393, 409, 26 Am. Rep. 471, and cases cited. The reason is that such adjudications, if they may be called such, are not judgments or awards in the nature of judgments. Id. 410. They are punishments imposed for offenses against the court as an organ of public justice to enable or to maintain its dignity, and duly perform its functions. *State v. Howell*, 80 Conn. 668, 671, 69 Atl. 1057, 125 Am. St. Rep. 141. . . . But if it appears from the record that the court did not have jurisdiction, as for example, that it had no authority to impose the punishment inflicted, or that the act for which the punishment was inflicted could not constitute a contempt, the action of the court may be set aside on a writ of error. It is well settled that the rule stated in *Tyler v. Hamersley*, 44 Conn. 393, 26 Am. Rep. 471, just recited, does not prevent a review of contempt proceedings to discover as pertinent to the question of jurisdiction, whether the act which was adjudged one in contempt was legally susceptible of being contempt. *Lord Ellenborough* in *Burdett v. Abbott*, 14 East, 1, the leading case upon the subject of contempts,

which the contempt arose has not been finally disposed of, especially where the offender is not a party to the main case.³⁸ The review upon the writ cannot be extended further than an inquiry into the jurisdiction of the lower court.³⁹

3. Certiorari.—In some jurisdictions *certiorari* is held to be the proper remedy by which to present to the appellate court the record in a contempt proceeding.⁴⁰ Upon such a writ the appellate court

indicates this in clearest terms. The resume of the authorities relied upon by the court in *Tyler v. Hamersley*, at page 413 of 44 Conn., 26 Am. Rep. 471, as establishing its proposition plainly shows that such was its understanding, and it proceeded to act upon that understanding when it entered upon the consideration of what was the vital point in the case, to wit, whether Tyler's act was one which could be regarded as a contempt. This principle was recognized in *Welch v. Barber*, 52 Conn. 147, 156, 52 Am. Rep. 567, where it was said: "The court below found that it was a contempt, and, the facts being of such a nature that it does not clearly appear as a matter of law that they did not and could not constitute a contempt, we are not at liberty to revise the finding on that point." In *State v. Howell*, 80 Conn. 668, 69 Atl. 1057, the right of the aggrieved party to have a review for the purpose of determining whether the publications of which the alleged contempt consisted could under the circumstances attending them be legally regarded as being in contempt was recognized. *McCarthy v. Hugo*, 82 Conn. 262, 73 Atl. 778, presents a similar situation. Numerous cases in other jurisdictions are to the same effect. In *re Watts*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933; *Butler v. Fayerweather*, 91 Fed. 459, 33 C. C. A. 625; *People v. Kelly*, 24 N. Y. 74." *Goodhart v. State* (Conn.) 78 Atl. 853.

Review of contempt order in bankruptcy proceeding is reviewable by writ of error and not by petition for review. *Brown v. Detroit Trust Co.*, 193 Fed. 622.

38. *Butler v. Fayerweather*, 91 Fed. 458, 33 C. C. A. 625; *Gould v. Sessions*, 67 Fed. 163, 14 C. C. A. 366, 35 U. S. App. 281.

39. *Cooper v. People ex rel. Wyatt*, 13 Colo. 337, 355, 22 Pac. 790; *Teller v. People*, 7 Colo. 451, 4 Pac. 48.

40. *Ala.—Ex parte Dickens*, 162

Ala. 272, 50 So. 218; *Easton v. State*, 39 *Ala.* 551, 87 Am. Dec. 49. *Ark. Ex parte Chastain*, 94 *Ark.* 558, 127 S. W. 973; *Ex parte Butt*, 78 *Ark.* 262, 93 S. W. 992; *Ex parte Davies*, 73 *Ark.* 358, 84 S. W. 633. *Cal.—Lamberson v. Superior Court*, 151 *Cal.* 458, 91 *Pac.* 100, 11 *L. R. A.* (N. S.) 619; *Otis v. Superior Court*, 148 *Cal.* 129, 82 *Pac.* 853; *Hutton v. Superior Court*, 147 *Cal.* 156, 81 *Pac.* 409. *Ia.—Coutts v. District Court*, 149 *Iowa* 297, 128 *N. W.* 362; *Wells v. District Court*, 126 *Iowa* 340, 102 *N. W.* 106; *State v. Buchanan County Dist. Court*, 84 *Iowa* 167, 50 *N. W.* 677. *La.—State v. Judge Civ. Dist. Court*, 45 *La. Ann.* 1250, 14 *So.* 310, 40 *Am. St. Rep.* 282. *Mich.—Montgomery v. Muskegon Boom Co.*, 104 *Mich.* 411, 62 *N. W.* 561. *Minn.—State v. Leftwich*, 41 *Minn.* 42, 42 *N. W.* 598. *Mo.—In re Clark*, 208 *Mo.* 121, 106 S. W. 990. *Mont.—State v. District Court*, 33 *Mont.* 138, 82 *Pac.* 789; *State v. Fourth Judicial Dist. Court*, 13 *Mont.* 347, 34 *Pac.* 39. *Nev.—Phillips v. Welch*, 12 *Nev.* 158. *N. J.—Hershenstein v. Hahn*, 77 *N. J. L.* 39, 71 *Atl.* 105. *N. Y.—People v. Forbes*, 143 *N. Y.* 219, 38 *N. E.* 303; *People v. Andrews*, 134 *App. Div.* 32, 118 *N. Y. Supp.* 37; *Matter of Teitelbaum*, 84 *App. Div.* 351, 82 *N. Y. Supp.* 887. *N. C.—Ex parte Biggs*, 64 *N. C.* 202; *State v. Woodfin*, 27 *N. C.* 199, 42 *Am. Dec.* 161. *Pa.—In re Hummel*, 9 *Watts* 416. *Tenn.—Warner v. State*, 13 *Lea* 52. *Va.—Baltimore, etc. R. Co. v. Wheeling*, 13 *Gratt.* 40. *Wis.—Talmadge v. Potter*, 12 *Wis.* 317.

Where the record brought up failed "to show that the petitioner was served with any notice or order to show cause that indicated the character of the charge of contempt which the petitioner was expected to answer," and where it did not appear that he was served with a copy of the affidavits upon which the proceeding was predicated, and no answer of the petitioner appeared on the record,

will inquire into jurisdictional matters,⁴¹ and also whether or not the act committed by the accused constituted a contempt, or whether it was innocent or justifiable.⁴² But in the absence of a statute the general rule is that the intrinsic correctness of a contempt judgment, as for instance, that the same was not warranted by the evidence, cannot be reviewed in *certiorari* proceedings, where it appears that the trial court had jurisdiction and that its proceedings were conducted in due form.⁴³

4. Habeas Corpus.—a. *General Scope.*—The question whether the judgment or order of commitment shows that the court had jurisdiction will be examined on *habeas corpus*.⁴⁴ And where the

and where it also failed to appear that the offender was given an opportunity to answer, the appellate court will on *certiorari* annul the order of contempt. *Reymert v. Smith*, 5 Cal. App. 380, 90 Pac. 470.

The Arkansas practice of reviewing contempt proceedings on *certiorari* has not been changed by the act of May 6, 1899, which does not extend the right of appeal in such cases. *Ex parte Butt*, 78 Ark. 262, 93 S. W. 992.

Sufficiency of Warrant of Commitment.—The sufficiency of the warrant of commitment is not involved in *certiorari* proceedings. Any error therein would be an error of the clerk and not of the court. *Walton v. Hobson*, 146 Iowa 703, 125 N. W. 805.

Motion To Quash.—*Certiorari* is not the proper remedy "to review a motion to quash contempt proceedings prior to the final determination thereof." *In re Smith*, 144 Mich. 39, 107 N. W. 724.

41. **Cal.**—*Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853. **Colo.**—*Cooper v. People ex rel. Wyatt*, 13 Colo. 337, 22 Pac. 790. **Nev.**—*Phillips v. Welch*, 12 Nev. 158.

See *In re Smith*, 144 Mich. 39, 107 N. W. 724, as to rule at common law.

In Alabama under this writ "the jurisdiction of the court and the regularity of its proceedings—that is, errors of law apparent on the record—are available; but the trial is not *de novo*, and conclusions of fact cannot be reviewed." *Ex parte Dickens*, 162 Ala. 272, 280, 50 So. 218, citing *McCulley v. Cunningham*, 96 Ala. 583, 11 So. 694; *Alabama G. S. R. Co. v. Christian*, 82 Ala. 307, 1 So. 121; *Clark & Daviney v. Jack*, 60 Ala. 271.

42. *People v. Hackley*, 24 N. Y. 74. "In *Overend v. Superior Court*, 131

Cal. 280, 63 Pac. 372, an order adjudging a witness guilty of contempt was annulled on *certiorari* because the question which he refused to answer was not set forth, and the order, therefore, did not show that he had refused to answer a pertinent question, for which reason the order did not state facts showing the accused to be guilty of a contempt of court." *In re Shortridge*, 5 Cal. App. 371, 90 Pac. 478.

43. *Wells v. Given*, 126 Iowa 340, 102 N. W. 106.

Extent of Review.—The Iowa statute relating to contempt authorizes the appellate court on *certiorari* to review the evidence and determine whether it is sufficient to make out a case of contempt. *Wells v. Given*, 126 Iowa 340, 102 N. W. 106.

It is only when the order is in excess of the jurisdiction of the court making it that it may be annulled on *certiorari*. *People v. Latimer* (Cal.), 117 Pac. 1051.

44. **U. S.**—*In re Swan*, 150 U. S. 634, 17 Sup. Ct. 225, 37 L. ed. 1207; *Ex parte Robinson*, 144 Fed. 835, 75 C. C. A. 663. **D. C.**—*Lamon v. McKee*, 7 Mackey 446. **Fla.**—*Florida & C. P. R. Co. v. Williams*, 45 Fla. 295, 33 So. 991. **Ind.**—*Ex parte Lawler*, 28 Ind. 241. **Kan.**—*In re Jewett*, 69 Kan. 830, 77 Pac. 567. **Ky.**—*Ex parte Alexander*, 2 Am. L. Reg. 44. **La.**—*State v. Fagin*, 28 La. Ann. 387. **Neb.**—*In re Havlik*, 45 Neb. 747, 64 N. W. 234. **Nev.**—*Ex parte Gardner*, 22 Nev. 280, 39 Pac. 570. **N. Y.**—*People v. Platzek*, 133 App. Div. 25, 117 N. Y. Supp. 852. **Pa.**—*Williamson v. Lewis*, 39 Pa. 9. **Tex.**—*Ex parte Kearby*, 35 Tex. Crim. 531, 34 S. W. 635; *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111. **Vt.**—*In re Cooper*, 32 Vt. 253.

"On the hearing of a writ of habeas

judgment upon which a commitment is based is void the defendant will be discharged.⁴⁵ But where the court had jurisdiction of the parties and the subject-matter, and found facts showing that it had jurisdiction, the appellate court has no power or authority upon this proceeding to interfere with the judgment of the court adjudging a party in contempt.⁴⁶ Upon *habeas corpus* the facts stated in the order of commitment must be taken as true and cannot be contradicted.⁴⁷

b. *Review of Certiorari by Habeas Corpus*.—There is no rule which permits a review by *habeas corpus* of *certiorari* proceedings in which the correctness of the contempt proceedings was determined by the appellate court.⁴⁸

5. *Mandamus*.—An order of disbarment for contempt has also been reviewed upon an application for *mandamus*,⁴⁹ and where a judge sought to try a question for contempt commenced before his predecessor in office, and the pending question was whether the successor in office had jurisdiction to try the question of fact, *mandamus* is the only adequate remedy and may properly be employed.⁵⁰

corpus, all the jurisdictional facts are open for examination and decision by the court or judge granting the writ." Matter of Depue, 185 N. Y. 60, 64, 77 N. E. 798. See *People ex rel. Cockran v. Hyatt*, 172 N. Y. 176, 64 N. E. 825.

When Unavailable.—"Irregularities in proceedings before justices of the peace committing a recusant witness cannot be reviewed upon *habeas corpus*. It is only when the proceedings are void that this writ can be of any value." *Ex parte Button*, 83 Neb. 636, 120 N. W. 203, 23 L. R. A. (N. S.) 1173.

45. *People v. Pirfenbrink*, 96 Ill. 68. Ind.—*Perry v. Pernet*, 165 Ind. 67, 74 N. E. 609. Mo.—*Ex parte Arnold*, 128 Mo. 256, 30 S. W. 768, 1036, 49 Am. St. Rep. 557, 33 L. R. A. 386. Tenn. *State v. Galloway*, 5 Coldw. 326, 98 Am. Dec. 404. W. Va.—*Ex parte Mylius*, 61 W. Va. 405, 56 S. E. 602.

The validity of the commitment may be attacked by *habeas corpus*. *Ex parte Shortridge*, 5 Cal. App. 371, 90 Pac. 478.

At common law a defendant was entitled to be discharged upon *habeas corpus* "if in commitment under a sentence absolutely void for the want of jurisdiction in the court rendering the same." *Cooper v. People ex rel. Wyatt*, 13 Colo. 337, 352, 22 Pac. 790.

46. Ariz.—*Ex parte Brown*, 3 Ariz. 411, 77 Pac. 489. Cal.—*Ex parte Cohen*, 5 Cal. 494. Ill.—*Clark v. People*, 1 Ill.

340, 12 Am. Dec. 177. Ia.—*Ex parte Holman*, 28 Iowa 88, 5 Am. Rep. 159. La. *Ex parte Wood*, 30 La. Ann. 672. Md. *Ex parte Maulsby*, 13 Md. (Appendix) 625. Mich.—*In re Bissell*, 40 Mich. 63. Miss.—*Shattuck v. State*, 51 Miss. 50, 24 Am. Rep. 624. Nev.—*Phillips v. Welch*, 12 Nev. 158. N. Y.—*In re Taylor*, 8 Misc. 159, 28 N. Y. Supp. 500. Tex.—*Jordan v. State*, 14 Tex. 436.

47. *In re Shortridge*, 5 Cal. App. 371, 90 Pac. 478.

48. *Seidlitz v. Benham* (Iowa), 132 N. W. 370.

49. *Lamon v. McKee*, 7 Mackey (D. C.) 446, 467.

A rule for an attachment against a party or a witness, being collateral to the cause, "and if it be not a matter within the discretion of the primary court, the error, if any, must in general be corrected by a *mandamus*, or other appropriate remedy." *Hogan v. Alston*, 9 Ala. 627. See, however, *Ex parte Dickens*, 162 Ala. 272, 279, 50 So. 218, in which the court states the better remedy is *certiorari*.

50. Cal.—*Ortman v. Dixon*, 9 Cal. 23. Mass.—*Kimball v. Morris*, 2 Metc. 573. Mich.—*Montgomery v. Palmer*, 100 Mich. 436, 59 N. W. 148. N. Y. *Ex parte Chamberlain*, 4 Cow. 49.

As to the general question of jurisdiction being reviewable on *mandamus*, see *Schwartz v. Barry*, 90 Mich. 267, 51 N. W. 279.

Where the court or judge before whom a proceeding is pending refuses or neglects to institute contempt proceedings in a proper case, it is proper to issue a mandamus to compel him to perform that duty.⁵¹

6. Prohibition.—When an order to show cause to punish for contempt is issued without authority of law, a writ of prohibition may issue to prevent a court from proceeding thereunder, there being no appeal from such an order, the same being interlocutory and not final.⁵²

G. STAY PENDING APPEAL.—1. Right To Stay.—In order to stay the judgment pending appeal a bond is necessary,⁵³ together with an order staying proceedings which is only granted when good cause is shown.⁵⁴ The appeal itself does not act as a stay.⁵⁵ There is, however, authority that the appeal acts as a *supersedeas* and suspends all proceedings until the appeal is disposed of.⁵⁶

2. Who May Grant.—The application for a stay must be made to the appellate court in which the appeal is pending, and not to the court from which the appeal is taken.⁵⁷

H. CONTROL OVER JUDGMENT.—Upon review the judgment may be affirmed entirely or in part,⁵⁸ reversed in whole or in part,⁵⁹ modified,⁶⁰ or corrected.⁶¹

51. *People v. Latimer* (Cal.), 117 Pac. 1051; *Crocker v. Conrey*, 140 Cal. 213, 73 Pac. 1006.

"Mandamus will lie to compel such action on the part of a court to compel compliance with an order requiring the payment of alimony when the party is financially able to so comply, or in any case where compliance with an order is essential for the protection of the beneficial rights of the petitioner." *People v. Latimer* (Cal.), 117 Pac. 1051.

In *Ex parte Dickens*, 162 Ala. 272, 277, 50 So. 218, the court said: "In the case of *Hogan v. Alston*, 9 Ala. 627, this court said that a rule for an attachment against a party or witness 'must, in general, be corrected by mandamus, or other appropriate remedy.'"

52. *State ex rel. Peterson v. Superior Court* (Wash.), 121 Pac. 836. See also: Cal.—*Williams v. Dwinelle*, 51 Cal. 442; *People v. County Judge*, 27 Cal. 151. Nev.—*Cline v. Langan*, 31 Nev. 239, 101 Pac. 553. Utah.—*People v. Carrington*, 5 Utah 531, 17 Pac. 735. Wis.—*State v. Cirenit Court*, 97 Wis. 1, 72 N. W. 193, 65 Am. St. Rep. 90, 38 L. R. A. 554. Eng.—*The Queen v. Lefroy*, L. R. 8 Q. B. 134.

53. *Fischer v. Hayes*, 7 Fed. 96, 19 Blatchf. 184; *Ex parte Clancy*, 90 Cal. 553, 27 Pac. 411.

54. *Steube v. State*, 3 Ohio C. C. 333.

55. *Whitem v. State*, 36 Ind. 196, 211; *Steube v. State*, 3 Ohio C. C. 333.

Stay After Sentence.—After sentence is passed no stay of any kind can be granted. *Reg. v. Ellis*, 32 N. Bruns. (Can.) 561.

56. *Foster v. Staar*, 148 Ill. App. 491.

57. *Van Orden v. Van Orden*, 27 App. Div. 136, 50 N. Y. Supp. 184. See also *Copeland-Chatterton Co. v. Business Systems Co.*, 16 Ont. L. R. 481, 11 Ont. W. R. 762.

58. *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650; *In re Copeutt*, 69 Hun 110, 23 N. Y. Supp. 394, 52 N. Y. St. 724.

59. *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650; *Smith v. McQuade*, 13 N. Y. Supp. 63, 36 N. Y. St. 557 (upon reversal the proceedings fall). See *Patton v. Harris*, 15 B. Mon. (Ky.) 607, holding that the court has no power to reverse.

60. Ky.—*Turner v. Com.*, 2 Mete. 619; *Bickley v. Com.*, 2, J. J. Marsh. 572; *Fechter v. Hays*, 4 Ky. L. Rep. 217. La.—*State v. Houston*, 40 La. Ann. 434, 4 So. 131. N. Y.—*Buffalo Loan, etc. So. v. Medina Gas, etc. Co.*, 68 App. Div. 414, 74 N. Y. Supp. 486; *Luedeke v. Coursen*, 3 Misc. 559, 23 N. Y. Supp. 314, 52 N. Y. St. 516.

61. *Coleman v. State*, 121 Tenn. 1, 113 S. W. 1045.

IX. COSTS.—In proceedings for civil contempts, the complainant if successful is entitled to costs.⁶² If the proceeding be decided in favor of the accused he is entitled to costs.⁶³ But in a proceeding for criminal contempt they are not usually imposed in addition to the punishment,⁶⁴ though costs may be ordered taxed against a petitioner upon proceedings to review the judgment.⁶⁵

X. FORMS.—Some illustrative forms will be found in the notes.⁶⁶

62. **U. S.**—*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 447, 31 Sup. Ct. 492, 55 L. ed. 797. **Nev.**—*Ahl-ers v. Thomas*, 24 Nev. 407, 56 Pac. 93, 77 Am. St. Rep. 320. **N. D.**—*State v. Winbauer*, 128 N. W. 679; *State v. Heidt*, 127 N. W. 72. **W. Va.**—*State v. Irwin*, 30 W. Va. 404, 4 S. E. 413. **Can.**—*Reg. v. Howland*, 14 Ont. App. 184.

See, however, *Columbia Water Co. v. Columbia*, 4 S. C. 388, a special proceeding.

"That it is permissible to tax the costs and disbursements against a defendant found guilty of contempt was expressly held by us in the recent case of *State v. Heidt*, 127 N. W. 77. We see no reason to depart from that holding. In addition to the authorities cited in *State v. Heidt*, see *Ex parte Whitmore*, 9 Utah 441, 35 Pac. 524; *People v. Rochester, etc., R. Co.*, 78 N. Y. 294, *affirming* 14 Hun 371. There are cases holding that in criminal contempts no costs can be imposed, but we think such decisions were controlled by statutes differing from those in force here." *State v. Winbauer* (N. D.), 128 N. W. 679.

No costs can be taxed until the issues of fact have been determined. *Sargent v. Warren*, 2 N. Y. St. 179.

63. **N. C.**—*Weaver v. Hamilton*, 47 N. C. 343. **Wash.**—*State v. Milligan*, 4 Wash. 29, 29 Pac. 763, may be taxed against a county. **W. Va.**—*State v. Irwin*, 30 W. Va. 404, 4 S. E. 413.

In a proceeding to punish a witness for contempt of court, the accused is entitled to costs if it be found there was no contempt. *State v. Rhinhardt*, 92 Tenn. 270, 21 S. W. 524.

64. **U. S.**—*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 447, 31 Sup. Ct. 492, 55 L. ed. 797. **Mont.**—*State v. District Court*, 41 Mont. 369, 109 Pac.

434; *State v. District Court*, 29 Mont. 230, 74 Pac. 412; *State v. District Court*, 24 Mont. 33, 60 Pac. 493. **N. Y.**—*People v. Marr*, 181 N. Y. 463, 74 N. E. 431, 106 Am. St. Rep. 562; *modifying* 88 App. Div. 422, 84 N. Y. Supp. 965; *Boon v. McGucken*, 67 Hun 251, 22 N. Y. Supp. 424.

"Where they are awarded they go to the Government." *Gompers v. Bucks Stove & Range Co.*, *supra*; *Durant v. Washington County*, 1 Woolw. (U.S.) 377, 8 Fed. Cas. No. 4,191.

Costs Included in Fine.—*State v. District Court*, 113 Minn. 304, 129 N. W. 583 (a reasonable attorney's fee was also allowed); *In re A. B.*, 3 Manitoba 316; *Reg. v. Ellis*, 32 N. Bruns. 561. *Albany City Bank v. Schermerhorn*, 9 Paige Ch. (N. Y.) 372; *In re O'Brien*, 16 Can. Sup. Ct. 197.

65. *In re Hanson*, 80 Kan. 783, 105 Pac. 694.

66. Order To Show Cause.—In the matter of the petition of _____

"The court finds that _____ should be and hereby are attached to show cause, if any they have, why they, and each of them, respectively, should not be adjudged guilty of contempt of court in this: (insert facts constituting the contempt). It is therefore ordered that the said _____ be and hereby are ordered to show cause as above set forth, and directed to appear before this court _____, at the opening of court, at — o'clock A. M., on said date, before Judge _____, to further answer to said charge, and to appear at such other times, from day to day and from time to time, as this court may direct, and that the further hearing of this cause be continued until _____, A. D. 19____, at — o'clock A. M., and that the said _____ give bond for his appearance on the said _____ day

of —, A. D. 19—, at — o'clock —, before the said Judge —, in the sum of — dollars (\$—), with good and sufficient surety to be approved by the clerk of this court, and upon failure to file said bond with said surety, approved by the clerk of this court, the said — to stand committed to the county jail for such contempt, and the said commitment to stand until said bond is given." *Oster v. People*, 192 Ill. 473, 61 N. E. 469.

In Proceedings Instituted by the Court Itself.—"It having come to the knowledge of the court through publication in the newspapers, etc. (insert substance of publication), and the statements contained in the said — being within the knowledge of the court untrue, as they are scandalous, it is ordered that said — show cause before the supreme court in bank, at the city of — on — the — day of —, at 10 o'clock A. M., why he should not be adjudged guilty of contempt of court and punished therefor. . . . The following is a copy of the letter referred to (the letter which was the subject of the publication was set out in full).

Ordered further, that a copy of this order be served upon said — forthwith." *In re Shay* (Cal.), 117 Pac. 442.

Information on Application for Issuance of Rule To Show Cause.

"State of Illinois, Supreme Court, ss. Northern Grand Division, September Term, A. D. 1872.

The People of the State of Illinois v. Charles L. Wilson and Andrew Shuman.—Information.

"And now come the said people, by Washington Bushnell, attorney general, and represent to the court that on the 16th day of October, A. D. 1872, there was, and still is, pending in this court, a certain cause for the adjudication and determination of this court, wherein one Christopher Rafferty is plaintiff in error and the People of the State of Illinois are defendants in error, and that, on the same day there was published in the city of Chicago, in said state, a certain daily newspaper called the Chicago Evening Journal, of which said paper on said day the Charles L. Wilson was proprietor and the said Andrew Shuman was editor, and that said Charles L. Wilson and Andrew Shuman, on the said day, caused to be published in said paper, of and con-

cerning said cause so pending in this court, and of and concerning this court and its supposed action with reference to said cause, a certain article, in the words following, that is to say: (Here insert article on other matter constituting the contempt). Wherefore, the said attorney general, for and on behalf of the said People, moves this court for a rule upon the defendants, Charles L. Wilson and Andrew Shuman, to be and appear before this court, on a day to be named, and show cause, if any they or either of them have, why an attachment should not issue against them for a contempt of this court in respect to the publication of said article.

"Washington Bushnell, Attorney General." *People v. Wilson*, 64 Ill. 195, 197, 198, 199.

Order for Attachment.—"At a session of the circuit court for the county of Wayne, held at the circuit court rooms in the city of Detroit, on the second day of February, A. D. 1889.

"Present, Hon. C. J. Reilly, Hon. H. N. Brevoort, Hon. Geo. Gartner, Hon. Geo. S. Hosmer, Circuit Judges.

"In the Matter of William W. Langdon, for an alleged unlawful interference, etc.

"Before Judge Gartner.

"On filing the affidavits of John Nicholson and George F. Robison in said matter, and it appearing to the court from the matters therein alleged that an alleged unlawful interference on the part of said William W. Langdon was made by him with the proceedings in the action tried in said court wherein James Hughes, by his next friend, was the plaintiff, and the Detroit, Grand Haven & Milwaukee Railway Company was the defendant, during the trial of said action, it is, therefore ordered, that an attachment do issue to the said William W. Langdon, and that he be brought before the court to answer for such alleged misconduct, and that a copy of the affidavits upon which this order is based, together with a copy of this order, be served upon him at the time of the service of such attachment." *Langdon v. Wayne Circuit Judges*, 76 Mich. 358, 364, 43 N. W. 310.

Writ of Attachment.

"State of Illinois. In the Supreme Court, Northern Grand Division, September Term, A. D. 1872.

"The People of the State of Illinois,
to the Sheriff of La Salle County—
Greeting:

"Whereas, it has been made to appear that C. L. W. and A. S. have printed and published an article, which has been adjudged by the said court, now in session at Ottawa, in the aforesaid county and state, to have been printed and published in contempt of said court while so in session, as aforesaid.

"We, therefore, command you, that you attach the said C. L. W. and A. S., so as to have their bodies forthwith before our said supreme court, at Ottawa, in the county aforesaid, to answer the said court of the said contempt, by them lately committed against it, as it is said, and further, to do and receive what our said court shall in that behalf consider. Hereof fail not, and have you then and there this writ.

"Witness, Charles B. Lawrence, Chief Justice of said court, and the seal thereof, at Ottawa, this 6th day of November, in the year of our Lord one thousand eight hundred and seventy-two.

W. M. Taylor, Clerk of the Supreme Court." *People v. Wilson*, 64 Ill. 195, 236.

The Attachment.—"State of Michigan, County of Wayne, ss.

The Circuit Court for the County of Wayne.

"To the Sheriff of the County of Wayne,
Greeting:

"In the name of the people of the State of Michigan, you are commanded to take W. W. L., if he be found in your bailiwick, and him safely keep so that you may have his body before our circuit court for said county, at courtroom No. 3, in the court-house in the city of Detroit, on Monday, February 4, A. D. 1889, at 9 o'clock A. M., to answer unto an alleged contempt of said court, in unlawfully interfering with the proceedings of said court in an action tried before a jury in said court, wherein one J. H., by his next friend, was plaintiff, and the Detroit, Grand Haven & Milwaukee Railway Company was defendant, which cause is now depending, by which the rights of said plaintiff in said cause were calculated to be defeated, impaired, impeded, or prejudiced, as appears by the affidavits of J. N. and G. F. R., filed this day, all of which

shall then and there be made to appear, and of this writ make due return.

"Witness the Honorable Cornelius J. Reilly, presiding circuit judge of the circuit court for the county of Wayne, this second day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

"William P. Lane, Clerk.

"(Seal.)

By William May, Deputy Clerk."

Rule Attaching Contemnor.—"Clark Circuit Court, Dec. term, Jan. 31st, 1905.

"Commonwealth of Kentucky, Plaintiff, v. (defendants).

Rule and Order of Arrest.

"Whereas, it appears from the affidavits of _____, filed in this court on the _____ day of _____, 19____, that there are reasonable grounds for believing that _____,

_____ have committed and are guilty of the offense of contempt of this court, and of its authority, committed as follows, to wit: (here insert facts constituting the contempt), all of which was well known to the said _____, _____, and to each of them; wherefore, it is ordered that a rule and order of arrest be, and it is hereby awarded against said _____,

_____ and _____, returnable on the first day of the next April term of this court, to show cause, if any they can, why they should not be punished by the imposition by a jury of a fine or imprisonment, or both such fine and imprisonment in the discretion of a jury, for said contempt. It is further ordered, that any peace officer of this state, who receives a copy of this order, shall be authorized to execute same by delivering a copy of same to _____, _____ and _____, or any of them, and arresting and taking them into custody, and delivering them to the jailer of Clark county. Any peace officer of this state who executes this rule and order of arrest is hereby authorized to admit each of said parties to bail in the sum of \$____, with good security, to be approved by the officer taking same, for the appearance of the defendant so arrested in this court on the first day of the next April term. The clerk of this court is directed to issue a copy of this order, with as many duplicate copies as may be desired, to the sher-

iffs or other peace officers of such counties as the judge of this court, the commonwealth's attorney for this district, or the county attorney for this county, may direct." *French v. Com.*, 30 Ky. L. Rep. 98, 100, 97 S. W. 427.

Writ of Attachment for Failure To Obey Subpoena.—"State of Illinois, County of Richland, ss.

The People of the State of Illinois to the Sheriff of said County—Greeting:

"We command you to summon _____ and _____ and them safely keep, so that you may have their bodies forthwith brought before the circuit court of Richland county, at the _____ term, to be holden at Olney, Illinois, in said county, to answer the People of the State of Illinois, for a contempt of court in not attending said court as a witness before the grand jury empaneled at April term of circuit court, after having been duly served with process. And have you then and there this writ.

"Witness, _____, clerk of said court and the seal thereof, at Olney, Illinois, in said county, this _____ day of _____, A. D. 19—.

"[Seal.] _____, Clerk."

Bail was indorsed on this writ in the sum of \$100. *Ferriman v. People*, 128 Ill. App. 230.

Form of Findings and Judgment.—

"In the matter of the Attachment of W. W. D. for contempt of court.

"Now, on this _____ day of _____, at the adjourned term of the court, comes W. W. D., in pursuance of the attachment heretofore issued, and the court having heard the explanations and admissions of the said W. W. D., and heard the evidence adduced, and being fully advised in the premises, find the facts as follows: (Insert the findings).

"The court finds, also from said facts, that said W. W. D. so absented himself from said court for the purpose and with the intent of obstructing the court in proceeding with the trial of said actions, and for the purpose of obstructing and preventing the said court in the administration of justice, the court not being able to proceed with the trial of said actions, in the absence of said W. W. D. and his attorney.

"The said D. offers the following facts as an excuse for his absence: (Insert facts).

"The court holds said excuse in-

sufficient, and finds the said W. W. D. guilty of contempt of the court in the premises.

"The said W. W. D. objects to the court proceeding in the present matter, for the reason that it has no jurisdiction or authority in the premises, and objects to any punishment being inflicted for the same reason, and for the further reason that the facts found do not in law constitute a contempt.

"It is, therefore, considered, ordered and adjudged by the court, that the said W. W. D. pay to the state of Kansas a fine in the sum of _____ dollars, and pay the costs of this proceeding, taxed at \$—, and that he be committed to the jail of _____ county, Kansas, until said fine and costs are paid. To which findings of fact and judgment the said W. W. D. at the time excepted." *In re Dill*, 32 Kan. 668, 680, 5 Pac. 39.

Judgment in Contempt for Refusal To Testify.—"At a Court of General Sessions of the Peace, holden in and for the city and county of New York, etc., April 31, 1861.

"Present, John T. Hoffman, Recorder.

"In the matter of Andrew J. Hackley.

"The grand jury, heretofore in due form selected, drawn, summoned and sworn to serve as grand jurors, in the court of general session of the peace in and for the city and county of New York, come into court and make complaint by and through their foreman, theretofore duly appointed and sworn, that A. J. H., after being duly summoned and sworn, as prescribed by law, as a witness in a certain matter and complaint pending before such grand jury, whereof they had cognizance, against certain aldermen and members of the common council of the city of New York, for feloniously receiving a gift of money, under an agreement that their votes should be influenced thereby in a matter then pending before said aldermen and members of the common council in their official capacity, did then and there refuse to answer the following legal and proper interrogatory, propounded to him, the said A. J. H., to wit: 'What did you do with the pile of bills received from Thomas Hope, and which he told you amounted to fifty thousand dollars?' And the said A. J. H. then and there, instead of answering the said interrogatory,

stated as follows, to wit: 'Any answer which I could give to that question would disgrace me, and would have a tendency to accuse me of a crime. I, therefore, demur to the question, referring to the ancient common law rule, that no man is held to accuse himself, and to the sixth section of the first article of the constitution of this state.' And the court having then and there decided that the said interrogatory is a legal and proper one, and that the reasons given by the said A. J. H. for not answering the same are invalid and insufficient; and now ordering the said A. J. H. to answer the said interrogatory, and he, the said A. J. H., still contumaciously and unlawfully refusing to answer the said interrogatory, the court doth hereby adjudge the said A. J. H., by reason of the premises aforesaid, guilty of a criminal contempt of court; and doth further order and adjudge that the said A. J. H., for the criminal contempt aforesaid, whereof he is convicted, be imprisoned in the jail of the county for the term of thirty days." *People v. Hackley*, 24 N. Y. 74.

Order To Answer Interrogatories.—"The Circuit Court for the County of Wayne.

"In the matter of William W. Langdon, for an alleged unlawful interference with the proceedings in an action tried in said circuit court wherein James Hughes, by his next friend, is plaintiff, and the Detroit, Grand Haven and Milwaukee Railroad Company is defendant.

"The said W. W. L., having been arrested upon an attachment heretofore issued, and having been brought into court to answer for the alleged misconduct on his part in interfering with the proceedings in the said cause:

"It is now ordered, by the court herein, that said W. W. L. make writen answer on oath, on or before the ninth day of February, 1889, to the following interrogatories." Then follow the interrogatories signed. *Langdon v. Wayne Circuit Judge*, 76 Mich. 358, 365, 43 N. W. 310.

Commitment for Contempt.—(Title of the Court.)

"On this day the superior court of the state of California in and for the city and county of San Francisco, being regularly in session, and having then and there regularly before it the

actions and proceedings of the People v. Eugene E. Schmitz and Abraham Ruef, and being then and there engaged in such actions and proceedings in the taking of testimony in open court while a witness, ———, was upon the witness stand in open court and being regularly examined and interrogated in respect to said actions and proceedings, after the said ——— had been duly and regularly sworn to testify as a witness in said matter, and while he was so testifying in regard to his actions, etc. (here insert facts sufficient to show the contempt). And the said ——— (the contemnor), having refused to obey the orders and directions of said court, and having interrupted and continued to interrupt the orderly conduct of the proceedings before the said court, and having interrupted and interfered with the due and orderly administration of justice in said court, the said court adjudged the said ——— guilty of contempt of court, and directed that the sheriff of the city and county of San Francisco take the said ——— into custody, and that he be confined for the period of ——— in the county jail of the city and county of San Francisco, and the court then found and now finds the following facts in relation to the said contempt, to wit: (Insert finding of facts). And the conduct and acts and language of the said ——— were calculated to and they did interrupt the orderly conduct of the investigation and proceeding before said court, and they did interfere with and interrupt the administration of justice in said court; that the conduct and the language of the said ——— were boisterous and offensive; that by reason thereof the said ——— was guilty of a contempt of court committed in the presence of the court; and the court being duly advised in the premises.

"It is hereby ordered, adjudged and decreed, that the said ——— be confined in the county jail of the city and county of San Francisco for the period of ———; that the sheriff of the city and county of San Francisco take the said ——— into his custody and execute this sentence and order.

"Dated ———. F. H. Dunne,

"Judge of Superior Court."

In re Shortridge, 5 Cal. App. 371, 90 Pac. 478.

Order for Bail.—"At a session of the circuit court for the county of Wayne, held at the circuit court rooms in the city of Detroit, on the fourth day of February, 1889.

"Present, Hon. C. J. Reilly, Hon. H. N. Brevoort, Hon. Geo. Gartner, Hon. Geo. S. Hosmer, Circuit Judges.

"In the matter of William W. Langdon for an alleged unlawful interference, etc.

"Before Judge Gartner,

"The said respondent having been brought before the court by attachment, and the court having directed interrogatories to be filed, and that the said respondent file answers thereto on oath, on motion of F. H. Canfield, Esq., counsel for respondent, it is ordered that said respondent file answers to said interrogatories on or before Saturday, February 9, inst.

"It is further ordered, that the hearing of said matter be adjourned to Monday, February 11, inst., and that said respondent be remanded into the custody of the sheriff of Wayne county, unless he execute to the people of the state of Michigan a recognizance in the sum of \$1,000 with two sureties, to appear upon the adjourned day, and from day to day, until the determination of said matter." Langdon v. Wayne Circuit Judges, 76 Mich. 358, 365, 43 N. W. 310.

Order To Pay Costs.—

"This court finds that the writing and publishing of the letter aforesaid by the said Henry O'Brien was, under the circumstances under which it was written and published, a contempt of this court. But this court, having regard to the circumstances appearing in the affidavits, and being of opinion that no prejudice can now result to the relator from the publication of the said letter, doth not see fit to make any order save that the said Henry O'Brien do forth-

with pay to the said relator his costs of this application to be taxed." *In re O'Brien*, 16 Can. Sup. 197, 206.

Notice of Motion on Application To Punish for Contempt.—Take notice, that by special leave granted by his lordship the chancellor, this court will be moved on behalf of the above named Frederic Felitz, on Thursday, the 1st day of April, 1886, at the hour of eleven o'clock in the forenoon, or so soon thereafter as counsel can be heard, for an order to commit Henry O'Brien, of the city of Toronto, Esq., solicitor for the above named William H. Howland in this cause, to the common gaol of the county in which he may be found, on the ground that the said Henry O'Brien, while such solicitor and while the proceedings in this cause are still pending, has been guilty of contempt of this court and for his said contempt of court in writing and publishing and procuring to be published in the issue of the Toronto Daily Mail of Saturday, the 27th March, 1886, a letter addressed to the editor of the Mail, with the heading, "The Mayor's Position Explained," and signed "Henry O'Brien."

And that all necessary attachments may be issued for that purpose and for an order that the said Henry O'Brien do pay the costs of this application, or for such other order as to the said court may seem just.

And take notice, that on such application will be read the affidavits of Frederic Felitz and Christopher William Bunting this day filed and exhibits therein referred to, together with papers and proceedings taken herein.

Dated this 29th day of March, 1886.

Yours, etc., Bain, Laidlaw & Co., Solicitors for relator. To Henry O'Brien, Barrister, Toronto, and to Messrs. Robinson & O'Brien, Solicitors for W. H. Howland. *In re O'Brien*, 16 Can. Sup. 197, 202.

CONTINUANCES

By H. W. HUMBLE,
Associate Professor of Law, University of Kansas.

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I. DEFINITION.—A continuance is an adjournment of a cause to a time certain.¹ "Continuance" and "postponement" are often used interchangeably as meaning the same thing.² More accurately a continuance is distinguished from a postponement in that the latter is a putting off to a later day in the same term, while the former is a putting off to a subsequent term.³

II. POWER TO GRANT CONTINUANCES.—**A. CONSTITUTIONAL PROVISIONS.**—In criminal cases, continuances may be granted while the accused is not present. This is not a part of the trial, but a preliminary matter and does not contravene the right of the accused to appear and defend in person.⁴ The constitutional guaranty of accused persons to compulsory process for witnesses may necessitate continuances in certain cases.⁵ However, the defendant may be required to put in writing what he expects to prove by the absent witnesses.⁶

Statutes Allowing Admission.—It is held by one court that a statute allowing the prosecuting attorney to admit facts stated in an affidavit as true and thus prevent a continuance, does not contravene the bill of rights;⁷ by two courts that a statute calling for an admission merely that the witness would so testify to prevent a continuance in criminal cases is constitutional;⁸ by one court, that such a statute as the latter

1. *Com. v. Maloney*, 145 Mass. 205, 13 N. E. 482.

In *Cox v. Stout*, 85 Ind. 422, a continuance is called a "delay." And see *Bridges v. Koppelman*, 63 Misc. 27, 117 N. Y. Supp. 306.

2. *Morris v. State*, 104 Ind. 457; *State v. Underwood*, 76 Mo. 630.

3. This distinction is made in the following cases: Ala.—*Alabama G. S. R. B. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65. Ga.—*Reese v. State*, 7 Ga. 373. Ind.—*Hubbard v. State*, 7 Ind. 160. Miss.—*Cannon v. State*, 75 Miss. 364, 22 So. 827.

"Motions to postpone a trial to a later day of the term stand upon the same footing as applications for continuances from term to term." *Alabama G. S. R. B. Co. v. Hill*, *supra*. And see *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467.

4. Mo.—*State v. Hall*, 189 Mo. 262, 87 S. W. 1181. Va.—*Kibler v. Com.*, 94 Va. 804, 26 S. E. 858. Wash.—*State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

5. *State v. Adam*, 40 La. Ann. 745, 5 So. 30.

6. *Childress v. State*, 86 Ala. 77, 5 So. 775.

7. *Powers v. Com.*, 114 Ky. 237, 24 Ky. L. Rep. 1001, 70 S. W. 644.

8. *Hoyt v. People*, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239; *Aiken v. Com.*, 24 Ky. L. Rep. 523, 68 S. W. 849. See also *Lea v. State*, 64 Miss. 294; *Comerford v. State*, 23 Ohio St. 599. Such statute does not deprive the defendant of the right to meet the witnesses face to face, for he is not compelled to admit the facts stated in the affidavit of the people. *Hoyt v. People*, *supra*.

However, it has been held that if the accused has shown due diligence to procure the attendance of an absent witness, a statute seeking to prevent the postponement of a criminal trial by an admission by the prosecution that the witness would testify as alleged is unconstitutional in that it violates the right of the accused to the compulsory attendance of witnesses in his behalf and may amount to a denial of the equal protection of the laws. *State v. Berkley*, 92 Mo. 41, 4 S. W. 24, followed in *State v. Neiderer*, 94 Mo. 79, 6 S. W. 708. See also *Ark.—Graham v. State*, 50 Ark. 161, 6 S. W. 721. La.—*State v. Brette*, 6 La. Ann. 652. Tex.—*De Warren v. State*, 29 Tex. 464; *Hyde v. State*, 16 Tex. 446, 457.

is not a taking of property without due process of law;⁹ by one court that an admission by the accused in a criminal case that a certain witness for the prosecution would testify as stated in an affidavit is a waiver of the constitutional right to be confronted with the witness, and that said affidavit may be used as evidence.¹⁰ It has been declared that the legislature has full power to regulate continuances and may vest the courts with control over the same in criminal cases.¹¹

B. IN WHAT PROCEEDINGS OBTAINABLE.—1. **Generally.**—Probably no court can be found which has no power to continue cases.¹²

2. **Suits in Equity.**—In equity, the granting of a continuance is discretionary with the chancellor.¹³

3. **Criminal Cases.**—Several courts have declared continuances in criminal cases to be governed by the same principles as in civil actions,¹⁴ while others have declared that affidavits for continuances

9. *Geary v. Kansas City, O. & S. R. Co.*, 138 Mo. 251, 39 S. W. 774, 60 Am. St. Rep. 555.

10. *United States v. Sacramento*, 2 Mont. 239, 25 Am. Rep. 742.

11. *Lillard v. State*, 17 Tex. App. 114.

12. **Under the code**, the grounds for seeking a postponement because of the absence of a material witness are the same in actions of an equitable and those of a legal nature. *Howard v. Freeman*, 30 N. Y. Super. 25, 3 Abb. Pr. (N. S.) 292.

A constitutional provision requiring cases to be disposed of within a certain time does not prevent continuances by the courts. *Worthy v. Tate*, 42 Ga. 392.

A law providing for continuances because of the defendant's absence in the military service of the United States is not in conflict with the constitutional provision requiring all laws of a general nature to have a uniform operation, nor is it a law impairing the obligation of contracts. *McCormick v. Busch*, 15 Iowa 127, 83 Am. Dec. 401.

A continuance cannot be used where a statute requires a dismissal. *Houston v. Jennings*, 12 Tex. 487.

A probate court sitting monthly should grant continuances more readily than a court sitting semi-annually. *Kimball's Admr. v. Dunn's Heirs*, 12 La. 445.

Unnecessary delay by continuance should be avoided. *State v. Box*, 66 S. C. 402, 44 S. E. 969.

13. *Campbell v. Campbell*, 67 Ga. 423.

The right to a continuance in chancery until the next term after the issue is completed is not given by statute unless depositions are to be taken. *Mason v. Palmerton*, 2 Ind. 117; *Andrews v. Jones*, 3 Blackf. (Ind.) 440.

14. *Spence v. State*, 8 Blackf. (Ind.) 281; *People v. Kelly*, Jud. Repos. (N. Y.) 51.

It is a matter of discretion in criminal cases. *State v. Howard*, 30 Mont. 518, 77 Pac. 50. And see *State v. Rhia*, 25 Kan. 576.

In Arkansas it has been said that to warrant a new trial for a refusal to grant a continuance, "it must be a flagrant instance of an arbitrary and capricious exercise of power operating to the denial of justice." *Miller v. State*, 94 Ark. 538, 128 S. W. 353.

"Until the passage of our statute allowing exceptions to be taken to decisions of courts in overruling motions for continuances in criminal cases, approved February 18, 1857 (Pub. Laws 1857, p. 103), applications for continuances in criminal cases were addressed purely to the discretion of the court, and its decision thereon could not be assigned for error. *Baxter v. People*, 8 Ill. 368; *Holmes v. People*, 10 Ill. 478." *Hoyt v. People*, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239, 241.

In capital cases, continuances may be granted as in other criminal cases. *United States v. Coolidge*, 2 Gall. 364, 25 Fed. Cas. No. 14,858.

should be scanned more closely in criminal than in civil cases, owing to the superior temptation to delay in criminal cases.¹⁵ The state¹⁶ as well as the defendant may obtain a continuance.¹⁷ There is a conflict of authority as to whether or not the state may obtain same without showing cause.¹⁸

4. Proceedings Before Justices of the Peace.—It would seem that a justice of the peace might make a reasonable postponement of the trial of a case before him. And it has been so held.¹⁹ Various limitations have been attached to the exercise of the power,²⁰ and the question is frequently determined by statute.²¹

III. CONTINUANCE BY OPERATION OF LAW.—Where a cause is held under advisement beyond the term,²² or where the court adjourns without disposing of a case²³ pending at the end of the term²⁴ and upon the docket²⁵ such causes are continued by operation of law and no order of continuance is necessary.²⁶

15. *Moore v. State*, 59 Fla. 23, 52 So. 971; *Adams v. State*, 56 Fla. 1, 48 So. 219; *Ballard v. State*, 31 Fla. 266, 12 So. 865; *Gladden v. State*, 12 Fla. 562; *Hyde v. State*, 16 Tex. 445, 67 Am. Dec. 630.

"No guilty man is ever ready for trial. Every continuance of his cause brings him so much nearer to an acquittal." *Territory v. Harding*, 6 Mont. 323, 12 Pac. 750.

The same credence is not given to the affidavit of the defendant in criminal as in civil cases. *People v. Horton*, 4 Park. Cr. (N. Y.) 222.

16. *State v. Flemons*, 6 Ind. 279; *State v. Painter*, 40 Iowa 298.

17. *Rex v. Stuart*, Trin. (Eng.) 336; 2 Bac. Abr. Trial (H), 576, and numerous authorities in subsequent sections herein.

18. The state must show cause. *State v. Markham*, 1 Overt. Tenn.) 66.

Contra, *Watts v. State*, 26 Ga. 231, the reason being: if the state were coerced, a *non pros.* might be entered and the prosecution renewed later.

Where persons are indicted jointly and the defendants sever, a continuance as to one does not deprive the other of a right to demand trial without further delay. *Winkle v. State*, 20 Ga. 666.

19. *People v. Beam*, 66 Cal. 394, 5 Pac. 677; *Robinett v. Munn*, 9 Mo. 246.

There is authority for the statement that he can grant no continuance un-

less authorized by the statute, the court being one of limited jurisdiction. *Lyman-Eliel Drug Co. v. Cooke*, 12 N. D. 88, 94 N. W. 1041.

20. The right of adjournment *sua motione* must be claimed and exercised by the justice at the return of process. *Kilmore v. Sudam*, 7 Johns. (N. Y.) 529.

No power to continue until the time appointed in the writ arrives. *Martin v. Fales*, 18 Me. 23, 36 Am. Dec. 693.

Justice cannot adjourn cause before return of summons. *Halsey v. Whittock*, 3 N. J. L. 434.

Adjournment without defendant's consent at any other time than on the return day of the writ is a discontinuance. *Stadler v. Moors*, 9 Mich. 264.

21. **Kan.**—*Cook v. Larson*, 47 Kan. 70, 27 Pac. 113. **Minn.**—*Johnson v. Little*, 82 Minn. 69, 84 N. W. 643; *O'Brien v. Pomroy*, 22 Minn. 130. **N. J.**—*Auten v. Bryan*, 2 N. J. L. 135. **N. Y.**—*Howell v. Capelli*, 9 App. Div. 18, 41 N. Y. Supp. 105, 75 N. Y. St. 566.

22. *Mayor v. Yocum*, 15 Mo. App. 579.

23. **Ark.**—*Carley v. Barnes*, 11 Ark. 291. **Mo.**—*Horn v. Excelsior Springs Co.*, 52 Mo. App. 548. **Neb.**—*Strickler v. Foegal*, 40 Neb. 773, 59 N. W. 384. 24. *Smith v. Thompson*, 3 Ga. 23; *Donaldson v. Copeland*, 201 Ill. 540, 66 N. E. 844.

25. *Udike v. Armstrong*, 4 Ill. 564.

26. *Greer v. McGehee*, 3 Port.

IV. GROUNDS FOR CONTINUANCE. — A. GENERAL STATEMENT. — A statute in Iowa which may be regarded as declaratory of what the law is regardless of statute, provides that continuances may be allowed for cause which satisfies the court that substantial justice will thereby be more nearly obtained.²⁷

B. ABSENCE OR DISABILITY OF COUNSEL. — 1. Duty To Employ Counsel. — A party must exercise due diligence in employing counsel if he desires such services.²⁸

2. Absence. — a. *Gives No Absolute Right.* — Mere absence of counsel does not give a party an absolute right to a continuance,²⁹ nor is absence of counsel favored as a ground for continuance.³⁰ Where counsel is professionally engaged elsewhere, a continuance is some-

(Ala.) 398; *Trew v. Gaskill*, 10 Ind. 265. *Contra*, *Kennon v. Bell*, Minor (Ala.) 98. If not record of continuance the case is discontinued.

Provision by statute for continuance by operation of law where the judge is absent. *Knickerbocker v. Knickerbocker*, 53 Ill. 399.

An order on reference virtually continues a cause so long as it remains in force. *Mendenhall v. Smith*, Minor (Ala.) 381.

Rule for a commission to examine witnesses is not a continuance by operation of law. *Jackson v. Wadsworth*, 18 Johns. (N. Y.) 136.

The effect of failure to enter an order of continuance is not to abate the cause, but rather to amount to a continuance generally. *State v. Moore*, 57 Mo. App. 662.

27. *Childs v. Heaton*, 11 Iowa 271; *State v. Tilghman*, 6 Iowa 496; *Brady v. Malone*, 4 Iowa 146. And see *McCarthy v. Metropolitan St. R. Co.*, 48 Misc. 633, 96 N. Y. Supp. 139; *Bentley v. Page*, 2 McMull. (S. C.) 52.

Even at the first term, cause for continuance must be shown. *Herrington v. Harkins' Admr.*, 1 Rob. (Va.) 591.

Loss of Pleadings. — In *Birmingham Ry. Light & Power Co. v. Moore*, 148 Ala. 115, 42 So. 1024, a continuance was held to have been properly refused, where the original pleadings having been lost, the court directed the use of the records as provided for by statute.

28. *Cal.* — *People v. Flannelly*, 128 Cal. 83, 60 Pac. 670. *Ky.* — *Moody v.*

Com., 19 Ky. L. Rep. 1198, 43 S. W. 209. *Mont.* — *York v. Steward*, 30 Mont. 363, 76 Pac. 755.

Granting continuance to obtain counsel is a matter of discretion. *People v. Considine*, 105 Mich. 149, 63 N. W. 196.

Continuance granted on rule to employ new counsel. *Fenwick v. Brent*, 1 Cranch C. C. 280, 8 Fed. Cas. No. 4, 732.

Absent attorney had not been employed; continuance refused. *Magruder v. State*, 47 Tex. Crim. 465, 84 S. W. 587.

29. *Cal.* — *Baumberger v. Arff*, 96 Cal. 261, 31 Pac. 53. *Ga.* — *Giles v. State*, 66 Ga. 344; *Horshaw v. Cook*, 16 Ga. 526. *Ill.* — *Dornan v. Buckley*, 119 Ill. App. 523.

Continuance Denied. — *Ga.* — *Robinson v. State*, 82 Ga. 535, 9 S. E. 528. *La.* *State v. Clay*, 121 La. 529, 46 So. 616. *N. Y.* — *Schlesinger v. Keene*, 88 N. Y. Supp. 1042.

Denial Improper. — *Ga.* — *Johnson v. State*, 1 Ga. App. 729, 57 S. E. 1056; *Ky.* — *Ray v. Com.*, 124 S. W. 792; *Watkins' Admr. v. Ahrens & Ott Mfg. Co.*, 18 Ky. L. Rep. 926, 38 S. W. 868; *Bates v. Com.*, 13 Ky. L. Rep. 132, 16 S. W. 528. *Minn.* — *State v. Nerbovig*, 33 Minn. 480, 24 N. W. 321. *N. Y.* *Harde v. Purdy*, 62 Misc. 232, 114 N. Y. Supp. 814.

30. *Cotton State Life Ins. Co. v. Edwards*, 74 Ga. 220; *Hook v. Teasley*, 72 Ga. 901; *Poppell v. State*, 71 Ga. 276; *Wright v. State*, 18 Ga. 383; *Allen v. State*, 10 Ga. 85; *McKay v. Marine Ins. Co.*, 2 Caines (N. Y.) 384.

times granted³¹ and at times denied,³² as seems wise in view of the circumstances of the case. In any event, excuse for such absence must be shown,³³ and furthermore that his presence is necessary,³⁴ and that such absence was not anticipated.³⁵

b. *Other Counsel Present.*—Where one of several associate counsel is absent, a continuance because of such absence will not be granted as a rule.³⁶

31. Matter of discretion. **Cal.** People v. Collins, 75 Cal. 411, 17 Pac. 430. **Ga.**—Hill v. Clark, 51 Ga. 122. **N. Y.**—Marsh v. Nassau Show-Case Co., 26 Misc. 837, 56 N. Y. Supp. 1083. **Pa.**—Gerlach v. Engelhoffer, 7 Phila. 241 (entitled to have cause kept open); Fritz v. The Church, 3 Phila. 236, 15 Leg. Int. 341 (by rule of court). **W. Va.**—Rossett v. Gardner, 3 W. Va. 531.

32. **U. S.**—Palmer v. United States, Hoff. Land Cas. 249, 18 Fed. Cas. No. 10,697, where delay had taken place. **Cal.**—Haight v. Green, 19 Cal. 113. **Ga.**—Hatcher v. Bowen, 74 Ga. 840, "not favored ground for continuance." **Ill.**—Feinberg v. People, 174 Ill. 609, 51 N. E. 798 (second continuance refused); Culver v. Colehour, 115 Ill. 558, 5 N. E. 39 (where counsel not actually engaged in another case). **La.**—State v. Turner, 122 La. 371, 47 So. 685; State v. Dubois, 24 La. Ann. 309 (second continuance refused). **Minn.**—Adamek v. Plano Mfg. Co., 64 Minn. 304, 66 N. W. 981. **Mo.**—State v. Hedgepeth, 125 Mo. 14, 28 S. W. 160, wherein court offered to furnish other counsel. **N. Y.**—Ranney v. Gwynne, 3 E. D. Smith 59. **Pa.**—Olden v. Litzenburg, 8 Leg. Int. 106, not an engagement in another court.

33. **Ga.**—Wilson v. State, 6 Ga. App. 16, 64 S. E. 112. **Ill.**—Shutt Imp. Co. v. Thompson, 109 Ill. App. 540. **Mo.**—St. Louis, etc. R. Co. v. Holladay, 131 Mo. 440, 33 S. W. 49.

34. **Cal.**—People v. Russell, 156 Cal. 450, 105 Pac. 416 (continuance denied where no certainty as to return); Berentz v. Belmont Oil Co., 148 Cal. 577, 84 Pac. 47, 113 Am. St. Rep. 308; People v. Goldenson, 76 Cal. 328, 19 Pac. 161. **Ill.**—McClory v. Crawley, 59 Ill. App. 392. **Ky.**—Cornelius v. Com., 23 Ky. L. Rep. 771, 64 S. W. 412 (continuance granted where counsel engaged as special judge); Stephens v. Com., 9 Ky. L. Rep. 742, 6

S. W. 456. **Tex.**—Page v. Arnim, 29 Tex. 53.

By statute, absence of leading counsel made peremptory cause for continuance. **Woodridge v. Rickert**, 33 La. Ann. 234.

The negligence of the attorney in being absent is imputed to the client. **Zabel v. Nyenhuis**, 83 Iowa 756, 49 N. W. 999.

Absence of counsel in military service ground for continuance. **Dalton City Co. v. Dalton Mfg. Co.**, 33 Ga. 243.

35. **State v. Ostrander**, 18 Iowa 435; **Hagerty v. Scott**, 10 Tex. 525; **Davis v. Zumwalt**, 1 White & Wills. Civ. Cas. (Tex.) §596.

36. Among numerous authorities to this effect, see: **Ark.**—Edmonds v. State, 34 Ark. 720. **Cal.**—*In re Kasson's Estate*, 141 Cal. 33, 74 Pac. 436. **Colo.**—Reynolds v. Campling, 23 Colo. 105, 46 Pac. 639. **Del.**—State v. Adams, 5 Har. 107. **Fla.**—Smith v. State, 48 Fla. 307, 37 So. 573. **Ga.**—Cliett v. State, 132 Ga. 36, 63 S. E. 626. **Ill.**—Gould v. Elgin City Banking Co., 136 Ill. 60, 26 N. E. 497, *affirming* 36 Ill. App. 390. **Ind.**—Belck v. Belck, 97 Ind. 73. **Ia.**—Wasson v. American Patriots, 126 N. W. 778. **Kan.**—State v. Sullivan, 43 Kan. 563, 23 Pac. 645. **Ky.**—Kennedy v. Com., 32 Ky. L. Rep. 1381, 108 S. W. 891. **La.**—State v. Murray, 111 La. 688, 35 So. 814. **Neb.**—First Nat. Bank v. Dye, 73 Neb. 300, 102 N. W. 614. **S. O.**—State v. Hunter, 79 S. C. 84, 60 S. E. 241. **S. D.**—Wheaton v. Liverpool & London Globe Ins. Co., 20 S. D. 62, 104 N. W. 850. **Tenn.**—State v. Frost, 103 Tenn. 685, 54 S. W. 986. **Tex.**—Weaver v. State, 34 Tex. Crim. 232, 30 S. W. 220; **Stockholm v. State**, 24 Tex. App. 598, 7 S. W. 338. **Wash.**—Zelinsky v. Price, 8 Wash. 256, 36 Pac. 28.

Continuance should not be granted unless justice requires it. **Brown v. Com.**, 7 Ky. L. Rep. 451.

c. *Where Member of Legislature.*—It is sometimes provided by statute that absence of counsel due to his actual attendance upon a session of the legislature as a member thereof is ground for a continuance.³⁷ However, it must be shown that counsel was employed before the commencement of the session of the legislature.³⁸

d. *Illness in Family.*—Absence of counsel due to illness in his family is ground for continuance in the discretion of the court.³⁹

e. *Abandonment.*—The right to be heard by counsel being a precious one, where counsel fails to appear,⁴⁰ or fails to prepare the case and another is employed,⁴¹ or where the attorney abandons the case,⁴² through no fault of the client,⁴³ a continuance may be granted.

3. *Disability.*—a. *Illness.*—(1.) *Usually Granted.*—As a rule, upon showing that counsel is ill, a continuance is granted,⁴⁴ although the granting of the same is a matter of discretion.⁴⁵

Where sole or leading counsel engaged in superior court or court of appeals, continuance should be granted. *Waxelbaum Co. v. Atlantic Coast Line R. Co.*, 3 Ga. App. 394, 59 S. E. 1129.

When there is a sudden withdrawal of leading counsel and associate counsel is unprepared, the continuance should be granted, or trial postponed for a reasonable time. *Jackson v. State*, 88 Ga. 784, 15 S. E. 677.

37. *Ware v. City of Jerseyville*, 158 Ill. 234, 41 N. E. 736; *St. Louis & S. E. R. Co. v. Teters*, 68 Ill. 144; *Williams v. Baker*, 67 Ill. 238; *Mackin v. Cody*, 68 Ill. App. 108; *Wiegard v. Fieldon Creamery Co.*, 65 Ill. App. 202; *Harrigan v. Turner*, 53 Ill. App. 292.

The affidavit must be made during the session, not before. *Joiner v. Drainage Comrs.*, 17 Ill. App. 607.

That counsel absent on public service as senator is ground for continuance. *Patin v. Poydras*, 7 Mart. N. S. (La.) 593.

Contra.—*Sharman v. Morton*, 31 Ga. 34; *Short Mt. Coal Co. v. Boas*, 1 Pears. (Pa.) 44.

38. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *Stockley v. Goodwin*, 78 Ill. 127.

39. *Roper v. United States*, 7 Ind. Ter. 185, 104 S. W. 584.

Continuance Granted.—*Thompson v. Thornton*, 41 Cal. 626; *Eslinger v. East*, 100 Ind. 434.

Continuance Denied.—*Southern R. Co. v. Brock*, 132 Ga. 853, 64 S. E. 1083, illness of mother.

40. *State v. Ferris*, 16 La. Ann. 424.

41. *Allen v. Pollad's Admr.*, 15 Ky. L. Rep. 52, 22 S. W. 436.

42. *Wray v. People*, 78 Ill. 212; *Miller v. Harker*, 96 Ind. 234.

43. *Hatfield v. Com.*, 21 Ky. L. Rep. 1461, 55 S. W. 679.

44. *U. S.—Rhode Island v. Massachusetts*, 11 Pet. 226, 9 L. ed. 697; *Shultz v. Moore*, 1 McLean 334, 22 Fed. Cas. No. 12,825; *Rumford Chem. Wks. v. Hecker*, 1 Ban. & A. 135, 20 Fed. Cas. No. 12,131. *Cal.*—*People v. Logan*, 4 Cal. 188, 60 Am. Dec. 604. *Ga.*—*Thompson v. Hays*, 119 Ga. 167, 45 S. E. 970; *Chivers v. State*, 5 Ga. App. 654, 63 S. E. 703. *Ia.*—*Turner v. Loomis*, 125 N. W. 662; *Rice v. Melendy*, 36 Iowa 166. *Ky.*—*Wilson v. Com.*, 134 Ky. 669, 121 S. W. 614; *Johnson v. Com.*, 119 S. W. 745. *La.*—*Vicksburg, S. & P. R. Co. v. Scott*, 47 La. Ann. 706, 17 So. 249; *Marrero v. Nunez*, 3 La. Ann. 54; *Smelser v. Williams*, 10 Rob. 97. *Mich.*—*People v. Shufelt*, 61 Mich. 237, 28 N. W. 79. *Tex.*—*Daugherty v. State*, 33 Tex. Crim. 173, 26 S. W. 60. *Eng.*—*Rex v. Gray*, 1 Burr. 510, 97 Eng. Reprint 424.

There should be more than the mere statement of the party to prove the attorney's illness. *Hunt v. O'Brien*, 59 Ill. App. 321.

45. *Ga.*—*Wall v. State*, 126 Ga. 86, 54 S. E. 815 (no promise by counsel beyond jurisdiction to attend); *Nixon v. State*, 85 Ga. 455, 11 S. E. 874 (other counsel appointed—continuance denied). *Ill.*—*Condon v. Brockway*, 157 Ill. 90, 41 N. E. 634, affirming 50 Ill. App. 625 (continuance refused; not

(II.) **Other Counsel Present.**—As a rule, a continuance will not be granted because of the illness of one counsel, when other associate counsel is present.⁴⁶

(III.) **Waiver.**—If counsel who asserts his illness attends and properly conducts the cause, upon the denial of the continuance, such denial is not erroneous.⁴⁷

b. **Death.**—Death of counsel,⁴⁸ if unexpected, is ground for continuance.⁴⁹

c. **Intoxication.**—Intoxication of counsel may entitle party to an adjournment,⁵⁰ but not to a continuance, at least where associate counsel is present to proceed with the case.⁵¹

shown that other counsel could not be obtained); *Kessel v. O'Sullivan*, 60 Ill. App. 548 (merely ground for postponement). **Kan.**—*State v. Bane*, 1 Kan. App. 537, 42 Pac. 376. **Ky.** *Dowdy v. Preston*, 3 Ky. L. Rep. 760 (abstract), continuance denied; not shown that attendance would be beneficial. **N. H.**—*Hutchinson v. Manchester St. R. Co.*, 73 N. H. 271, 60 Atl. 1011. **Tex.**—*Murmurt v. State* (Tex. Crim.), 67 S. W. 508, mere fatigue not ground for continuance.

Continuance refused in *Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; *Kohn v. Short*, 18 La. Ann. 291.

Not ground for continuance unless client's case is prejudiced. *Jarvis v. Shacklock*, 60 Ill. 378; *Tipton County Comrs. v. Brown*, 4 Ind. App. 288, 30 N. E. 925.

Incapacity of counsel known long before trial, no ground for continuance. *Bunn v. People*, 103 Ill. App. 336.

Where counsel ill, the party should state that he expects to have the benefit of counsel at the next term. *Lamar v. McDaniel*, 78 Ga. 547, 3 S. E. 409; *Smith v. Printup*, 59 Ga. 610.

46. **Cal.**—*Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88. **Colo.**—*Hartford Fire Ins. Co. v. Hammond*, 41 Colo. 323, 92 Pac. 686. **Ky.**—*Howerton v. Com.*, 33 Ky. L. Rep. 1008, 112 S. W. 606. **La.**—*State v. Golden*, 113 La. 791, 37 So. 757. **Mo.**—*State v. Decker*, 217 Mo. 315, 116 S. W. 1096; *State v. Bailey*, 94 Mo. 311, 7 S. W. 425. **N. Y.** *McCready v. Lindenborn*, 37 App. Div. 425, 56 N. Y. Supp. 54, judgment affirmed, 165 N. Y. 630, 59 N. E. 1125. **S. C.**—*State v. Edwards*, 86 S. C. 215,

68 S. E. 524; *Rice v. Lockhart Mills*, 75 S. C. 150, 55 S. E. 160. **Tex.** *Thompson v. State*, 45 Tex. Crim. 397, 77 S. W. 449; *Johnson v. State*, 41 Tex. Crim. 9, 51 S. W. 911, 54 S. W. 598; *Dignowity v. Sullivan*, 49 Tex. Civ. App. 582, 109 S. W. 428.

Sickness of principal counsel good ground for continuance. *Patin v. Poydras*, 7 Mart. N. S. (La.) 593; *Baillio v. Wilson*, 6 Mart. N. S. (La.) 334.

Continuance granted where attorney ill who intended to argue the case, although other counsel was engaged in the case. *Barry v. Louisiana Ins. Co.*, 12 Mart. O. S. (La.) 484.

47. **Cal.**—*Hawes v. Clark*, 84 Cal. 272, 24 Pac. 116. **Ky.**—*Crabtree Coal Min. Co. v. Sample's Admr.*, 24 Ky. L. Rep. 1703, 72 S. W. 24; *Hayden v. Com.*, 20 Ky. L. Rep. 274, 45 S. W. 886. **S. C.** *State v. Boyleston*, 84 S. C. 574, 66 S. E. 1047.

48. *Hunter v. Fairfax*, 3 Dall. (U. S.) 305, 1 L. ed. 613; *Richardson v. Nolan*, 7 Mart. N. S. (La.) 103.

49. *Geiger v. Payne*, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571 (continuance denied where death expected); *State v. Zellers*, 7 N. J. L. 220.

If attorney dies during the trial, the court may grant an adjournment and refuse a continuance. *Crabtree Coal Min. Co. v. Hamby's Admr.*, 28 Ky. L. Rep. 687, 90 S. W. 226.

50. *People v. Warren*, 130 Cal. 678, 63 Pac. 87.

51. *Coleman v. State*, 43 Tex. Crim. 15, 63 S. W. 322; *Webb v. State* (Tex. Crim.), 40 S. W. 989.

Arrest of attorney held ground for continuance. *Scott v. State*, 43 Tex. Crim. 610, 68 S. W. 171.

C. ABSENCE OR DISABILITY OF PARTY.—1. Not Generally a Reason.—The mere absence of a party to the litigation⁵² is no ground for a continuance,⁵³ unless it is shown that the party's presence is necessary,⁵⁴ and, if he be a party defendant, that he has a meritorious defense.⁵⁵ Moreover, the absence must be for good cause.⁵⁶

52. Discretion may be exercised in favor of the real defendant although not a party to the second, when justice demands. *City of Spokane v. Costello*, 42 Wash. 182, 84 Pac. 652.

A continuance must be desired by a party to the action and not by one merely interested therein. *Burgwald v. Donelson*, 2 Kan. App. 301, 43 Pac. 100.

Plaintiff is not entitled to a continuance because of defendant's absence. He should take proper measures by subpoena or interrogatories. *Boardman v. Taylor*, 66 Ga. 638.

53. *Ga.*—*Hays v. Hamilton*, 68 Ga. 833; *White v. Blasland*, 42 Ga. 184. *Ill.*—*Hazen v. Pierson*, 83 Ill. 241. *Ind.*—*Davis v. Luark*, 34 Ind. 403; *Jacobs v. Finkel*, 7 Blackf. 432. *La.*—*State v. Lejeune*, 52 La. Ann. 463, 26 So. 992; *Richardson v. Dinkgrave*, 26 La. Ann. 651; *Kohn v. Short*, 18 La. Ann. 291. *Mo.*—*Riverside Lumb. Co. v. Schmidt*, 130 Mo. App. 227, 109 S. W. 71 (not always ground for continuance); *Geiber v. McCoy*, 23 Mo. App. 295. *N. J.*—*Smith v. Burnet*, 17 N. J. Eq. 40. *N. C.*—*Crites v. Lanier*, 1 N. C. 12. *Tex.*—*Hannah v. Chadwick*, 2 Wills. Civ. Cas. §518, continuance matter of discretion. *W. Va.*—*McDonald v. Peacemaker*, 5 W. Va. 439. *Wis.*—*Allis v. Meadow Springs Distilling Co.*, 67 Wis. 16, 29 N. W. 543, 30 N. W. 300.

A party must not "subordinate the business of the court to his own business engagements and convenience." *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660.

By statute, cause should be continued at the first term if party absent from the state. *Blanchard v. Wild*, 1 Mass. 342.

54. *U. S.*—*Jones v. Little*, 2 Dall. 182, 1 L. ed. 340. *Ga.*—*Barker v. Marietta Guano Co.*, 112 Ga. 305, 37 S. E. 379; *Cauthen v. Barnesville Sav. Bank*, 69 Ga. 767. But see *Mathews v. Willoughby*, 85 Ga. 289, 11 S. E. 620, wherein the court declares: "We know of no rule of law which requires

counsel to state why it is necessary that his client should be present." *Ill.*—*Schnell v. Rothbath*, 71 Ill. 83; *Mayo v. Frye Mfg. Co.*, 126 Ill. App. 577; *Telford v. Brinkerhoff*, 45 Ill. App. 586; *Harris v. Rose*, 26 Ill. App. 237. *Ind.*—*Burkhart v. Merry*, 88 Ind. 438. *Ia.*—*Hibbets v. Hibbets*, 117 Iowa, 177, 90 N. W. 613. *Kan.*—*Paulucci v. Verity*, 1 Kan. App. 121, 40 Pac. 927. *Mo.*—*Hurck v. St. Louis Exposition & Music Hall Assn.*, 28 Mo. App. 629. *N. Y.*—*Daly v. Minke*, 86 N. Y. Supp. 92. *Pa.*—*Cowperthwaite v. Miller*, 2 Phila. 219, 14 Leg. Int. 36.

55. *Ill.*—*Waarich v. Winter*, 33 Ill. App. 36. *Ind.*—*Fisse v. Katzentine*, 93 Ind. 490. *Kan.*—*Beard v. Mackey*, 51 Kan. 131, 32 Pac. 921. *N. Y.*—*Sloan v. Dickey*, 68 Misc. 593, 124 N. Y. Supp. 609.

What the defense is must also be stated. *Ross v. McDuffie*, 91 Ga. 120, 16 S. E. 648.

56. *Ga.*—*Cavender v. Atkins*, 2 Ga. App. 173, 58 S. E. 332. *Ky.*—*Steele v. Com.*, 3 Dana 84, cause be shown definitely. *N. Y.*—*Post v. Wright*, 1 Caines 111. *N. C.*—*Crites v. Lanier*, 1 N. C. 12.

The following were held sufficient grounds for granting continuances: Unavoidable absence (*American Standard Jewelry Co. v. R. J. Hill & Son*, 90 Ark. 78, 117 S. W. 781); party out of state when suit commenced and not yet returned (*Stoyel v. Westcott*, 3 Day (Conn.) 348); imprisoned and no access to counsel (*Chandler v. Barker*, 2 Harr. [Del.] 316); attending deceased brother's funeral (*Storer v. Heitfield*, 17 Idaho 113, 105 Pac. 55); party infirm (*Deacon v. Rasch*, 40 Ind. App. 77, 81 N. E. 84); excusable absence (*Helm v. Voils*, 58 Kan. 816, 49 Pac. 662); confinement in lunatic asylum preventing preparation for trial (*Medley v. Com.*, 138 Ky. 1, 127 S. W. 485, 129 S. W. 547); party delayed by quarantine (*Mays v. Com.*, 25 Ky. L. Rep. 646, 76 S. W. 162); acting as juror in another case (*Brower v. Tatro*, 115 Mich. 368, 73 N. W. 421, 4 Det.

2. **Illness.**—Although mere ill health⁵⁷ or slight illness⁵⁸ of a party to the litigation is insufficient ground for a continuance, illness is generally regarded as a sufficient ground.⁵⁹

Leg. N. 893); party to two suits—continuance as to second (*Finan v. Millmore*, 2 Mich. N. P. 172), no expectation of being called as a witness (*Jourdan v. Healey*, 22 Civ. Proc. 157, 19 N. Y. Supp. 240); imprisonment (*Allphin v. State*, 41 Tex. 79).

In the following cases the causes stated were held insufficient to obtain continuances: Cal.—*Wilkinson v. Parrott*, 32 Cal. 102, absence on important business. Del.—*Springer v. Mendenhall*, 3 Harr. 381, imprisonment before the term. Ga.—*Hitchcock v. McGourik*, 119 Ga. 973, 47 S. E. 563 (conditional refusal to continue; illness of party's brother); *Gunn v. Gunn*, 95 Ga. 439, 22 S. E. 552 (party had another suit about to be tried pending in another state). Ill.—*Packer v. Wetherell*, 44 Ill. App. 95, engagement in a justice's court. Kan.—*State v. Ellvin*, 51 Kan. 784, 33 Pac. 547, voluntary intoxication.

It is not commendable practice to continue trial because plaintiff is intoxicated. *Charles v. People's Ins. Co.*, 3 Colo. 419.

Insanity.—Continuance while hope of regaining reason. *Stratford v. Stratford*, 92 N. C. 297.

Illness in party's family. Continuance matter of discretion. *Skinner v. Bryce*, 75 N. C. 287.

Confinement in penitentiary no ground for continuance. Party may be brought before the court on writ of *habeas corpus* and tried for the second offense. *Rigor v. State*, 101 Md. 465, 61 Atl. 631.

Stricter showing of diligence is required than where witness is absent. *Gates v. Hamilton*, 12 Iowa 50.

57. Ga.—*Mitchell v. Mitchell*, 40 Ga. 11, second continuance refused. Ill.—*Schlesinger v. Nunan*, 26 Ill. App. 525. La.—*State v. Ward*, 14 La. Ann. 673, continuance matter of discretion.

58. *Hopkins v. State*, 52 Fla. 39, 42 So. 52; *Barrow v. State*, 121 Ga. 187, 48 S. E. 950.

59. Cal.—*Jaffe v. Lillenthal*, 101 Cal. 175, 35 Pac. 636. Colo.—*Elliott v. Field*, 21 Colo. 378, 41 Pac. 504. Ga.—*Martin v. Nichols*, 121 Ga. 506, 49 S. E. 613; *Morse v. Lowe*, 111 Ga.

274, 36 S. E. 688; *Connell v. Sharpe*, 32 Ga. 443. Ind.—*Post v. Cecil*, 11 Ind. App. 362, 39 N. E. 222 (sudden illness). Ky.—*Ehrlich v. Com.*, 131 Ky. 680, 115 S. W. 797; *Hollis v. Watson*, 28 Ky. L. Rep. 550, 89 S. W. 548. Mich.—*Locke v. Leonard Silk Co.*, 37 Mich. 479. N. Y.—*Irish Industrial Exposition & A. Co. v. Sheridan*, 121 App. Div. 922, 106 N. Y. Supp. 392. Tex.—*Low, Hudson & Gray Water Co. v. Hickson*, 32 Tex. Civ. App. 457, 74 S. W. 781. Vt.—*Massucco v. Tomassi*, 78 Vt. 188, 62 Atl. 57. Va.—*McAlexander v. Haviston*, 10 Leigh 486.

Continuance refused in: U. S.—*Edwards v. Nichols*, 8 Fed. Cas. No. 4,296, it is not a "legal" (absolute) cause for continuance. Ala.—*Spann v. Torbert*, 130 Ala. 541, 30 So. 389; *Campbell v. White*, 77 Ala. 397 (court may refuse continuance on this ground). Mo.—*Owens v. Tinsley*, 21 Mo. 423.

Proof of illness.—It must be proved by competent evidence. *Gainsley v. Bainsley* (Cal.), 44 Pac. 456.

Letter of client to attorney is not evidence. *O'Barr v. Alexander*, 37 Ga. 195.

Physician refused to state that harmful results would result from the appearance of party. Continuance refused. *Solomon v. State*, 71 Miss. 567, 14 So. 461.

Semble. It must be shown that presence would be beneficial. *Rubens v. Mead*, 121 Cal. xvii, 53 Pac. 432.

Second continuance refused. *Malone v. State*, 49 Ga. 210.

President of defendant corporation not so sick as to prevent taking of deposition. Continuance denied. *Puget Sound Mach. Depot v. Brown Alaska Co.*, 42 Wash. 681, 85 Pac. 671.

Party threatened with pneumonia—continuance denied. *J. H. Rottman Distilling Co. v. Van Frank*, 88 Mo. App. 50.

Sickness due to long-continued alcoholism—continuance granted. *Contra*, if merely drunk. The form of the physician's affidavit is set out at length in the report. *Harrod v. Hutchinson*, 32 Ky. L. Rep. 3, 105 S. W. 365.

A continuance in a criminal case be-

3. Death.—The death of a party to the litigation is not necessarily ground for continuance,⁶⁰ although it may be sufficient under certain circumstances.⁶¹

4. In Service of State.—Absence of parties due to public employment⁶² in the following capacities has been held sufficient ground for continuance: Attendance on a session of the legislature as a member thereof;⁶³ performance of military service.⁶⁴ It is not a good reason for a continuance, however, that the party has been summoned and sworn as a grand juror in another court.⁶⁵

D. ABSENCE OF WITNESS OR EVIDENCE.—**1. In General.**—Although a motion for a continuance because of the absence of a material witness⁶⁶ or documentary evidence⁶⁷ is addressed to the discretion of

cause of the defendant's infirmity of mind brought on by drinking and other causes, is a matter of discretion. *Branch v. State*, 35 Tex. Crim. 304, 33 S. W. 356.

Where party is about to undergo a serious surgical operation, a continuance should be granted. *Michelsen v. Spies*, 83 Hun 509, 32 N. Y. Supp. 17.

60. *Alexander v. Patten*, 1 Cranch C. C. 338, 1 Fed. Cas. No. 171; *Field v. Armstrong*, 69 Ga. 170.

61. *Babcock, Gardner & Co. v. Wells*, 10 La. 197.

One plaintiff died, other out of jurisdiction; continuance granted to provide security for costs. *Lambert v. Smith*, 1 Cranch. C. C. 347, 14 Fed. Cas. No. 8,027.

Death of party may make adverse party's testimony incompetent and thus necessitate continuance to obtain evidence. *Hagarty v. Thompson*, 1 W. N. C. (Pa.) 576.

Death of party is no reason for a continuance at instance of party's representatives, but adverse party may object to trial while there is no responsible party of record. *Christine v. Whitehill*, 16 Serg. & R. (Pa.) 98.

62. *Republica v. Matlack*, 2 Dall. (U. S.) 108, 1 L. ed. 310.

63. *Gyer's Lessee v. Irwin*, 4 Dall. (U. S.) 107, 1 L. ed. 762; *Short Mt. Coal Co. v. Boas*, 1 Pears. (Pa.) 44.

Party member of congress, present at session; continuance matter of discretion. *Nones v. Edsall*, Wall. Jr. 189, 18 Fed. Cas. No. 10, 290.

The legislative privilege does not extend to cases of parties to litigation absent as members of the legislature. But if there is an affidavit filed to the effect that the party cannot attend to

his case without neglecting his legislative duties, the continuance should be granted. *Johnson v. Offutt*, 4 Mete. (Ky.) 19.

By statute, suits against members of the legislature were suspended in Louisiana in 1806. *Bradshaw v. Dickson*, 9 La. 485.

64. Presence must be necessary. *Duncan v. Niles*, 32 Ill. 541.

Need not show presence necessary. *Butler v. McCall*, 15 Iowa 431.

Continuance matter of discretion. *Crawford v. Brady*, 35 Ga. 184.

Privilege allowed to paymaster in the army. *Clark v. Woodbury*, 23 Iowa 61.

Statute applies to persons indicted before and after its passage. *Com. v. Viers*, 63 Ky. 377.

65. *Goodwin v. White*, 1 Browne (Pa.) 272.

66. *La.*—*State v. Finn*, 31 La. Ann.

408. *Mo.*—*Farmers' & Drovers' Bank v. Williamson*, 61 Mo. 259. *N. Y.*

Ten Broeck v. Travelers' Ins. Co., 6 N. Y. St. 100; *Leggett v. Boyd*, 3 Wend.

376. *Tex.*—*Citizens' R. Co. v. Robertson* (Tex. Civ. App.), 103 S. W. 443.

Wash.—*State v. Croney*, 31 Wash. 122, 71 Pac. 783. *Wis.*—*Hayes v. Frey*, 54

Wis. 503, 11 N. W. 695.

Effect of Injuries.—An application for a continuance indefinitely in an action for personal injuries, until time develops the effect of the injuries, is properly denied. *Missouri, T. & K. R. Co. v. Huff* (Tex. Civ. App.), 32 S. W. 551.

67. *Ill.*—*Hughes v. Washington*, 63

Ill. 245. *La.*—*Tucker v. Peebles*, 10 La. 403. *Mo.*—*Campbell v. McCaskill*,

88 Mo. App. 44. *Ore.*—*Young v. Pat-*

the trial court,⁶⁸ the continuance will generally be granted on a proper showing⁶⁹ either for the purpose of allowing the taking of the deposition of the absent witness,⁷⁰ or to allow time for the attendance of the witness, or to procure the missing documents.⁷¹ A party litigant is entitled to a reasonable opportunity to procure the testimony of witnesses.⁷² This right, however, is subject to the following limitations: There must be an explanation of failure to have witness in court;⁷³ the evidence must be material,⁷⁴ pertinent,⁷⁵ and relevant;⁷⁶ not im-

ton, 9 Ore. 195. **Tex.**—Peck v. Moody, 33 Tex. 84.

68. Discretion properly exercised in refusing a continuance because of absence of deceased's skull. *Moss v. State*, 152 Ala. 30, 44 So. 598.

69. **Ga.**—Ryder v. State, 100 Ga. 528, 28 S. E. 246, 62 Am. St. Rep. 334 38 L. R. A. 721. **Ind.**—City of Logansport v. Dykeman, 116 Ind. 15, 17 N. E. 587; *Nixon v. Brown*, 8 Blackf. 504. **Kan.**—Atchison, T. & S. F. R. Co. v. O'Melia, 1 Kan. App. 374, 41 Pac. 437. **N. Y.**—Hooker v. Rogers, 6 Cow. 577. **W. Va.**—State v. Madison, 49 W. Va. 96, 38 S. E. 492.

In *Adams v. Colton*, 3 Ill. 71, the statement of winning counsel is to the effect that "at common law, the questions which arise on a motion for a continuance on account of the absence of a witness are: 1. Is the witness material? 2. Has the defendant been guilty of laches? 3. Can the witness be procured at the next term?"

A party is not bound to testify in his own behalf and may have a continuance because of an absent witness. *Fox v. Reynolds*, 24 Ind. 46.

If there be doubt in criminal cases as to whether the accused has had time to procure witnesses, he should be given the benefit of the doubt. *State v. Boitreaux*, 31 La. Ann. 188.

70. **Ind.**—Phillips v. Phillips, 5 Ind. 190. **Ia.**—Husted v. Williams, 126 Iowa 634, 102 N. W. 519; *Owens v. Hart*, 66 Iowa 565, 24 N. W. 41. **Neb.** *Newman v. State*, 22 Neb. 355, 35 N. W. 194. **N. Y.**—Perkins v. Whitney, 58 Hun 608, 12 N. Y. Supp. 184. **Tex.**—Mason v. State, 57 Tex. Crim. 319, 122 S. W. 871. **Wash.**—Hill v. Hill, 42 Wash. 250, 84 Pac. 829. **W. Va.**—Walker v. State, 4 W. Va. 749.

A party cannot claim a continuance because of the non-return of his adversary's commission. *St. Joseph's College v. Lee*, 4 La. 229.

A continuance will not be granted because a witness is absent if his deposition has been taken. **Ill.**—Heitschmidt v. McAlpine, 59 Ill. App. 231. **Pa.**—Bond v. Hunter, 1 Yeates 284; *Goodwin v. White*, 1 Browne 272. **Va.** *Goodell's Exrs. v. Gibbons*, 91 Va. 608, 22 S. E. 504.

71. The accused is entitled to the personal attendance of witnesses where practicable. *People v. Dodge*, 28 Cal. 445.

72. **Ky.**—Kentucky Cent. R. Co. v. Carey, 5 Ky. L. Rep. 512. **Mich.**—*People v. Vanderpool*, 2 Mich. N. P. 73 (criminal cases). **Miss.**—Bedford v. Gartrell, 36 So. 529; *Cade v. State*, 96 Miss. 434, 50 So. 554. **Mo.**—*State v. Farrow*, 74 Mo. 531.

73. *Kann v. Weir*, 95 N. Y. Supp. 584; *Davis v. Foreman (Tex.)*, 20 S. W. 52.

74. **Colo.**—Hewes v. Andrews, 12 Colo. 161, 20 Pac. 338; *Keegan v. Donnelly*, 11 Colo. App. 31. **Ill.**—*Johnson v. Anna Building & Loan Assn.*, 126 Ill. App. 592. **Ind.**—*Emmons v. Meeker*, 55 Ind. 321; *Griffith v. State*, 12 Ind. 548. **Ky.**—*Grubbs v. Pickett*, 1 A. K. Marsh. 255. **Kan.**—*St. Louis, W. & W. R. Co. v. Ransom*, 29 Kan. 298. **La.**—*State v. Manceaux*, 42 La. Ann. 1164, 8 So. 297. **N. Y.**—*Spanghehl v. Spanghehl*, 39 App. Div. 5, 57 N. Y. Supp. 7; *Witowski v. Maisner*, 21 Misc. 487, 47 N. Y. Supp. 599. **Ore.**—*State v. Huffman*, 39 Ore. 48, 63 Pac. 1. **S. C.**—*State v. Smith*, 56 S. C. 378, 34 S. E. 657. **Tex.**—*Chicago, R. I. & T. R. Co. v. Long*, 97 Tex. 69, 75 S. W. 483; *Raley v. State*, 4 Tex. Civ. App. 426, 105 S. W. 342; *McGehee v. Minster (Tex. Civ. App.)*, 25 S. W. 718; *Atkins v. State*, 44 Tex. Crim. 291, 70 S. W. 744. **W. Va.**—*Gulland v. Gulland*, 62 W. Va. 671, 59 S. E. 612; *Tompkins v. Burge*, 2 W. Va. 187.

75. *United States v. Smith*, 3 Wheeler Cr. Cas. 100, 27 Fed. Cas. No. 16,342; *Sellars v. Kelly*, 45 Miss. 323.

76. **Ga.**—*Seagraves v. W. E. Powell*

material,⁷⁷ unnecessary,⁷⁸ uncontroverted,⁷⁹ unimportant,⁸⁰ consistent with the adverse party's contentions,⁸¹ or in no wise likely to affect the result.⁸² The evidence must be competent,⁸³ and must be definite and not merely speculative.⁸⁴

Probability of Obtaining Evidence.—There must be a reasonable probability that the evidence can be obtained if the continuance be granted.⁸⁵

Co., 72 S. E. 349; *Fox v. Armour Pkg. Co.*, 121 Ga. 273, 48 S. E. 924. **Ky.** *Chambers v. Handley*, 3 J. J. Marsh. 98. **Ore.**—*State v. Finch*, 54 Ore. 422, 103 Pac. 505. **Va.**—*Andrews v. Com.*, 100 Va. 801, 40 S. E. 935.

77. **Ala.**—*House v. State*, 139 Ala. 132, 36 So. 732. **Alaska.**—*United States v. Bird*, 1 Alaska 379. **Ark.** *Morphew v. State*, 84 Ark. 487, 106 S. W. 480. **Cal.**—*Harper v. Lamping*, 33 Cal. 641. **D. C.**—*Fields v. United States*, 27 App. Cas. 433. **Ga.**—*Parker v. State*, 81 Ga. 332, 6 S. E. 600. **Ill.** *Stringam v. Parker*, 159 Ill. 304, 42 N. E. 794, *affirming* 56 Ill. App. 36. **Ind.**—*Prather v. Young*, 67 Ind. 480. **Ia.**—*State v. McDonough*, 104 Iowa 6, 73 N. W. 357. **Kan.**—*State v. Gould*, 40 Kan. 258, 19 Pac. 739. **Ky.**—*Teviss v. Eliza*, 7 Dana 394. **La.**—*Anselm v. Wilson*, 8 La. 35. **Miss.**—*Smokey v. Johnson*, 4 So. 787. **Mo.**—*State v. Dale*, 89 Mo. 579, 1 S. W. 760. **Mont.** *Territory v. Roberts*, 9 Mont. 12, 22 Pac. 132. **N. C.**—*Harget v. Foscoe*, 3 N. C. 145. **Tex.**—*Price v. Lauve*, 49 Tex. 74. **Va.**—*Nash v. Upper Appomattox Co.*, 5 Gratt. 332. **Wash.**—*Jackson v. Mercantile Mut. Fire Ins. Co.*, 45 Wash. 244, 88 Pac. 127.

78. *Reynolds v. Martin*, 55 Ga. 628. 79. *Baker v. State* (Tex. Crim.), 81 S. W. 1215.

80. *Bird v. McElvaine*, 10 Ind. 40. 81. *Greenwood v. State* (Tex. Crim.), 44 S. W. 177; *Toms v. State* (Tex. Crim.), 40 S. W. 491; *Sisk v. State* (Tex. Crim.), 42 S. W. 985; *Hargrove v. State* (Tex. Crim.), 51 S. W. 1124; *Slade v. State*, 29 Tex. App. 381, 16 S. W. 253; *Fernandez v. State*, 4 Tex. App. 419.

82. *Grundies v. Bliss*, 86 Ill. 132; *Pemberton v. State*, 55 Tex. Crim. 464, 117 S. W. 837; *Reese v. State* (Tex. Crim.), 97 S. W. 697; *Land v. State*, 34 Tex. Crim. 330, 30 S. W. 788; *Goldsmith v. State*, 32 Tex. Crim. 112, 22 S. W. 405; *Smith v. Wofford* (Tex. Civ.

App.), 97 S. W. 143; *Houston, E. & W. T. R. Co. v. Ollis*, 37 Tex. Civ. App. 231, 83 S. W. 850; *Boyett v. State*, 26 Tex. App. 689, 9 S. W. 275.

The court may look to the pleadings to determine the relevancy and materiality of the facts which the testimony is expected to prove. *Douglass v. Neil*, 37 Tex. 529.

Testimony negative in character; continuance denied. *Dailey v. State* (Tex. Crim.), 55 S. W. 821.

83. **U. S.**—*Warburton v. Aken*, 1 McLean 460, 29 Fed. Cas. No. 17,143; *United States v. Toms*, 1 Cranch C. C. 607, 28 Fed. Cas. No. 16,532. **Ark.** *Statham v. State*, 42 Ark. 273. **Cal.** *Cohn v. Brownstone*, 93 Cal. 362, 28 Pac. 953. **Colo.**—*Thackaray v. Hanson*, 1 Colo. 365. **Ga.**—*Debk v. State*, 99 Ga. 667, 26 S. E. 752; *Haley v. Evans*, 60 Ga. 157. **Ind.**—*Post v. State*, 14 Ind. App. 452, 42 N. E. 1120. **Ia.** *State v. Athey*, 133 Iowa 382, 108 N. W. 224. **Ky.**—*Lisle v. Com.*, 82 Ky. 250. **La.**—*State v. Cook*, 52 La. Ann. 114, 26 So. 751. **Mich.**—*Meyer v. Knott*, 137 Mich. 714, 100 N. W. 907, 11 Detroit Leg. N. 436. **Miss.**—*Gastrell v. Phillips*, 64 Miss. 473, 1 So. 729. **Mo.** *Cartwright v. Culver*, 74 Mo. 179. **Neb.** *Clark v. Mullen*, 16 Neb. 481, 20 N. W. 642. **N. M.**—*Waldo v. Beckwith*, 1 N. M. 182. **Pa.**—*Cockrey v. Beideman*, 2 Phila. 236, 14 Leg. Int. 45. **S. C.** *Lyles v. Robinson*, 1 Bailey 25. **Tex.** *Calhoun v. Wright*, 23 Tex. 522; *Laws v. State* (Tex. Crim.), 101 S. W. 987. **Wis.**—*Parkeson v. Bracken*, 1 Pin. 174, 39 Am. Dec. 296.

84. *Corpus v. State*, 51 Tex. Crim. 315, 102 S. W. 1152; *Mitchell v. State*, 46 Tex. Crim. 427, 80 S. W. 629.

85. **Ark.**—*Weatherford v. State*, 78 Ark. 36, 93 S. W. 61. **Cal.**—*People v. Sanders*, 114 Cal. 216, 46 Pac. 153 (search for one year without success—continuance denied); *People v. Cleveland*, 49 Cal. 577. **Ga.**—*Branch Son's & Co. v. DuBose*, 55 Ga. 21. **Ill.**—*Slade*

2. **Absence Caused By Adverse Party.**—Where the adverse party is the cause of the absent evidence, a continuance should be granted.⁸⁶ The same rule has been applied where persons friendly to the adversary cause such absence.⁸⁷

3. **Corroborating Testimony.**—A continuance should be granted upon proper application to procure the attendance of a witness who will corroborate defendant's testimony on material matters.⁸⁸

4. **Cumulative Evidence.**—There is no invariable rule as to the granting of a continuance when the evidence is cumulative,⁸⁹ the matter depending largely upon the discretion of the court⁹⁰ and the circumstances of the case. In many instances continuances have been granted though the evidence was cumulative;⁹¹ in many others the

v. McClure, 76 Ill. 319. **Ind.**—*Dun-
nington v. Syfers*, 157 Ind. 458, 62
N. E. 29. **Ia.**—*State v. Burns*, 124
Iowa 207, 99 N. W. 721. **Ky.**—*Ferrell
v. Commonwealth*, 127 S. W. 162.
La.—*State v. Simmons*, 121 La. 561,
46 So. 651. **Miss.**—*Wilson v. Zook*, 69
Miss. 694, 13 So. 351. **Neb.**—*Stratton
v. Dole*, 45 Neb. 472, 63 N. W. 875.
Nev.—*State v. Rosemurgey*, 9 Nev. 308.
N. Y.—*Brown v. Moran*, 65 How. Pr.
349. **Ore.**—*State v. Leonard*, 3 Ore.
157. **Tex.**—*Franklin v. State*, 46 Tex.
Crim. 181, 78 S. W. 934. **W. Va.**—*State
v. Brown*, 62 W. Va. 546, 59 S. E.
508.

That witness is one of floating pop-
ulation is properly considered. **Com.**
v. Delero, 218 Pa. 487, 67 Atl. 764.

Court may consider the probability
of the existence of the witness. *Miller
v. State*, 94 Ark. 538, 128 S. W. 353.
And see *Cremeans v. Com.*, 104 Va.
860, 52 S. E. 362, 2 L. R. A. (N. S.)
721.

Witness a fugitive from justice jus-
tifies denial of continuance. **Ky.**—*City
of Covington v. O'Meara*, 133 Ky. 762,
119 S. W. 187; *Rankin v. Com.*, 6 Ky.
L. Rep. 407. **La.**—*State v. Baum*, 51
La. Ann. 1112, 26 So. 67. **Tex.**—*Stevens
v. State* (Tex. Crim.), 49 S. W. 105;
Deckard v. State, 58 Tex. Crim. 34, 124
S. W. 173; *Vann v. State*, 48 Tex.
Crim. 11, 85 S. W. 1064.

So If Witness is Concealing Himself.
Howard v. State, 7 Ga. App. 61, 65
S. E. 1076.

86. **U. S.**—*United States v. Duane*,
Wall. Sr. 5, 25 Fed. Cas. No. 14,996;
Echeveria v. Nairac, Wall. Sr. 29, 8
Fed. Cas. No. 4,261. **Fla.**—*McDuffee
v. State*, 55 Fla. 125, 46 So. 721. **Ga.**
Chester Church v. Blount, 70 Ga. 779.

Ky.—*Bentle v. Guke Brewing Co.*, 14
Ky. L. Rep. (abstract) 766. **N. Y.**
Church v. Church, 81 App. Div. 349,
80 N. Y. Supp. 770; *Premo v. Smith*,
32 N. Y. Super. Ct. 467, 40 How. Pr.
480, 10 Abb. Pr. (N. S.) 90. **Va.**
Taylor v. Peck, 21 Gratt. 11.

87. *Joseph v. Com.*, 8 Ky. L. Rep.
53, 1 S. W. 4; *Com. v. Carter*, 11 Pick.
(Mass.) 277.

88. *Hendrickson v. Com.*, 24 Ky. L.
Rep. 2173, 73 S. W. 764 (especially
where defendant is impeached); *Smith
v. Com.*, 9 Ky. L. Rep. 1005, 8 S. W.
192; *Burnly v. State* (Tex.), 14 S. W.
1008; *Beard v. State* (Tex. Crim.), 115
S. W. 592; *Phipps v. State*, 34 Tex.
Crim. 560, 31 S. W. 397.

Continuance refused to obtain cor-
roborative testimony of an undisputed
point. *Chambers v. Beahan*, 57 Ill.
App. 285.

89. *Howard v. Com.*, 15 Ky. L. Rep.
873, 26 S. W. 1.

90. *State v. Furbeck*, 29 Kan. 532;
Com. v. Carnes, 30 Ky. L. Rep. 506, 98
S. W. 1045.

91. **Ga.**—*Reid & Murphy v. State*,
23 Ga. 190. **Ky.**—*Wilkerson v. Com.*, 88
Ky. 29, 9 S. W. 836; *Thompson v. Com.*,
13 Ky. L. Rep. (abstract) 399. **S. D.**
State v. Phillips, 18 S. D. 1, 98 N. W.
171. **Tex.**—*Dillingham v. Ellis*, 86
Tex. 447, 25 S. W. 618; *Cameron v.
State*, 57 Tex. Crim. 316, 122 S. W.
870; *Morgan v. State*, 54 Tex. Crim.
542, 113 S. W. 934; *Smith v. State*, 54
Tex. Crim. 617, 114 S. W. 827; *Ninnon
v. State*, 17 Tex. App. 650.

The first continuance should be
granted. *Gilford v. State* (Tex. Crim.),
78 S. W. 692; *Davis v. State* (Tex.
Crim.), 65 S. W. 918; *Porter v. State*
(Tex. Crim.), 32 S. W. 692; *Riley v.*

court in its discretion has denied the request especially when a previous application has been granted.⁹²

5. **Death.**—The death of a witness may be ground for a continuance where the testimony is material, and time is necessary to procure the testimony of another witness on the point.⁹³

6. **Diligence.**—a. *General Statement.*—Due diligence to procure the absent evidence must have been exercised,⁹⁴ and seeming careless-

State, 58 Tex. Crim. 176, 125 S. W. 582; Johnson v. State, 55 Tex. Crim. 134, 114 S. W. 1178; Hardin v. State, 52 Tex. Crim. 238, 106 S. W. 352; Burnly v. State (Tex. App.), 14 S. W. 1008; Irvine v. State, 20 Tex. App. 12.

92. Ala.—Gaines v. State, 146 Ala. 16, 41 So. 865. Ark.—Owen v. State, 86 Ark. 317, 111 S. W. 466; St. Louis, I. M. & S. Ry. Co. v. Fisher, 97 S. W. 279; Vanata v. State, 82 Ark. 203, 101 S. W. 169; Harper v. State, 79 Ark. 594, 96 S. W. 1003; Maxey v. State, 66 Ark. 523, 52 S. W. 2. Colo.—Abby v. Dexter, 18 Colo. App. 498, 72 Pac. 892. Fla.—Dornarm v. State, 48 Fla. 18, 37 So. 561; Surrency v. State, 48 Fla. 59, 67 So. 575. Ill.—McKichan v. McBean, 45 Ill. 228. Ind. Ter.—Kelley v. United States, 7 Ind. Ter. 241, 104 S. W. 604. Ia.—Stevens v. Campbell, 6 Iowa 538. Ky.—Campbell v. Dreher, 33 Ky. L. Rep. 444, 110 S. W. 353. La.—State v. Primeaux, 39 La. Ann. 673, 2 So. 423; State v. Hillstock, 45 La. Ann. 298, 12 So. 352. Mo.—State v. Horn, 209 Mo. 452, 108 S. W. 3; State v. Riddle, 179 Mo. 287, 78 S. W. 606. N. Y.—Caldwell v. New Jersey Steamboat Co., 56 Barb. 425. Pa.—Gillman v. Media, M. A. & C. Elec. Ry. Co., 224 Pa. 267, 73 Atl. 342. Tex.—Cravens v. State (Tex. Crim.), 103 S. W. 921; Taylor v. State (Tex. Crim.), 87 S. W. 1039; Bryant v. State (Tex. Crim.), 47 S. W. 373; Kirk v. State (Tex. Crim.), 37 S. W. 440; Steel v. State (Tex. Crim.), 30 S. W. 1064; Francis v. State, 57 Tex. Crim. 555, 123 S. W. 1114; Buckner v. State, 55 Tex. Crim. 511, 117 S. W. 803; Grim-singer v. State, 44 Tex. Crim. 1, 69 S. W. 583; Gulf, C. & S. F. Ry. Co. v. Adams (Tex. Civ. App.), 121 S. W. 876; Wise County Nat. Bank v. Knox (Tex. Civ. App.), 54 S. W. 276; Pruitt v. State, 30 Tex. App. 156, 16 S. W. 773; Frizzell v. State, 30 Tex. App. 42, 16 S. W. 751. Va.—Scott v. Boyd, 101 Va. 28, 42 S. E. 918; Thompson v. Com., 88 Va. 45, 13 S. E. 304. Wash.

State v. Boyce, 24 Wash. 514, 64 Pac. 719. Wyo.—McKinney v. State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710.

Second continuance denied. Gregory v. State (Tex.), 48 S. W. 577, denying hearing (Crim. App.), 43 S. W. 1017; Ray v. State (Tex. Crim.), 85 S. W. 1151; Brown v. State, 47 Tex. Crim. 326, 83 S. W. 378; McComas v. State (Tex. Crim.), 81 S. W. 1212; Knowles v. State, 44 Tex. Crim. 322, 72 S. W. 398.

93. Long v. McDonald, 39 Ga. 186, death of defendant's partner who was relied upon to prove the partnership.

94. U. S.—Copper River Min. Co. v. McClellan, 138 Fed. 333, 70 C. C. A. 623, that many of the material witnesses were without the district and that it was not safe to go to trial without them is insufficient. Ark. Golden v. State, 19 Ark. 590. Cal. Tiffin v. Cummings, 144 Cal. 612, 78 Pac. 23, that there was insufficient time to subpoena witness not enough. Colo. Banker Min. & Mill Co. v. Allen, 20 Colo. App. 351, 78 Pac. 1070, it is not improper to refuse a continuance in the absence of a showing that counsel did not know of witness' absence in time to take his deposition, and when it did not appear that witness could not attend without injury to his health. Del.—Dulany v. Boston, 2 Har. 350. Ga.—Fitzgerald v. State, 126 Ga. 556, 55 S. E. 482, it is not error to refuse continuance, where arrest on March 20th, subpoena issued on March 27th and again on 28th, for trial on 30th. Idaho.—State v. Corcoran, 7 Idaho 220, 61 Pac. 1034. Ill.—Meyers v. Andrews, 87 Ill. 433. Ind.—Conrad v. State, 144 Ind. 290, 43 N. E. 221. Ia.—Moffitt v. Chicago Chronicle Co., 107 Iowa 407, 78 N. W. 45. Kan. State v. Tucker, 72 Kan. 481, 84 Pac. 126, statutory requirements must be complied with. Ky.—McQueen v. Com., 28 Ky. L. Rep. 20, 88 S. W. 1047. La. Mills v. Fellows, 30 La. Ann. 824. Miss.—Hattox v. State, 80 Miss. 186,

ness in failing to obtain the desired evidence must be explained and

31 So. 579. **Mo.**—*Kelly v. Saunders*, 35 Mo. 200. **Neb.**—*Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862. **N. Y.**—*Babcock v. Hill*, 35 Barb. 52. **Okla.**—*Kirk v. Territory*, 10 Okla. 46, 60 Pac. 797. **Pa.**—*Smith v. Cunningham*, 9 Phila. 96. **Tex.**—*Pate v. State*, 47 Tex. Crim. 373, 83 S. W. 695; *Childers v. State*, 16 Tex. App. 524. **Va.**—*Early v. Com.*, 86 Va. 921, 11 S. E. 795. **Wash.**—*Roeder*, *Peabody & Co. v. Brown*, 1 Wash. Ter. 112. **W. Va.**—*Mullinax v. Waybright*, 33 W. Va. 84, 10 S. E. 25.

In the following cases it was held that there was a lack of sufficient diligence: **U. S.**—*Pacey v. McKinney*, 125 Fed. 675, 60 C. C. A. 365. **Ark.**—*Carroll v. State*, 71 Ark. 403, 75 S. W. 471. **Cal.**—*People v. Long*, 142 Cal. 482, 76 Pac. 232 (where proper and due diligence was not shown, nor that the facts to which they were to testify could not have been testified to by other witnesses); *Tompkins v. Montgomery*, 123 Cal. 219, 55 Pac. 997; *People v. Lampson*, 70 Cal. 204, 11 Pac. 593; *Pierson v. Holbrook*, 2 Cal. 598. **Colo.**—*Litchfield v. Daniels*, 1 Colo. 268; *Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1058. **Ga.**—*Thompson v. Hays*, 123 Ga. 110, 51 S. E. 33 (failure to comply with statutory requirements); *Kidd v. State*, 101 Ga. 528, 28 S. E. 990; *Wilcox v. Mims*, 95 Ga. 564, 20 S. E. 382; *Rome R. Co. v. Barnett*, 94 Ga. 446, 20 S. E. 355; *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. 778; *Peters v. West*, 70 Ga. 343; *Boyd v. McFarlin*, 58 Ga. 208; *McGinnes v. McGinnes*, 23 Ga. 613; *Moody v. Davis*, 10 Ga. 403. **Idaho.**—*Alvord v. United States*, 1 Idaho 585. **Ill.**—*City of Chicago v. Wilshire*, 238 Ill. 317, 87 N. E. 383; *Bailey v. Kerr*, 180 Ill. 412, 54 N. E. 165; *Jamison v. People*, 145 Ill. 357, 34 N. E. 486. *Anheuser-Busch Brewing Co. v. Hutmacher*, 127 Ill. 652, 21 N. E. 628, *affirming* 29 Ill. App. 316; *City of Freeport v. Isbell*, 93 Ill. 381; *Goss v. Howard*, 43 Ill. 223; *Wiley v. Platter*, 17 Ill. 538; *Union County v. Axley*, 53 Ill. App. 670; *Steward v. Miller*, 17 Ill. App. 660. **Ind.**—*Osborn v. Storms*, 65 Ind. 321; *Wolcott v. Mack*, 53 Ind. 269; *Chamberlain v. Reid*, 49 Ind. 332; *Brown v. Shearon*, 17 Ind. 239; *Toledo, W. & W. R. Co. v. Fisher*,

13 Ind. 258; *Hall v. State*, 3 Ind. 439; *Murphy v. State*, 6 Ind. 490; *State v. Collins*, 79 Kan. 411, 99 Pac. 817; *McDonald v. Citizens' Nat. Bank*, 58 Kan. 818, 51 Pac. 287; *Clark v. Dekker*, 43 Kan. 692, 23 Pac. 956; *Tucker v. Garner*, 25 Kan. 454; *Moon v. Helfer*, 25 Kan. 139. **Ky.**—*Hutsell v. Com.*, 25 Ky. L. Rep. 262, 75 S. W. 225; *First National Bank v. Giltner*, 10 Ky. L. Rep. 240. **La.**—*State v. Vicknair*, 113 La. 963, 43 So. 635 (where the witnesses were not summoned); *State v. Nathaniel*, 52 La. Ann. 558, 26 So. 1008; *State v. Veillon*, 49 La. Ann. 614, 21 So. 856; *State v. Dixon*, 47 La. Ann. 1, 16 So. 589; *State v. Lewis*, 45 La. Ann. 24, 11 So. 874; *Cobb v. Franks*, 6 La. Ann. 767; *Wilton v. Bryant*, Man. Unrep. Cas. 230. **Mass.**—*Foster v. Abbott*, 1 Mass. 234. **Minn.**—*Washington County Comrs. v. McCoy*, 1 Minn. 100. **Mo.**—*Langener v. Phelps*, 74 Mo. 189; *State v. Lange*, 59 Mo. 418; *Evans v. Pond*, 30 Mo. 235. **N. Y.**—*Gerkhardt v. Austin*, 28 Misc. 191, 58 N. Y. Supp. 1072; *Tribune Assn. v. Smith*, 8 Jones & S. 251. **Okla.**—*Welty v. United States*, 14 Okla. 7, 76 Pac. 121 (where reasonable diligence was not shown); *Smith v. Territory*, 11 Okla. 669, 69 Pac. 805; *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924. **Ore.**—*Savage v. Savage*, 10 Ore. 331. **Pa.**—*Clark v. Cochran*, 1 Miles 282; *Danielson v. Brown*, 4 Bin. 243. **S. C.**—*Deschamps v. Atlantic Coast Line R. Co.*, 82 S. C. 236, 64 S. E. 144 (where there was no diligent effort made to secure the testimony). **Tenn.**—*Nashville, C. & St. L. R. Co. v. Johnson*, 15 Lea 677; *Bewley v. Cummings*, 3 Coldw. 232. **Tex.**—*Galveston, H. & S. A. R. Co. v. Gage*, 63 Tex. 568; *Hogan v. Burleson*, 25 Tex. Supp. 35; *Henderson v. State*, 22 Tex. 593; *Reece v. State*, 59 Tex. Crim. 428, 128 S. W. 1124 (application for continuance showed issuance of subpoena for the witness on April 27 and was returned on Oct. 6 showing no service. On that day another subpoena issued returnable Nov. 4. It was alleged that the sheriff failed to use due diligence and made no attempt to serve the witness, until Nov. 3, and that the return failed to show any reason for not securing the service; there had previously been several continuances); *High v. State* (Tex. Crim.),

the court satisfied that there was no want of due diligence on the part of him who seeks the continuance.⁹⁵

The burden is upon the party seeking the continuance to show that diligence has been exercised.⁹⁶

In criminal cases where the evidence is vital a continuance is sometimes granted although there is an insufficient showing of diligence.⁹⁷

b. *When Duty Initiate*.—The duty to become diligent does not exist in criminal cases until the indictment is found,⁹⁸ nor, it seems, in civil cases while the action is dormant.⁹⁹

c. *Mistake of Law*.—Mistake of law is no excuse for want of diligence in procuring the attendance of witnesses.¹

98 S. W. 849; *Thomas v. State*, 49 Tex. Crim. 633, 95 S. W. 1069; *Gaut v. State*, 49 Tex. Crim. 493, 94 S. W. 1034; *Thompson v. State*, 45 Tex. Crim. 244, 76 S. W. 561; *Berry v. State*, 44 Tex. Crim. 395, 72 S. W. 170; *Texas & P. R. Co. v. Huff & Lemon* (Tex. Civ. App.), 99 S. W. 177 (application failed to show witness' residence or that due diligence had been shown); *Chicago, R. I. & G. R. Co. v. Calvert*, 41 Tex. Civ. App. 236, 91 S. W. 825; *Lane v. State*, 16 Tex. App. 172; *Texas Exp. Co. v. Scott*, 2 Wills. Civ. Cas., §72. **Utah**.—*Charter Oak Life Ins. Co. v. Gisborne*, 5 Utah 319, 15 Pac. 253. **Va.**—*Richmond & M. R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. 901. **Wash.** *State v. Hutchinson*, 14 Wash. 580, 45 Pac. 156. **W. Va.**—*Tompkins v. Burgess*, 2 W. Va. 187. **Wis.**—*Hill v. City of Fondulac*, 56 Wis. 242, 14 N. W. 25; *Dingman v. State*, 48 Wis. 485, 4 N. W. 668. **Eng.**—*Saunders v. Pittman*, 1 Bos. & P. 33.

In the following cases there was held to be sufficient diligence: **Ga.** *Metts v. State*, 29 Ga. 271. **Ill.**—*Miles v. Danforth*, 32 Ill. 59; *Common v. People*, 28 Ill. App. 230. **Ind.**—*Knowlton v. Smith*, 17 Ind. 508. **Ia.**—*State v. Stone*, 65 Iowa 366, 21 N. W. 681 (due diligence in view of the circumstances of the case); *State v. Scott*, 44 Iowa 93. **Miss.**—*Watts v. State*, 90 Miss. 757, 44 So. 36, witness who was first on the scene, and where it did not appear there was lack of reasonable diligence to secure his attendance. **Mo.**—*Darne v. Broadwater*, 9 Mo. 19; *McLane v. Harris*, 1 Mo. 700. **Tex.** *Pettis v. State*, 47 Tex. Crim. 66, 81 S. W. 312 (where it did not appear that there was lack of diligence); *Wallace v. State*, 46 Tex. Crim. 341, 81 S. W. 966 (continuance cannot be refused on the ground of unreliability of witness); *Bain v. State* (Tex. Crim.),

74 S. W. 542; *Lancaster v. State* (Tex. Crim.), 31 S. W. 515.

95. **Cal.**—*Kuhland v. Sedgwick*, 17 Cal. 123. **La.**—*Montgomery v. Citizens' Mut. Ins. Co.*, 18 La. Ann. 227. **Mo.** *State v. Bennett*, 31 Mo. 462. **Tex.** *Payne v. Cox*, 13 Tex. 480; *Stegar v. State* (Tex. Crim.), 105 S. W. 789.

Fact that witness is sheriff is not excuse for want of diligence. *Adair v. Cooper*, 25 Tex. 548.

Lack of time and funds to procure witnesses from abroad accepted. *State v. Von Kutzleben*, 136 Iowa 89, 113 N. W. 484.

96. *Jackson v. State*, 94 Ark. 169, 126 S. W. 843; *Walker v. State*, 13 Tex. App. 618.

97. *Thompson v. State* (Tex. Crim.), 78 S. W. 691; *Proctor v. State* (Tex. Crim.), 65 S. W. 368 (first continuance granted); *Casey v. State*, 51 Tex. Crim. 433, 102 S. W. 725; *Ball v. State*, 44 Tex. Crim. 489, 72 S. W. 384.

Diligence requires not everything possible but everything reasonable. *Bell v. Williams*, 3 La. 447.

Where public records desired, party should not rely on a subpoena *duces tecum* but should procure a copy. *Slidell v. Locke*, 18 La. 461.

A party has a right to rely on the diligence of his joint defendant. *Walker v. Com.*, 5 Ky. L. Rep. 861.

98. *Hockley v. People*, 30 Colo. 117, 69 Pac. 512; *Dinkens v. State*, 42 Tex. 250.

99. Where the trial has been suspended by the death of a party, the adversary is not bound to presume that the action will be revived so far as diligence in procuring witnesses is concerned. *Jequith v. Davidson*, 21 Kan. 341.

1. *Hughes v. Com.*, 25 Ky. L. Rep. 2153, 80 S. W. 197; *Todd v. Wiley*, 3 Humph. (Tenn.) 576.

d. *Duty to Procure Process.*—It is the duty of a party to use the ordinary means to obtain the testimony of witnesses. The witness should be subpoenaed² unless a subpoena would be useless.³

Time When Subpoena To Be Issued.—The subpoena must be issued in due time to enable the witness to attend trial.⁴

Duty As To Form of Process.—The party must make reasonable effort to see that process is issued in proper form.⁵

2. *Ga.*—Harrison v. Langston, 100 Ga. 394, 28 S. E. 162; Smith v. State, 97 Ga. 352, 23 S. E. 830; Lumpkin v. Respass, 68 Ga. 822. *Ind.*—Ohio & M. Ry. Co. v. Wrape, 4 Ind. App. 108, 30 N. E. 427. *Ia.*—Friske v. Berryhill, 10 Iowa 203. *Kan.*—State v. Miller, 63 Kan. 62, 64 Pac. 1033. *Ky.*—Johnson v. Com., 29 Ky. L. Rep. 442, 93 S. W. 581. *La.*—State v. Comstock, 36 La. Ann. 308; Cole v. LaChambre, 31 La. Ann. 41. *Mo.*—State v. Emory, 12 Mo. App. 593, memorandum. *N. Y.*—Hosman v. Kinnally, 43 Misc. 76, 86 N. Y. Supp. 263. *S. C.*—Bone v. Hilten, 1 Mill. 197. *Tex.*—Gulf, C. & S. F. Ry. Co. v. Wheat, 68 Tex. 133, 3 S. W. 455; Hall v. York, 16 Tex. 18; Hensley's Admr. v. Lytle, 5 Tex. 497, 55 Am. Dec. 741; Galveston Shoe & Hat Co. v. Rowe, 49 Tex. Civ. App. 336, 109 S. W. 1101. *Wyo.*—Kearney Stove Works v. McPherson, 5 Wyo. 178, 38 Pac. 920.

If the witness, without the party's knowledge or consent, absents himself after he has been subpoenaed, a continuance should be granted. *Bentle v. Gerke Brewing Co.*, 14 Ky. L. Rep. 766; *Blasland-Parcels-Jordan Shoe Co. v. Hilig*, 70 Mo. App. 301.

3. *Scribner v. Reeves*, 1 Phila. 284, 9 Leg. Int. 2; *Mapes v. State*, 14 Tex. App. 129.

It is not sufficient diligence to issue a subpoena when the witness is a non-resident of the state and a subpoena cannot reach him. *Payne v. First Nat. Bank*, 16 Kan. 147.

4. *Conner v. Sampson*, 22 Tex. 20.

The subpoena was held not to have been issued in sufficient time in the following cases: *Ark.*—McCrae v. State, 92 Ark. 28, 122 S. W. 479. *Cal.*—Jacks v. Buell, 47 Cal. 162, where subpoena had been placed in sheriff's hands four days prior to trial. *Ga.*—Frost v. Pennington, 6 Ga. App. 298, 65 S. E. 41, service of subpoena *duces tecum* must be ten days before trial. *Ill.*

Davids v. People, 192 Ill. 176, 61 N. E. 537, a few days. *Ind.*—Leary v. Nave, 66 Ind. 220, return of "not found" on day of trial. *La.*—State v. Venables, 40 La. Ann. 215, 3 So. 727, subpoena issued on day cause called for trial. *Mo.*—State v. Crane, 202 Mo. 54, 100 S. W. 422 (subpoena issued on day cause set for trial); *Schultz v. Moon*, 33 Mo. App. 329 (subpoena issued on day before cause set for trial). *Pa.*—Knight v. Parry, 1 Ashm. 221, subpoena not issued till day of trial. *Tex.*—Pulliam v. Webb, 26 Tex. 95; *Parker v. Campbell*, 21 Tex. 763 (two days); *Parker v. Leman*, 10 Tex. 116 (three days); *Ford v. State*, 45 Tex. Crim. 288, 77 S. W. 800 (subpoena issued a "few days" before trial). *Utah.*—Corp. of Members of Jesus Christ of Latter Day Saints v. Watson, 30 Utah 126, 83 Pac. 731, issued on day set for trial. *Va.*—*In re Mull*, 8 Gratt. 695, subpoena issued on day before case set for trial.

Subpoena was held to have been issued in time to justify continuance in view of circumstances: *Thompson v. State*, 46 Tex. Crim. 412, 80 S. W. 623 (issued day before trial to party within thirteen miles of courthouse, and sheriff made no effort to find witness); *Martin v. State*, 44 Tex. Crim. 538, 72 S. W. 386 (subpoena served day of or before, but witness too ill to attend); *Galveston, H. & S. A. R. Co. v. Quilhot* (Tex. Civ. App.), 123 S. W. 200 (subpoena issued on day before for witness living at place of trial and who was there when the action was commenced two months before).

The pendency of an application for security for costs does not relieve the party of the duty to subpoena his witnesses. *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex. 421, 1 S. W. 161.

5. *Ill.*—Lichliter v. Russell, 89 Ill. App. 62. *Ga.*—Horton v. State, 112 Ga. 27, 37 S. E. 100. *Va.*—Spengler v. Davy, 15 Gratt. 381.

Duty As To Service.—The subpoena should be placed in the hands of the officer,⁶ with proper directions for service,⁷ and effort made to see that the same is duly served.⁸

Effect of Disability of Party.—Although a person in prison is under a disadvantage in procuring witnesses and may be able merely to place the subpoenas in the hands of the officers,⁹ neither imprisonment¹⁰ nor illness¹¹ is an absolute excuse for want of diligence in procuring witnesses.

e. Duty Upon Failure To Obey Subpoena.—Diligence may demand the attachment of the person of a witness who fails to obey a subpoena,¹² and even a second attachment has been held indispen-

In *State v. Kemp*, 120 La. 378, 45 So. 283, the subpoena issued was not in correct name of witness.

Mistake of clerk in issuing subpoenas not charged against party as a matter of diligence. *State v. Thomas*, 40 La. Ann. 151, 860, 3 So. 589.

6. *Brown v. Forsyth*, 10 Rob. (La.) 116.

In *O'Rear v. Com.*, 25 Ky. L. Rep. 1537, 78 S. W. 407, there was held to be a showing of diligence where there was a misunderstanding as to whether or not subpoenas had been issued to the sheriff.

It is due diligence to send the subpoena to the sheriff of the county in which the witness resides. *Foushee v. Lea*, 4 Call. (Va.) 279.

7. *Saul v. See*, 2 La. 130; *Golding v. The Castro*, 20 La. Ann. 458.

In *Carroll v. State*, 71 Ark. 403, 75 S. W. 471, a continuance was properly refused when it appeared that there had been a previous continuance because of absence of witness, and defendant had not properly assisted sheriff in locating witness.

8. *Ga.*—*Glover v. State*, 89 Ga. 391, 15 S. E. 496; *Edwards v. State*, 69 Ga. 737. *Ind.*—*Leary v. Meier*, 78 Ind. 393; *Dickey v. Morgan*, 8 Blackf. 533. *La.*—*Raby v. Brown*, 14 La. 247. *S. C.*—*Bacot v. Deas*, 67 S. C. 245, 45 S. E. 171. *Tex.*—*Robinson v. Martel*, 11 Tex. 149.

Defective return of officer not imputed to the party. *Neyland v. State*, 13 Tex. App. 536.

The return of the sheriff must be produced to show that the witness has been subpoenaed. *Gordon v. Spencer*, 2 Blackf. (Ind.) 286.

Merely placing the subpoena in the officer's hands is not sufficient. *Robin-*

son v. Martel, 11 Tex. 149; *Van Brown v. State*, 34 Tex. 186.

But in *Pettit v. State*, 135 Ind. 393, 34 N. E. 1118, there was held to be due diligence where subpoena was sent to sheriff of county where witness resided thirty days before trial, and it was believed that service was made, and all possible effort was made to secure the presence of witness.

In *Reece v. State*, 59 Tex. Crim. 428, 128 S. W. 1124, there had been several continuances and another was denied on a showing that subpoena issued on April 27 was returned on Oct. 6 without service. On the latter day another subpoena issued returnable Nov. 4. It was alleged that the sheriff made no effort to serve this until Nov. 3, and that the return showed no service and no reason for the failure.

9. *Paulk v. State*, 5 Ga. App. 567, 63 S. E. 659.

10. *McDermott v. State*, 89 Ind. 187; *Com. v. Gross*, 1 Ashm. (Pa.) 281.

A defendant in jail should not rely wholly on his attorney to subpoena witnesses. *Weaver v. State*, 154 Ind. 1, 55 N. E. 858, where prisoner gave his attorney the names of witnesses but made no further inquiry about the matter.

11. *Deming v. Terry*, 8 Ind. 418.

12. *Ala.*—*Millender v. State*, 155 Ala. 17, 46 So. 756. *Ind.*—*Rodgers v. McLeary*, 5 Ind. 236. *Ia.*—*State v. McGinn*, 109 Iowa 641, 80 N. W. 1068. *Ky.*—*Holzhauser v. Sheeny*, 31 Ky. L. Rep. 1238, 104 S. W. 1034. *Tex.*—*Rowland v. Wright*, 64 Tex. 261; *Williams v. State*, 34 Tex. 151; *Longacre v. State* (Tex. Crim.), 41 S. W. 629; *Hill v. State*, 18 Tex. App. 665; *Martin v. State*, 9 Tex. App. 293; *Parker-son v. State*, 9 Tex. App. 72.

sable,¹³ merely issuing a second subpoena has been held a lack of diligence.¹⁴

f. *Duty to Take Deposition.*—It is generally held that diligence demands the taking of the deposition of an absent or disabled witness where the law provides for deposition in such a case,¹⁵ unless some excuse appears therefor.¹⁶ And there must have been no unnecessary delay in taking the same,¹⁷ particularly where the witness whose depo-

Continuance granted notwithstanding failure to use compulsory process in *United States v. Moore*, Wall. Sr. 23, 28 Fed. Cas. No. 15,805.

13. *Henry v. State*, 38 Tex. Crim. 306, 42 S. W. 559; *Barrett v. State*, 18 Tex. App. 64.

If witness is in another county, he should be attached, not subpoenaed. *Chaplin v. State*, 7 Tex. App. 87.

Mailing the attachment to the sheriff in another county is not sufficient. *White v. State*, 6 Tex. App. 476.

14. *Brady v. State*, 120 Ga. 181, 47 S. E. 535; *Isham v. State (Tex.)*, 49 S. W. 594.

Either a second subpoena or attachment. *State v. Williams (Tex. Crim.)*, 49 S. W. 594.

15. *Del.*—*Cromwell v. Granfield*, 76 Atl. 602, where the witness was absent on defendant's business. *Fla.*—*Shiver v. State*, 41 Fla. 630, 27 So. 36.

Ill.—*Cobb Chocolate Co. v. Kundson*, 207 Ill. 452, 69 N. E. 816 (where the application was made on day of trial); *Marble v. Bonhotel*, 35 Ill. 240; *Stevenson v. Sherwood*, 22 Ill. 238, 74 Am. Dec. 140.

Ind.—*Louisville, N. A. & C. Ry. Co. v. Kions*, 82 Ind. 357; *Briggs v. Garner*, 54 Ind. 572. *Ia.*—*Adams v. Peck*, 4 Iowa 551. *La.*—*Lee v. Andrews*, 10 Mart. (O. S.) 682.

Mo.—*Valle v. Picton*, 91 Mo. 207, 3 S. W. 860. *Tex.*—*Southern Cotton-Press & Mfg. Co. v. Bradley*, 52 Tex. 587. *W. Va.*—*Mate Creek Coal Co. v. Todd*, 66 W. Va. 671, 66 S. E. 1066.

Contra, *Hooker v. Rogers*, 6 Cow. (N. Y.) 577; *Blum v. Bassett*, 67 Tex. 194, 3 S. W. 33.

In *Seagraves v. W. E. Powell Co. (Ga.)* 72 S. E. 349, a continuance was refused because the plaintiff's condition for some time before the trial had indicated that she might not be able to attend and no effort was made to get her answers to interrogatories.

16. *LaBee v. Sultan Logging Co.*, 59 Wash. 341, 109 Pac. 1023.

In *Cromartie v. Atlantic Coast Line R. Co. (N. C.)*, 72 S. E. 98, after de-

fendant had obtained permission to take deposition of a disabled witness and the case had been set down for a peremptory day, he neglected to take the deposition believing that the witness would be able to attend, and a continuance was refused though the *ex parte* statement of the witness was allowed to be read.

17. *Ga.*—*Martin v. Anderson*, 21 Ga. 301. *Ill.*—*Fisher v. Greene*, 95 Ill. 94. *Ind.*—*Benson v. McFadden*, 50 Ind. 431, *affirming* 1 Wils. 527. *Ia.*—*Cole v. Strafford*, 12 Iowa 345. *Kan.*—*Gill v. Buckingham*, 7 Kan. App. 227, 52 Pac. 897. *Ky.*—*Wilson v. Hocker*, 15 Ky. L. Rep. (abstract) 573. *La.*—*McCarty v. McCarty*, 19 La. 296; *McLearn v. Pettit*, 5 La. 294; *Cole v. La-Chambre*, 31 La. Ann. 41; *Vaiden v. Abney*, 7 La. Ann. 575. *Miss.*—*Worsham v. McLeod*, 11 So. 107. *Mo.*—*Globe Mut. Ins. Co. v. Carson*, 31 Mo. 218. *N. Y.*—*Bonchereau v. LeGuen*, 2 Johns. 196. *Pa.*—*Koecker v. Koecker*, 7 Phila. 364; *Cooper v. Mitchell*, 1 Phila. 73, 7 Leg. Int. 110. *Tex.*—*Stinnett v. Rice & Co.*, 36 Tex. 106; *Texas & P. Ry. Co. v. Hoskins*, 2 Wills. Civ. Cas., §66.

And a cause is properly ordered on for trial where more than eight months has elapsed since the issuance of the commission and no reasonable excuse is presented for the delay. *Stokes v. Garr*, 17 N. J. L. 851.

In *People's Nat. Bank v. Hazard (Pa.)*, 80 Atl. 1094, a continuance was held to have been properly refused where the rule for a commission was not entered until four days before the case was called for trial although it had been at issue for over a year.

In *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182, the utmost diligence had been used and a commission had been issued which had not been returned.

In *Bean v. Missoula Lumber Co.*, 40 Mont. 31, 104 Pac. 869, the witness had been absent for months, and no showing of diligent attempts to obtain the deposition was made.

sition is to be taken is beyond the jurisdiction of the court.¹⁸

Payment of Illegal Fees To Notary.—One is not bound to pay an illegal and exorbitant sum to the notary or commissioner for his services in order to obtain possession of the deposition. The party has done his duty in this respect if he has tendered to the notary the fees fixed by statute.¹⁹

Time For Return Unexpired.—And where the delay granted for taking the deposition has not expired when the case is called for trial, and

In *Kelly v. Weir*, 19 Misc. 366, 43 N. Y. Supp. 497, there was held to be a sufficient showing of diligence where the witness was in Europe, having left before his deposition could be obtained, but the moving party had kept himself informed as to the whereabouts of witness, who would return within ten days of time set for trial.

18. *Ind.*—*Marks v. State*, 101 Ind. 353. *Ia.*—*State v. Farrington*, 90 Iowa 673, 57 N. W. 606. *Mo.*—*Hamiltons v. Moody*, 21 Mo. 79. *Neb.*—*Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb. 121, 61 N. W. 111. *Tex.*—*Rush v. State* (Tex. Crim.), 76 S. W. 927; *Haile v. State* (Tex. Crim.), 43 S. W. 999; *Gentry v. State* (Tex. Crim.), 20 S. W. 551; *Bowen v. State*, 3 Tex. App. 617.

The deposition of a sea-faring witness must be taken. *McKay v. Marine Ins. Co.*, 2 Caines (N. Y.) 384; *Deanes v. Seriba*, 2 Call (Va.) 415.

First Continuance Granted.—*Johnson v. Silletoe*, 2 Harr. (Del.) 305.

Second Continuance Denied.—*Roach v. State*, 47 Tex. Crim. 500, 84 S. W. 586.

Sending Messenger.—Where a deposition might be taken, one at his peril sends a special messenger to obtain the attendance of the witness. *Jeter v. Heard*, 12 La. Ann. 3.

19. In *Hall v. Hale*, 202 Ill. 326, 66 N. E. 1060, a full affidavit was filed and the facts are thus summarized by Boggs, J.: "Under the provisions of section 42 of chapter 110 of the Revised Statutes, entitled 'Practice,' a party is entitled to a continuance, as a matter of right, if his affidavit discloses the necessary facts. (*Morgan v. Raymond*, 38 Ill. 448.) But if the application in the case at bar should be deemed to be addressed to the discretion of the court we think it an

abuse of such discretion to deny it. It was made to appear to the court from the affidavit for a continuance and from the order entered by the court, hereinbefore set out, that the deposition of the witness Kelly had been taken before one William J. Farwell, as a commissioner, under a *dedimus protestatem* issued out of the court; that both parties were present and participated in the examination of the witness before said commissioner; that the said commissioner refused to file the deposition except upon the payment of more than the fees provided by the statute to be paid a commissioner for taking the deposition; that the appellant promptly applied to the court for an order requiring said commissioner to file said deposition on payment of the fees allowed and provided by statute, and that appellant, on the same day said order was entered, gave notice that she would sue out a *dedimus protestatem* to re-take the deposition of said Kelly; that she did procure said *dedimus* to be issued without delay, and that said Kelly resided in Iowa county, Wisconsin, but a short distance from Chicago, and that the deposition would be re-taken and on file ready to be used within a few days. It was made manifest to the court that the appellant could not proceed to trial without the testimony of Kelly, and equally clear that she could only get the deposition which had been taken before said Farwell by complying with the illegal demands of Farwell."

To procure a continuance on the ground that the notary demanded excessive fees for taking the deposition, it must be alleged that the amount was more than the party was able to pay for payment might be made under protest and recovered. *Hall v. Muggeridge*, 103 Ill. App. 593.

the deposition has not been received, there should be a continuance.²⁰

Defect Without Negligence.—If no negligence in taking the deposition is shown there may be a continuance where there is such a defect as requires a new deposition.²¹

Where Testimony of a Party Desired.—The same diligence must be exercised to procure the attendance of an adversary,²² or co-defendant,²³ and, probably, a co-plaintiff as in the case of any other witness.²⁴

g. Reliance on Promise of Witness.—As a rule, it is a lack of diligence sufficient to justify the court in denying a continuance, if the party relies upon the promise of the witness to attend and for that reason fails to use the customary methods to insure the production of the evidence in question.²⁵

h. Reliance Upon Adverse Party.—It is no excuse whatsoever for failing to exercise diligence that the party relied upon his adversary

20. *Calhoun v. Mechanics' & Traders' Bank*, 28 La. Ann. 260. In this case "no steps were taken to cause the time granted for the return of the commission to be curtailed. No offer was made to admit the facts which the commission was obtained to establish."

21. *Tarleton v. Bringier*, 15 La. Ann. 419, where a new commission was necessary. And see *U. S.—Waskern v. Diamond*, 29 Fed. Cas. No. 17,248, 1 Hemp. 701. *Ala.—Jewell v. Center*, 25 Ala. 498. *Kan.—Order of United Commercial Travelers of America v. Barnes*, 72 Kan. 293, 82 Pac. 1099.

22. *Brice v. Shultz*, 6 Phila. (Pa.) 264, 23 Leg. Int. 222.

23. *Lane v. State*, 27 Ind. 108; *Gibson v. State*, 59 Miss. 341.

24. The absence of a party in interest necessitates more than reasonable diligence to procure his attendance or deposition. *Quincy Whig Co. v. Tillson*, 67 Ill. 351.

25. *Cal.—Lightner v. Menzel*, 35 Cal. 452. *Del.—Parrish v. Gardner*, 3 Har. 495. *Ill.—Moore v. Goelitz*, 27 Ill. 18; *Day v. Gelston*, 22 Ill. 103. *Ia.—Foster v. Hinson*, 76 Iowa 714, 39 N. W. 682; *State v. Cross*, 12 Iowa 66, 79 Am. Dec. 519. *Kan.—State v. Barker*, 43 Kan. 262, 23 Pac. 575; *Wilkins v. Moore*, 20 Kan. 538; *Swenson v. Aultman*, 14 Kan. 273; *Campbell v. Blanke*, 13 Kan. 62. *Ky.—Beckwith Organ Co. v. Malone*, 32 Ky. L. Rep. 596, 106 S. W. 809; *Nicola Bros. Co. v. Hurst*, 30 Ky. L. Rep. 851, 99 S. W. 917; *Wing v. Com.*, 7 Ky. L. Rep. (abstract) 227.

Minn.—Mackubin v. Clarkson, 5 Minn. 247. *Nev.—Yori v. Cohn*, 26 Nev. 206, 65 Pac. 945, reversed 26 Nev. 206, 67 Pac. 212. *N. Y.—Freeland v. Howell*, Anth. N. P. 272. *Pa.—Herbner v. Wynn*, 1 Pa. Co. Ct. 538. *Tex.—Clark v. State*, 40 Tex. Crim. 127, 49 S. W. 85.

The following limitations and exceptions should be noted. In exceptional cases, the promise may be relied upon. *Knauer v. Morrow*, 23 Kan. 360.

If the witness be an attorney, his promise may be relied upon. *White v. Lynch*, 2 Dall. (U. S.) 183, 1 L. ed. 341.

Continuance granted where witness out of the jurisdiction and said he would return in fifteen days. *United States v. Workman*, 28 Fed. Cas. No. 16,764.

Where the witness could not be subpoenaed, the continuance may be granted. *People v. Brown*, 46 Cal. 102.

Continuance not a matter of right. *Hughes v. Humphreys*, 102 Ill. App. 194.

The continuance may be granted. *Moiyat v. Brown*, 17 Fed. 718.

Held, sufficient to excuse failure to attach witness who has been subpoenaed. *Owensboro City Ry. Co. v. Allen*, 32 Ky. L. Rep. 1353, 108 S. W. 357.

Mere information that witness will attend is no excuse for want of diligence. *State v. Barker*, 43 Kan. 262, 23 Pac. 575.

That witness misled the party is a sufficient excuse. *Richardson v. State*, 57 Tex. Crim. 285, 122 S. W. 560.

to produce certain evidence,²⁶ or that his adversary had served process upon the absent witness.²⁷

i. *Duty To Tender Fees.*—It is generally held that diligence does not require the tender of the fees of the witness as a condition precedent to obtaining the first continuance,²⁸ although upon a second²⁹ or third application this may be requisite.³⁰

j. *Effect of Presence of Witness.*—The fact that the witness was in the court room is no excuse for failing to subpoena him. Diligence demands that he be subpoenaed nevertheless.³¹

7. *Illness.*—The illness of a witness³² may be ground for a continuance if he is thereby prevented from testifying,³³ and if there be a reasonable expectation of procuring his testimony in the near future.³⁴

8. *Illness in Family.*—Serious illness in the family of the witness necessitating his absence may be ground for a continuance.³⁵

9. *Insanity.*—The insanity of a witness is no ground for a continuance unless there be a probability of recovery within a reasonable time.³⁶

26. Ill.—Walker v. Douglas, 70 Ill. 445. Ia.—State v. Hayden, 45 Iowa 11. Mo.—State v. Luke, 104 Mo. 563, 16 S. W. 242. S. C.—Thompson Bros. v. Piedmont Mut. Ins. Co., 77 S. C. 294, 57 S. E. 848.

27. Hutts v. Shoaf, 88 Ind. 395; Drake v. State, 5 Tex. App. 649.

28. Houston & T. C. R. Co. v. Wheeler, 1 White & W. Civ. Cas. (Tex.), §170; Texas Transp. Co. v. Hyatt, 54 Tex. 213; Blum v. Bassett, 67 Tex. 194, 3 S. W. 33; Hicks v. Porter, 38 Tex. Crim. 334, 85 S. W. 437; Walton v. Com., 32 Gratt. (Va.) 855.

29. Doll v. Mundine, 7 Tex. Civ. App. 96, 26 S. W. 87.

30. East Texas Land & Imp. Co. v. Texas Lumber Co., 21 Tex. Civ. App. 411, 52 S. W. 645.

Where the witness resided out of the county, held, party must tender witness's expenses or witness must have waived the right to same. Thurman v. Virgin, 18 B. Mon. (Ky.) 785.

31. Ore.—State v. Birchard, 35 Ore. 484, 59 Pac. 468. S. C.—Sheppard v. Lark, 2 Bailey 576. Va.—Harrington v. Harkins, 1 Rob. 591.

32. Ga.—Crittenden v. Coleman, 74 Ga. 803. Ia.—In re Townsend's Estate, 122 Iowa 246, 97 N. W. 1108. Mo. State v. Maddox, 117 Mo. 667, 23 S. W. 771. Miss.—State v. Vollm, 51 So. 275.

33. Irby v. State, 95 Ga. 467, 20

S. E. 218; Phillips v. Com., 90 Va. 401, 18 S. E. 841.

That the witness is unfit to appear in public is not for the attorney to state as a conclusion. There should be at least the statement of a physician that she is physically unable to be present at the trial. For this lack the motion here was refused, and because there was nothing to show that the witness refused to attend or that she could not have done so. Sutton v. People, 145 Ill. 279, 34 N. E. 420. See also *infra*, V, B, 4.

34. Sims v. State (Tex. Crim.), 45 S. W. 705.

Witness intoxicated; continuance should be sought. Shipp's Admr. v. Suggett's Admr., 9 Mon. (Ky.) 5.

35. Allen v. Downing, 3 Ill. 454; Langdon-Creasy Co. v. Rouse, 24 Ky. L. Rep. 2095, 72 S. W. 1113 (that his mother is in a dying condition); Peebles v. Ralls, 1 Lit. (Ky.) 26 (where it was said that a father or husband need not abandon his child or wife at the moment of apprehended death for the purpose of attending the trial of a pecuniary contest).

36. Continuance denied in Anderson's Admr. v. Birdsall's Admr., 19 La. 441; In re Burbank, 104 App. Div. 312, 34 Civ. Proc. 247, 93 N. Y. Supp. 866, affirmed, 185 N. Y. 559, 77 N. E. 1183.

10. Improbability That Witness Would Testify as Alleged. Where it is improbable that the witness would testify as alleged, a court may refuse to grant the continuance.³⁷

11. Impeaching Evidence.—The courts almost uniformly deny continuances to obtain evidence of an impeaching character.³⁸

12. Witness to Character.—In several criminal cases the absence of witnesses to character has been held no ground for a continuance.³⁹

Mitigation of Damages.—It has been held that evidence in mitigation of damages, as a showing of the bad character of the plaintiff in an action for slander, is material, and justifies a continuance to bring in an absent witness.⁴⁰

13. Non-resident Witness.—Where the witness is beyond the reach of the compulsory process of the trial court, a continuance may be granted.⁴¹ However, several authorities deny a continuance on this ground.⁴²

14. Other Witnesses Present.—A conflict of authority exists as to whether or not a continuance should be granted because of the absence of a witness, when other witnesses are present and capable of testifying as to the same matters. In favor of allowing the continuance

37. *Ia.*—*State v. Farr*, 33 Iowa 533. *Kan.*—*State v. DeMoss*, 74 Kan. 173, 85 Pac. 937. *Tex.*—*Lamar v. State* (Tex. Crim.), 39 S. W. 677; *McGriff v. State* (Tex. Crim.), 38 S. W. 789; *Johnson v. State* (Tex. Crim.), 35 S. W. 387; *Rollins v. State* (Tex. Crim.), 20 S. W. 358; *Dodson v. State*, 45 Tex. Crim. 574, 78 S. W. 514; *Dodd v. State*, 44 Tex. Crim. 480, 72 S. W. 1015. *Wis.* *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768.

38. *Ala.*—*Eatman v. State*, 139 Ala. 67, 36 So. 16. *Fla.*—*Stone v. State*, 57 Fla. 28, 48 So. 996. *Ga.*—*McCurdy v. Terry*, 33 Ga. 49. *Ky.*—*Sizemore v. Com.*, 32 Ky. L. Rep. 1154, 108 S. W. 254. *La.*—*State v. Spillman*, 43 La. Ann. 1001, 10 So. 198; *State v. Perkins*, 40 La. Ann. 210, 3 So. 647. *Me.*—*State v. Damery*, 48 Me. 327. *Miss.*—*Lundy v. State*, 44 Miss. 669. *Mo.*—*State v. Hillsabeck*, 132 Mo. 348, 34 S. W. 38. *Okla.*—*McCann v. McCann*, 24 Okla. 264, 103 Pac. 694. *Tex.*—*Benson v. State* (Tex. Crim.), 103 S. W. 911; *Bussey v. State*, 59 Tex. Crim. 260, 127 S. W. 1035; *Mumphreys v. State*, 57 Tex. Crim. 19, 121 S. W. 504; *Elsworth v. State*, 54 Tex. Crim. 38, 111 S. W. 963. *Va.*—*Myers v. Com.*, 90 Va. 705, 19 S. E. 881.

Held ground for continuance in *Stidstill v. Stato*, 7 Ga. 2.

Held matter of discretion in *State v. Rorabacher*, 19 Iowa 154.

Where the absent witness is an impeaching or sustaining witness, it should appear that there are no other persons present who could give similar testimony. *Salmons v. State*, 118 Ga. 763, 45 S. E. 611.

39. *Benson v. State*, 38 Tex. Crim. 487, 43 S. W. 527; *Wright v. State*, 37 Tex. Crim. 627, 40 S. W. 491; *Parks v. State*, 35 Tex. Crim. 378, 33 S. W. 872.

Continuance denied where testimony unreasonable. *Bronson v. State*, 59 Tex. Crim. 17, 127 S. W. 175.

40. *Woods v. Anderson*, 5 Blackf. (Ind.) 598.

41. *Ia.*—*State v. Barrett*, 8 Iowa 536. *Ky.*—*White v. Com.*, 80 Ky. 480, 4 Ky. L. Rep. 373. *Pa.*—*Campbell v. Sproat*, 1 Yeates 20. *S. C.*—*State v. Murphy*, 48 S. C. 1, 25 S. E. 43, continuance matter of discretion.

42. *U. S.*—*United States v. Gibert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204. *Ga.* *Brown v. State*, 65 Ga. 332. *Mass.*—*Com. v. Millard*, 1 Mass. 6. *Miss.*—*Christian & Craft Co. v. Dantzer Lumb. Co.*, 78 Miss. 74, 28 So. 788.

it is urged that the absent witness alone might be believed or be able to speak more positively.⁴³

15. Testimony False.—Where the testimony in question is probably not true, a continuance should be denied.⁴⁴

16. Waiver.—If the alleged absent witness is not absent,⁴⁵ or appears and testifies,⁴⁶ or could be examined,⁴⁷ or brought in,⁴⁸ the error resulting from a denial of a continuance is deemed waived and made harmless.

17. Witness To Prove Alibi.—Where, in criminal cases, the absent witness is expected to testify in relation to an alibi, a continuance should be granted.⁴⁹

E. AGREEMENT BY ATTORNEYS.—An agreement of counsel to con-

43. Continuance Denied. Ill.—West Chicago Park Comrs. v. Barber, 62 Ill. App. 108. **La.**—State v. Nash, 45 La. Ann. 1137, 13 So. 732. **Nev.**—Taylor v. Nevada-California-Oregon R. Co., 26 Nev. 415, 69 Pac. 858. **N. Y.**—Ten Broeck v. Travelers' Ins. Co., 6 N. Y. St. 100. **Tex.**—Gibson v. State, 58 Tex. Crim. 403, 126 S. W. 267; Caddell v. State, 50 Tex. Crim. 380, 97 S. W. 705; Carter v. State, 37 Tex. Crim. 403, 35 S. W. 378; Johnson v. State, 31 Tex. Crim. 456, 20 S. W. 985. **W. Va.**—Tompkins v. Burgess, 2 W. Va. 187.

Continuance Favored.—Hobbs v. State (Ga. App.), 68 S. E. 515; Little v. State, 121 Ga. 159, 48 S. E. 904; Hewless v. Henderson, 9 Rob. (La.) 379; Harrison v. Waymouth, 3 Rob. (La.) 340. See also, *infra*, V, B, 3.

It is in the discretion of the court to grant a continuance to obtain the attendance of a foreign witness to testify to matters provable by others. Ten Broeck v. Travelers' Ins. Co., 6 N. Y. St. 100.

44. Evidence Highly Incredible.—State v. Woodward, 182 Mo. 391, 81 S. W. 857, 103 Am. St. Rep. 646; Davis v. State (Tex. Crim.), 102 S. W. 1150; Mays v. State, 58 Tex. Crim. 651, 127 S. W. 546; Myers v. State, 56 Tex. Crim. 222, 118 S. W. 1032; Browning v. State, 26 Tex. App. 432, 9 S. W. 770.

While it is not the province of the court to pass upon the credibility of witnesses, yet the court may consider the attending facts relative to the motion for continuance, in order to determine the probability of the existence of such witnesses and testimony. Miller v. State (Ark.), 128 S. W. 353.

Continuance denied where the evidence would not be believed by the jury. Collins v. State (Tex. Crim.), 34 S. W. 949.

But in State v. Harris, 22 Wash. 57, 60 Pac. 58, judgment was reversed because a continuance was not allowed to procure the testimony of a witness who had been convicted of perjury in a former trial of the defendant here, and who had appealed. Continuance was asked until the decision on appeal. Subsequently, and before this appeal was heard, the information for perjury was held to be insufficient. The court said that the case here involved "something more than a mere question of the exercise of discretion by the trial judge. It involves the larger question of a defendant's right to have witnesses examined in his behalf. It involves the constitutional right of fair trial." "The question of the credibility of Guse [the witness] would be one resting solely with the jury."

45. Young v. Kent Circuit Judge, 116 Mich. 10, 74 N. W. 206, 4 Detroit Leg. N. 1033; Bourne v. Church, Bac. Abr. Trial (H.) 577.

46. Ky.—German Ins. Co. v. Goodfriend, 30 Ky. L. Rep. 218, 97 S. W. 1098. **Mo.**—State v. Coleman, 199 Mo. 112, 97 S. W. 574. **S. C.**—State v. Mills, 79 S. C. 187, 60 S. E. 664.

47. Keyes v. Houston & G. N. R. Co., 50 Tex. 169.

48. Woods v. Young, 1 Cranch. C. C. 346, 30 Fed. Cas. No. 17,994.

49. Thomas v. State, 51 Tex. Crim. 329, 101 S. W. 797; Murphy v. State, 41 Tex. Crim. 120, 51 S. W. 940; Long v. State, 39 Tex. Crim. 461, 46 S. W. 821, 73 Am. St. Rep. 954.

tinue the trial of a case, while not binding upon the court,⁵⁰ is generally respected.⁵¹ A few courts will not consider the agreement unless it is in writing,⁵² and made by the attorneys in the case, not merely the parties, since the conduct of the trial is committed to the attorneys.⁵³ An agreement to try the case at a certain time may preclude a further continuance.⁵⁴

F. AMENDMENT.—1. In General.—An amendment by his adversary sometimes entitles a party to a continuance as matter of right,⁵⁵ frequently, as a matter of discretion with the court.⁵⁶

2. Immaterial Amendment.—An immaterial amendment is not a ground for a continuance.⁵⁷

3. Substantial Amendment.—A substantial amendment is generally regarded as sufficient ground for a continuance.⁵⁸

50. *Ga.*—*Ford v. Holmes*, 61 *Ga.* 419. *Ind.*—*Moulder v. Kempff*, 115 *Ind.* 459, 17 *N. E.* 906. *Mo.*—*Hall v. Bramell*, 87 *Mo. App.* 285. *Tenn.*—*Berger v. Harrison*, 1 *Overt.* 483. *Tex.*—*Keaton v. State*, 41 *Tex. Crim.* 621, 57 *S. W.* 1125.

51. *Ark.*—*Rogers v. Conway*, 4 *Ark.* 70. *Colo.*—*Denver & R. G. R. Co. v. Roberts*, 7 *Colo. App.* 290, 43 *Pac.* 460. *D. C.*—*Strong v. District of Columbia*, 3 *McArthur* 499. *N. Y.*—*Richardson v. Brown*, 1 *Cow.* 255; *Hennion v. Henry E. Harris Co.*, 47 *Misc.* 663, 94 *N. Y. Supp.* 425. *S. C.*—*Castell v. Fleming*, 1 *Brev.* 463. *Tex.*—*McBride v. Setkles (Tex. App.)*, 16 *S. W.* 422.

The agreement should be indefinite. *Hart v. Jones*, 2 *Bay (S. C.)* 440.

52. *Ala.*—*Collin v. Falk*, 66 *Ala.* 223. *Cal.*—*Peralta v. Marica*, 3 *Cal.* 185. *Ia.*—*Sapp v. Aiken*, 68 *Iowa* 699, 28 *N. W.* 24. *N. Y.*—*Griswold v. Lawrence*, 1 *Johns.* 507.

53. *Nightingale v. Oregon Cent. R. Co.*, 2 *Sawyer* 338, 18 *Fed. Cas. No.* 10,264; *Parmalee v. Loomis*, 24 *Mich.* 242.

54. *Cal.*—*Meagher v. Gagliando*, 35 *Cal.* 602. *Ill.*—*St. Louis & S. E. R. Co. v. Teters*, 68 *Ill.* 144. *N. Y.*—*Jackson v. Wakeman*, 2 *Cow.* 578; *Riesgo v. Glengariffe R. Co.*, 116 *App. Div.* 414, 101 *N. Y. Supp.* 832; *Bird v. Snow, Church & Co.*, 53 *N. Y. Supp.* 900.

55. *Ill.*—*Hawks v. Lands*, 8 *Ill.* 227. *Ind.*—*Edwards v. Hough*, 5 *Ind.* 149, by statute. *Ky.*—*Cobb v. Curts*, 4 *Litt.* 235. *Mo.*—*Tunstall v. Hamilton*, 8 *Mo.* 500, by statute. *N. Y.*—*Holmes v. Lansing*, 1 *Johns. Cas.* 248, *Colem. & C. Cas.* 96.

New issues introduced by amendment after the impaneling of a jury entitles the adverse party to a continuance as matter of right. *Strong v. District of Columbia*, 3 *MacArthur (D. C.)* 499.

56. *Ga.*—*American Ins. Co. v. Bailey & Musgrove*, 6 *Ga. App.* 424, 65 *S. E.* 160. *Ia.*—*York v. Clemens*, 41 *Iowa* 95. *Mo.*—*Union Bank of Maryland v. Ridgeley*, 1 *Har. & G.* 324. *Pa.*—*Wood v. Bradbury*, 42 *Leg. Int.* 436.

57. *Ga.*—*Constitution Pub. Co. v. Way*, 94 *Ga.* 120, 21 *S. E.* 139. *Ill.*—*Phillips v. Edsall*, 127 *Ill.* 535, 20 *N. E.* 801. *Ind.*—*Magnuson v. Billings*, 152 *Ind.* 177, 52 *N. E.* 803. *Ia.*—*Masterson v. Brown*, 51 *Iowa* 442, 1 *N. W.* 791. *Kan.*—*Chandler v. Parker*, 65 *Kan.* 860, 70 *Pac.* 368. *Ky.*—*Clark v. Prentice*, 3 *B. Mon.* 584. *Mo.*—*Chambers v. Lane*, 5 *Mo.* 289. *Mont.*—*Wormall v. Reins*, 1 *Mont.* 627. *N. H.*—*Ross v. Carr*, 103 *Pac.* 307. *Pa.*—*Richards v. Nixon*, 20 *Pa.* 19; *Weikel v. Beckel*, 4 *Walk.* 336. *S. C.*—*McMahan v. Murphy*, 1 *Bailey* 535; *Righton v. Sumter*, 2 *McCord* 412. *Tex.*—*Texas & P. R. Co. v. Bagwell*, 3 *Tex. Civ. App.* 256, 22 *S. W.* 829. *Wis.*—*Whitefoot v. Leffingwell*, 90 *Wis.* 182, 63 *N. W.* 82.

Continuance not a matter of course. *Calumet Land Co. v. Perry*, 86 *Ill. App.* 378; *Scott v. Cromwell*, 1 *Ill.* 25; *Union Pac. R. Co. v. Motzner*, 8 *Kan. App.* 431, 55 *Pac.* 670.

58. *U. S.*—*Wyatt v. Harden, Hempst.* 17, 30 *Fed. Cas. No.* 18,106a; *Schnertzel v. Purcell*, 1 *Cranch C. C.* 246, 21 *Fed. Cas. No.* 12,472; *LeRoy v. Delaware Ins. Co.*, 2 *Wash. C. C.* 223, 15 *Fed. Cas. No.* 8,270. *Ill.*—*Link v. Archi-*

4. **When Prejudicial.**—It is frequently held that a continuance will not be granted because of an amendment unless the party desiring the continuance is prejudiced by the amendment;⁵⁹ for example, that the amendment has resulted in surprise to him.⁶⁰ But no such prejudice or surprise is caused by an amendment the purpose of which is to remedy defects in a pleading, and which raises no new issue, nor calls for new evidence.⁶¹ Many courts require the party seeking the continuance to show that he will be prejudiced if the continuance be not granted.⁶² It should appear that the moving party is less prepared to go to trial than he would have been if the amendment

tectural Iron Wks., 24 Ill. 551. **Ind.**—Meredith v. Lackey, 14 Ind. 529. **Kan.**—Woodruff v. Albright, 10 Kan. App. 113, 62 Pac. 250. **Ky.**—Cabanis v. Lyon, 3 J. J. Marsh. 332. **Minn.**—Despatch Laundry Co. v. Employer's Liability Assur. Corp., 105 Minn. 384, 117 N. W. 506, rehearing granted, 105 Minn. 384, 118 N. W. 152. **Miss.**—Vicksburg, S. & P. R. Co. v. Stocking, 10 So. 480. **Pa.**—Pittsburgh & S. R. Co. v. Clarke, 2 Pittsb. 48, 7 Pittsb. Leg. J. (O. S.) 129.

The party need not show surprise. **Illinois** Mut. Fire Ins. Co. v. Mar-seilles Mfg. Co., 6 Ill. 236.

59. **Ala.**—United States Fidelity & G. Co. v. Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344. **Colo.**—Tribune Pub. Co. v. Hamill, 2 Colo. App. 237, 30 Pac. 137. **Ga.**—Atlanta Land & Loan Co. v. Haile, 106 Ga. 498, 32 S. E. 606. **Ill.**—Evans v. Marden, 154 Ill. 443, 40 N. E. 446, *affirming*, 54 Ill. App. 291. **Ind.**—Rushville & S. P. Co. v. McManus, 4 Ind. 275. **Ia.**—Foote v. Burlington Gaslight Co., 103 Iowa 576, 72 N. W. 755. **Ky.**—Hess v. Hymson, 29 Ky. L. Rep. 327, 93 S. W. 9. **Mass.**—Tourtelot v. Tourtelot, 4 Mass. 506. **Mich.**—Crane Lumb. Co. v. Bellows, 116 Mich. 304, 74 N. W. 481, 4 Det. Leg. N. 1164. **Mont.**—Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 283, 70 Pac. 1114. **N. Y.**—McDonald v. Holbrook, Cabot & Daly Contracting Co., 105 App. Div. 90, 93 N. Y. Supp. 920. **N. C.**—Dobson v. Southern R. Co., 129 N. C. 289, 40 S. E. 42. **S. D.**—A. A. Cooper Wagon & Buggy Co. v. Stedronsky Bros. Co., 24 S. D. 381, 123 N. W. 846. **Tex.**—Western Union Tel. Co. v. Hirsch (Tex. Civ. App.), 84 S. W. 394; Fisk v. Miller, 13 Tex. 224. **Wash.**

Lampe v. Jacobsen, 46 Wash. 533, 90 Pac. 654.

60. **Ariz.**—Jordan v. Schuerman, 6 Ariz. 79, 53 Pac. 579. **Cal.**—Marr v. Rhodes, 131 Cal. 267, 63 Pac. 364. **Del.**—Cirwithin v. Mills, 2 Marv. 232, 43 Atl. 151. **Ga.**—Central Railroad & Bkg. Co. v. Jackson, 94 Ga. 640, 21 S. E. 845; Phillips v. City of Atlanta, 4 S. E. 256. **Ill.**—O'Donnell v. People, 224 Ill. 218, 79 N. E. 639. **Ind.**—Danley v. Scanlon, 116 Ind. 8, 17 N. E. 158. **Miss.**—Foreman v. State, 95 Miss. 77; 48 So. 611. **Mo.**—Jones v. Cox, 7 Mo. 173; Merrill v. City of St. Louis, 12 Mo. App. 466. **N. Y.**—Rosenberg v. Third Ave. R. Co., 47 App. Div. 323, 61 N. Y. Supp. 1052. **Pa.**—Bracken v. Pennsylvania R. Co., 222 Pa. 410, 71 Atl. 926. **S. D.**—Kennedy v. Agricultural Ins. Co., 21 S. D. 145, 110 N. W. 116. **Tex.**—Central & M. R. Co. v. Henning, 52 Tex. 466.

61. **Ill.**—Wabash R. Co. v. Campbell, 219 Ill. 313, 78 N. E. 346, 3 L. R. A. (N. S.) 1092. **N. D.**—Pollock v. Jordon, 132 N. W. 1000. **Wis.**—Gillett v. Robbins, 12 Wis. 319, notwithstanding that counsel relied upon the supposed defects for the purpose of defeating the action.

The surprise must be detrimental. **Branshaw v. Berry**, 2 Ky. L. Rep. 58, abstract.

It is for the court to decide whether the amendment caused surprise. **Folker v. Satterlee**, 2 Rawle (Pa.) 213.

62. **Ill.**—Cozzens v. Chicago Hydraulic Press Brick Co., 166 Ill. 213, 46 N. E. 788; Mills v. Bland, 76 Ill. 381; Crist v. Wray, 76 Ill. 204; Chicago & P. R. Co. v. Stein, 75 Ill. 41; Lindsey v. Lindsey, 40 Ill. App. 389. **Ind.**—Hubler v. Pullen, 9 Ind. 273, 68 Am. Dec. 620. **Neb.**—Bliss v. Beck,

had not been allowed and that continuance is not merely for delay.⁶³

G. ANOTHER PROCEEDING PENDING.—Where another proceeding is pending, in some way affecting the parties to the case at bar, a continuance of the latter is a matter dependent upon the circumstances of the case.⁶⁴

H. EVIDENCE NEWLY DISCOVERED.—When evidence is newly discovered, a continuance to procure the same may be allowed,⁶⁵ although such discovery is not made until after the trial has commenced,⁶⁶ if the

80 Neb. 290, 114 N. W. 162. **Tex.** Texas & N. O. R. Co. v. Goldberg, 68 Tex. 685, 5 S. W. 824. **Wis.**—Rahles v. J. Thompson & Sons Mfg. Co., 137 Wis. 506, 118 N. W. 350, judgment affirmed, 119 N. W. 289, 23 L. R. A. (N. S.) 296.

The court may require this. **Mangelsdorf Bros. Co. v. Harnden Seed Co.**, 132 Mo. App. 507, 112 S. W. 15.

The party defendant seeking the continuance must show not only surprise but a meritorious defense. **Keltenbaugh v. St. Louis, A. & T. R. Co.**, 34 Mo. App. 147.

63. **Jones v. Ragan (Ga.)**, 71 S. E. 1098, citing, **Craddock v. Kelly**, 129 Ga. 818, 60 S. E. 193.

The matter is regulated by statute in Georgia. The party must state under oath that he is surprised and that the continuance is not claimed for delay. See **Atlantic & B. R. Co. v. Douglas**, 119 Ga. 658, 46 S. E. 867.

64. **Gear v. Shaw**, 1 Pin. (Wis.) 608, continuance, matter of discretion.

A continuance was refused in the following cases: **U. S.**—**Loring v. Marsh**, 2 Cliff. 311, 15 Fed. Cas. No. 8,514. **Cal.**—**Carr v. Cronan**, 54 Cal. 600. **Ind.**—**Peters v. Banta**, 120 Ind. 416, 22 N. E. 95. **N. H.**—**Kidder v. Tufts**, 48 N. H. 121. **N. Y.**—**Hoyt v. Gelston**, 8 Johns. 179; **People v. Northern R. Co.**, 53 Barb. 98; **Smith v. College of St. Francis Xavier**, 61 N. Y. Super. 363, 20 N. Y. Supp. 533. **S. C.**—**Davis v. Hunt**, 2 Bailey 412. **Tex.**—**Myers v. State**, 7 Tex. App. 640. **Eng.**—**Salisbury v. Proctor**, 2 Salk. 646, 91 Eng. Reprint 547.

A continuance was held proper in the following cases: **Cal.**—**Macomber v. Bigelow**, 123 Cal. 532, 56 Pac. 449; **Rose v. Superior Court of Nevada County**, 65 Cal. 570, 4 Pac. 577. **Del.**—**E. F. Kirwan Mfg. Co. v. Truxton**, 1 Penne. 409, 42 Atl. 988. **La.**—**Clappier v. Banks**, 11 La. 593. **Mass.**—**McLauthlin v. Smith**, 176 Mass. 46, 57 N. E. 216; **Clinton Nat. Bank v. Tay-**

lor, 120 Mass. 124; **Winthrop v. Carlton**, 8 Mass. 456; **Com. v. Bliss**, 1 Mass. 32. **Nev.**—**Tinkum v. O'Neale**, 5 Nev. 93. **N. H.**—**Moore v. Maryland Casualty Co.**, 74 N. H. 47, 64 Atl. 1099; **Clark v. Clough**, 62 N. H. 693. **N. Y.**—**Coleville v. Chubb**, 60 Hun 578, 20 Civ. Proc. 352, 14 N. Y. Supp. 717; **Brady v. City of New York**, 57 N. Y. Super. 571, 5 N. Y. Supp. 181; **Hood v. Hayward**, 3 N. Y. St. 153; **Farnsworth v. Western Union Tel. Co.**, 1 N. Y. St. 80. **Ore.**—**Linn County v. Morris**, 40 Ore. 415, 67 Pac. 295. **Va.**—**White v. Com.**, 79 Va. 611.

A court has no power to continue a case until judgment in another action in another court of the same state. **Dunphy v. Belden**, 57 Cal. 427.

"Actions are always continued to await the event of an indictment pending in relation to the subject-matter of the suit." **Anthony v. Clarke**, 1 R. I. 284.

A defendant in a criminal case has no legal right to the postponement of his trial to await the result of the trial of his co-defendant so that the latter may be called as a witness. **State v. Nash**, 46 La. Ann. 194, 14 So. 607.

Continuance denied to await outcome of appeal from court's exclusion of evidence of vital importance. **Theis v. Chicago & N. W. R. Co.**, 107 Iowa 522, 78 N. W. 199.

In an action by an heir against the administrator, a continuance was granted to allow a settlement of the administrator's account. **Wheeler v. Bowen**, 20 Pick. (Mass.) 563.

65. **U. S.**—**Hourquibee v. Gerard**, 2 Wash. C. C. 164, 12 Fed. Cas. No. 6,733. **Cal.**—**Berry v. Metzler**, 7 Cal. 418. **Ky.**—**Allcorn v. Rafferty**, 4 J. Marsh. 220. **La.**—**Davis v. Davis**, 17 La. 259.

66. **Holmes v. Dobbins**, 19 Ga. 630. It is too late to grant a continuance on the ground of newly discovered evidence after the jury has agreed upon a verdict, though the verdict has not

testimony could not have been discovered at an earlier period.⁶⁷

I. MISTAKE. — Whether or not mistake is ground for a continuance depends entirely on the circumstances of the case.⁶⁸ If the adverse party,⁶⁹ or the judge,⁷⁰ causes the mistake the continuance should be granted. A mistake of law is held to be no ground for a continuance.⁷¹

J. PREPARATION, WANT OF. — A reasonable opportunity to prepare for trial should in all cases be allowed by the court.⁷² The court should grant a continuance if at the time the case is called for trial the parties are not prepared,⁷³ if there has been no lack of diligence

been published. *Hughley v. Holstein*, 34 Ga. 572.

67. *Baldessore v. Stephanes*, 27 Tex. 455; *Thompson v. Antry* (Tex. Civ. App.), 57 S. W. 47; *Rosset v. Greer*, 3 W. Va. 1.

An affidavit for a continuance on the ground of the absence of parties discovered to be witnesses just prior to the trial should be examined with rigid scrutiny. *State v. Barrett*, 54 Mo. 457. And see, *State v. Burns*, 54 Mo. 274, to the same effect.

68. Mistake held insufficient ground for continuance in the following cases: *Ia.*—*Cox v. Allen*, 91 Iowa 462, 59 N. W. 335; *State v. Smith*, 60 Iowa 755, 15 N. W. 593. *Ky.*—*Rainwater v. Com.*, 5 Ky. L. Rep. 103; *Shipp v. Gale*, Hard. 224. *S. C.*—*State v. Rabens*, 79 S. C. 542, 60 S. E. 442. *Tex.* *Simmons v. State*, 58 Tex. Crim. 574, 126 S. W. 1157; *Townsend v. State*, 5 Tex. App. 574.

Continuance held proper in *U. S.*—*Fowle v. Bowie*, 3 Cranch C. C. 362, 9 Fed. Cas. No. 4,995. *Ia.*—*Des Moines Branch Bank v. Van*, 12 Iowa 523. *Ky.* *Crocker v. Haley*, 29 Ky. L. Rep. 174, 92 S. W. 574.

69. *Richardson v. Boyd*, 69 Ark. 368, 63 S. W. 798; *Cornogg v. Abraham*, 1 Yeates (Pa.) 18.

70. *Light v. Richardson* (Cal.), 31 Pac. 1123.

A statement of the judge out of court is not binding for this purpose. *Trimble v. Southwest Missouri Light Co.*, 115 Mo. App. 605, 92 S. W. 346.

Continuance should be refused where it is sought because of a declaration of the judge that the case would not be tried during a certain time. *Bone v. Graves*, 43 Ga. 312.

71. *Mead v. Chadwick*, 8 Mart. N. S. (La.) 296; *Hall v. Mount, Hall & Co.*, 3 Coldw. (Tenn.) 73.

The continuance may be granted where otherwise the party will suffer from a mistake of himself or counsel, where no laches is imputable. *Earnest v. Napier*, 15 Ga. 306.

That counsel for the applicant notified his clients that they need not attend is not ground. *Hunt v. Lichtenberger*, 14 Ind. App. 320, 42 N. E. 240.

Mistaken advice of counsel not to prepare for trial is not ground for continuance. *Musgrove v. Perkins*, 9 Cal. 211.

Where attorney neglected to notify party of time for trial, a continuance was allowed. *Hanson v. Michelson*, 19 Wis. 498.

Where counsel relied on the promise of his client to procure witnesses, a continuance was refused because of the absence of the witness. *Toledo, St. L. & K. C. R. Co. v. Stephenson*, 131 Ind. 203, 30 N. E. 1082.

72. *State v. Simpson*, 38 La. Ann. 23; *Robertson v. Woolley*, 6 Wash. 156, 32 Pac. 1060.

How much time should be allowed to prepare to defend is for the court to determine in its discretion. *State v. Wilson*, 33 La. Ann. 261.

73. Continuance held proper in the following cases: *Ala.*—*Webb v. State*, 135 Ala. 36, 33 So. 487. *Colo.*—*Denver & R. G. R. Co. v. Loveland*, 16 Colo. App. 146, 64 Pac. 381. *Ga.*—*Youngblood v. Youngblood*, 76 Ga. 840; *Blackman v. State*, 76 Ga. 288; *Frain v. State*, 40 Ga. 529 (wherein accused was "dragged from his bed and forced to trial"); *Vanduzer v. McMillan*, 37 Ga. 299. *Ia.*—*Blythe v. Blythe*, 25 Iowa 266. *Ky.*—*Smith v. Com.*, 133 Ky. 532, 118 S. W. 368; *Rickets v. Hamilton*, 16 Ky. L. Rep. 762, 29 S. W. 736 (abstract). *La.*—*State v. Deschamps*, 41 La. Ann. 1051, 7 So. 133; *State v.*

in making preparation.⁷⁴ A reason for such want of preparation must be shown.⁷⁵ It is not sufficient excuse for entire want of preparation that counsel are engaged in other suits pending in court.⁷⁶

In a civil case defendant is not required to exert any diligence to prepare for trial until served in the suit.⁷⁷

In a criminal case, no preparation need be made before the indictment is found,⁷⁸ although imprisonment is not an excuse for want of preparation.⁷⁹ And there is no rule of law which entitles a defendant to claim as a right a continuance to the term succeeding that in which the indictment is found.⁸⁰ But a continuance should ordinarily be granted where defendant's attorney withdraws during the trial, to enable the new attorney to prepare and present the defense, especially where the charge is one of extreme gravity.⁸¹ But a defendant who voluntarily changes attorneys after announcing himself ready for trial, and who has not been misled or prejudiced by unprofessional conduct of his discharged attorney, is not entitled to delay the court

Brooks, 39 La. Ann. 239, 1 So. 421; Bronaugh v. Bowles, 3 La. 120. **Md.** Norwood's Lessee v. Owings, 1 Har. & J. 296. **Miss.**—Knox v. State, 52 So. 695. **Okla.**—Miller v. United States, 8 Okla. 315, 57 Pac. 836; Lawson v. Territory, 8 Okla. 1, 56 Pac. 698. **Va.** Radford v. Fowlkes, 85 Va. 820, 8 S. E. 817.

Continuance denied in the following cases: **Colo.**—Goldberger v. People, 45 Colo. 327, 101 Pac. 407. **Ga.**—Fitts v. City of Atlanta, 121 Ga. 567, 49 S. E. 793, 104 Am. St. Rep. 167, 67 L. R. A. 803; Harrison v. State, 83 Ga. 129, 9 S. E. 542; Walton v. State, 79 Ga. 446, 5 S. E. 203. **Ky.**—Louisville & N. R. Co. v. Abell, 14 Ky. L. Rep. 239. **La.**—State v. Pointdexter, 117 La. 380, 41 So. 638; Clay v. Oldham, 3 Mart. (N. S.) 276. **Mo.**—State v. Wilson, 85 Mo. 134. **Okla.**—Hunter v. State, 3 Okla. Crim. 533, 107 Pac. 444. **Tex.**—Moore v. State (Tex. Crim.), 90 S. W. 327. **W. Va.**—Williams v. Baltimore & O. R. Co., 9 W. Va. 33.

Want of preparation of one of counsel, no ground for continuance. Hogshead v. Baylor, 16 Gratt. (Va.) 92.

The party must show not merely that he is unprepared for trial, but that he has a valid defense. Kelley v. Mason, 4 Ind. 618.

74. Gregg v. Reade, Crabbe 64, 10 Fed. Cas. No. 5,804. **Ga.**—Oglesby v. State, 121 Ga. 602, 49 S. E. 706; Bailey v. Wilner, 107 Ga. 364, 33 S. E. 434. **Ill.**—Pardridge v. Wing, 75 Ill. 236; Dunlap v. Davis, 10 Ill. 84. **Kan.**—

State v. Emmons, 45 Kan. 397, 26 Pac. 679; State v. Hodges, 45 Kan. 389, 26 Pac. 676. **Ky.**—Reid v. Ingalls, 10 Ky. L. Rep. 195; Barnett v. Kennedy, 1 A. K. Marsh. 233. **N. M.** Beall v. Territory, 1 N. M. 507. **W. Va.**—Wilson v. Kochnein, 1 W. Va. 145.

On the ground of diligence, the time is to be computed down to the day when the case is called for trial, not merely to the first day of the term. Lewis v. Williams, 15 Tex. 47.

75. Stevens v. State, 93 Ga. 307, 20 S. E. 331; Deen v. Wheeler, 7 Ga. App. 507, 67 S. E. 212; People v. Shea, 147 N. Y. 78, 41 N. E. 505.

76. **U. S.**—Hammond v. Haws, Wall. Sr. 1, 11 Fed. Cas. No. 6,002. **Ga.** Burchard v. Boyce, 21 Ga. 6. **Ind.** Smith v. State, 132 Ind. 145, 31 N. E. 807, where it was said that the affidavit of the attorney in such a case would be better evidence.

77. Security Mut. Life Ins. Co. v. Calvert (Tex. Civ. App.), 75 S. W. 912.

78. Salisbury v. Com., 3 Ky. L. Rep. 211; State v. Wood, 68 Mo. 444. See, however, People v. Fuller, 2 Park. Cr. (N. Y.) 16, where the accused had been a long time in jail awaiting indictment.

79. Long v. State, 38 Ga. 491; Revel v. State, 26 Ga. 275.

80. State v. Arnold, 12 Iowa 479; State v. Cox, 10 Iowa 351; State v. Sultan, 142 N. C. 569, 54 S. E. 841.

81. Claxon v. Com., 17 Ky. L. Rep. 284, 30 S. W. 998.

as matter of right in order that the new attorney may familiarize himself with the case.⁸²

K. PUBLIC EXCITEMENT AND PREJUDICE.—Public excitement and prejudice may be sufficient ground for a continuance.⁸³ The matter is largely one of discretion with the court.⁸⁴ Where sufficient safeguards are placed about the selection of jurors to insure an impartial trial, a continuance on this ground appears to be unnecessary.⁸⁵

L. SECURITY FOR COSTS.—FAILURE TO GIVE.—Failure to give security for costs is not of itself sufficient ground for a continuance,⁸⁶ unless the adverse party is ordered to give same,⁸⁷ or demand for the same has been made within a reasonable time,⁸⁸ or unless the omission has prevented preparation for trial,⁸⁹ or, in some way, prejudice has resulted.⁹⁰

82. *Robinson v. State*, 18 Wyo. 216, 106 Pac. 24.

83. *Ga.*—*Maddox v. State*, 32 Ga. 581, 79 Am. Dec. 307. *La.*—*State v. Ford*, 37 La. Ann. 443. *Mass.*—*Com. v. Dunham*, Thatcher C. C. 516. *W. Va.* *State v. Manns*, 48 W. Va. 480, 37 S. E. 613.

A continuance on this ground was denied in: *Courier Journal Co. v. Salee*, 104 Ky. 335, 20 Ky. L. Rep. 634, 47 S. W. 226; *Quinn v. Com.*, 23 Ky. L. Rep. 1302, 63 S. W. 792; *Joyce v. Com.*, 78 Va. 287.

In criminal cases the matter is regulated by statute in Tennessee. See *John v. State*, 1 Head (Tenn.) 49.

That it is ground for a change of venue but not for a continuance, see *State v. Rice*, 7 Idaho 762, 66 Pac. 87; *State v. Hawkins*, 18 Ore. 476, 23 Pac. 475.

Public excitement alone is not sufficient ground for a continuance. *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814.

84. *Ga.*—*Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528. *Ind.*—*Walker v. State*, 136 Ind. 663, 36 N. E. 358. *La.* *State v. Anshire*, 47 La. Ann. 542, 17 So. 141. *Tenn.*—*State v. Poe*, 8 Lea 647. *Tex.*—*Hubbard v. State*, 43 Tex. Crim. 564, 67 S. W. 413.

Continuance denied in prosecution for violation of local option law where the excitement was due to a prohibition election. *Leach v. State* (Tex. Crim.), 53 S. W. 630.

Allegation of "excited condition" of the public mind is too vague. *Baw v. State*, 33 Tex. Crim. 24, 24 S. W. 293.

If the excitement is no more than the natural consequence of the criminal conduct, and notorious bad character of the prisoner, public excitement may be expected and cannot be avoided in such cases; otherwise every notorious and hardened offender, whose crimes excite the indignation of the community, would have a right to demand a postponement of his trial. *Com. v. Carson*, 1 Wheeler Cr. Cas. (N. Y.) 487.

Popular excitement is not ground for postponement after the first term of court. In this case the agitation was kept up by the prisoner's escape and recapture. *Wright v. State*, 18 Ga. 383.

Only in exceptional cases is public excitement ground for continuance. *State v. Abshire*, 47 La. Ann. 542, 17 So. 141.

Popular excitement alone is not sufficient ground for postponement, except under extraordinary circumstances. *Thomas v. State*, 27 Ga. 287.

Public excitement is no ground for a continuance where the trial is for a petty offense. *Poole v. State*, 18 Ga. 567.

85. *Lovett v. State*, 60 Ga. 257; *Mitchell v. State*, 41 Ga. 527; *Thompson v. State*, 24 Ga. 297.

86. *Christ v. Mark*, 3 Bibb (Ky.) 296; *Cox v. Fenwick*, 3 Bibb (Ky.) 183.

87. *Jacobs v. State*, Gilm. (Va.) 123.

88. *Hawkins v. Willbank*, 4 Wash. C. C. 285, 11 Fed. Cas. No. 6,247.

89. *Grahame v. Douglas*, *Wright* (Ohio) 738.

90. See *Cox v. Hunt*, 1 Blackf. (Ind.) 146.

M. SURPRISE.—When surprise, of a character which the law recognizes as such, occurs, a continuance is proper.⁹¹ The party seeking the continuance must show how he has been surprised,⁹² and support the motion for a continuance by an affidavit.⁹³

N. UNCLASSIFIED GROUNDS.—Many reasons not specified under any of the foregoing headings have been advanced to obtain continuances.⁹⁴ Thus a continuance is often granted where a party files

91. Continuance was held proper in the following cases: **Cal.**—*Ross v. Anstill*, 2 Cal. 183. **Conn.**—*Crotty v. City of Danbury*, 79 Conn. 379, 65 Atl. 147. **Ga.**—*Simon v. Myers*, 68 Ga. 74; *Leverett v. Tift*, 6 Ga. App. 90, 64 S. E. 317. **Ind.**—*Kennedy v. State*, 81 Ind. 379. **Ky.**—*Rankin v. Com.*, 82 Ky. 424; *Lexington St. R. Co. v. Strader*, 28 Ky. L. Rep. 157, 89 S. W. 158; *Vaught v. Murray*, 24 Ky. L. Rep. 1587, 71 S. W. 924; *Donallen v. Lennox*, 6 Dana 89. **La.**—*Bronaugh v. Bowles*, 3 La. 120; *Davis v. Millandon*, 14 La. Ann. 808; *State v. Vigoreux*, 13 La. Ann. 309. **Miss.**—*Garrett v. Carlton*, 65 Miss. 188, 3 So. 376. **Mo.**—*Alt v. Groschlose*, 61 Mo. App. 409. **N. Y.**—*Freeland v. Brooklyn Heights R. Co.*, 54 App. Div. 90, 66 N. Y. Supp. 321. **Pa.**—*Sheldon & Co. v. Bahner*, 4 Pa. Co. Ct. 16. **Tex.**—*Texas & P. Co. v. Boggs* (Tex. Civ. App.), 30 S. W. 1089; *Lutton v. State*, 14 Tex. App. 518; *Eldridge v. State*, 12 Tex. App. 208; *Webb v. State*, 9 Tex. App. 490; *McKinney v. State*, 8 Tex. App. 626. **Wash.**—*Straw-Ellsworth Mfg. Co. v. Cain*, 20 Wash. 351, 55 Pac. 321.

In the following cases wherein the party was apparently taken unawares but did not show sufficient grounds for surprise, a continuance was denied. **Conn.**—*Smith v. Holebrook*, 2 Root 45; *Clinton v. Hopkins*, 2 Root 25. **Ga.**—*Long v. Huggins*, 72 Ga. 776; *Turner v. Tubersing*, 67 Ga. 161; *Aetna Ins. Co. v. Sparks*, 62 Ga. 187; *Lynes v. Reid*, 40 Ga. 237; *McCutchin v. Bankston*, 2 Ga. 244. **Ky.**—*Woodcock v. Sutton's Admr.*, 8 Ky. L. Rep. 616. **La.**—*Bonella v. Maduel*, 26 La. Ann. 112. **Tex.**—*Read v. Allen*, 63 Tex. 154; *Missouri Pac. R. Co. v. Kuthman*, 2 Wills. Civ. Cas., §463. **Wis.**—*McKinney v. Jones*, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

92. *People v. Symonds*, 22 Cal. 348; *Hood v. Fay*, 15 S. D. 84, 87 N. W. 528.

When certain evidence is held incompetent, the court may continue the case to enable the party to obtain further testimony. *Doe v. Doe*, 37 N. H. 268.

When surprise occurs at the trial by the introduction of unexpected testimony, the party who seeks the continuance must do so on the ground that he seeks evidence to meet the new evidence and must show the nature of the same. *Dixon v. State*, 46 Neb. 298, 64 N. W. 961.

It is in the discretion of the court to grant a continuance to obtain better evidence where secondary evidence is excluded. *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 105 Pac. 632, 28 L. R. A. (N. S.) 1053, where verbal evidence of a contract was excluded and the party sought a continuance to procure a copy.

If a party rightfully refuses to produce evidence (as books), no continuance should be granted his opponent until it is produced. *Boyce v. Foster*, 1 Bailey (S. C.) 540.

93. *Lyons & E. P. Toll Road Co. v. People*, 29 Colo. 434, 68 Pac. 275.

94. On a prosecution for seduction the hysterical condition of the prosecutrix and its tendency to excite the sympathy of the jury is no ground for a continuance. *Rucker v. State*, 77 Ark. 23, 90 S. W. 151.

A continuance was denied, so that a decree of divorce might be set aside and the relation of husband and wife restored and the wife thereby disqualified to testify. *State v. Luper*, 49 Ore. 605, 91 Pac. 444.

That a special plea in abatement to an indictment has been overruled upon demurrer is no ground for continuance. *Carter v. State*, 75 Ga. 747.

That defendant in a criminal case is excitable is no ground for a continuance. *Harvey v. State*, 67 Ga. 639.

On a trial for murder, it is no ground for continuance that the defendant at the same term had been convicted of

a pleading after long delay;⁹⁵ or where a pleading is withdrawn and a new one filed;⁹⁶ or because a party has not filed an answer to a bill of discovery;⁹⁷ or where defendant has been prejudiced by the destruction of the plaintiff's pleading;⁹⁸ or where the court has not been able to sit for want of an appropriate place;⁹⁹ or if the judge is sitting elsewhere;¹ or to enable another judge to seal a bill of exceptions after the death of the trial judge.² So a continuance has been allowed because of the sudden illness of a juror,³ and because of incompetence of a juror after the discharge of the general panel.⁴

Improper discussion in the presence of the jury may be reason for continuance.⁵ The court may, or may not, grant a continuance because of the absence of the stenographer.⁶

As to defective service of process, or failure to serve, see the cases cited below.⁷

A continuance of an action at law is not justified by the fact that a discovery is being sought in equity.⁸

another and different murder, which was calculated to prejudice him. *Jones v. State*, 61 Ark. 88, 32 S. W. 81.

95. *U. S.*—*Wise v. Groverman*, 1 Cranch C. C. 418, 30 Fed. Cas. No. 17,910; *Veatch v. Harbaugh*, 1 Cranch C. C. 402, 28 Fed. Cas. No. 16,905. *Ia.* *Williams v. Niagara Fire Ins. Co.*, 50 Iowa 561. *Ky.*—*Crew's Admr. v. Newland*, 13 Mon. 135. *Mo.*—*Bunding v. Blumenthons*, 8 Mo. 695; *Dempsey v. Harrison*, 4 Mo. 267. *Pa.*—*Rankin v. Cooper*, 1 Browne 253.

96. *Halbead v. Ross*, 1 Dall. 405, 1 L. ed. 197; *Risher v. Thomas*, 1 Mo. 739.

97. *Hurst v. Hurst*, 3 Dall. (U. S.) 512, 1 L. ed. 700.

98. *Suggett v. Bank of Kentucky*, 8 Dana (Ky.) 201.

99. *Ex parte Larkin*, 11 Nev. 90.

1. *Gamble v. Central R. Co.*, 74 Ga. 586.

2. *McCandless v. McCabe*, 20 Pa. 183.

3. *Young v. Marine Ins. Co.*, 1 Cranch C. C. 566, 30 Fed. Cas. No. 18,164.

4. *Fisher v. City of Philadelphia*, 4 Brewst. (Pa.) 395.

Refused where another juror might have been substituted. *Hook v. Stovall*, 26 Ga. 704.

5. *Easterbrooks v. Rhode Island, etc., R. Co.*, 28 R. I. 234, 66 Atl. 298, discussion of *ad damnum* clause. And see *Moll v. Zimmerman*, 1 Woodw. Dec.

(Pa.) 501, improper argument to jury.

"Improper remarks by counsel in the course of argument, made before a jury, has been stricken, but in the hearing of those who have been summoned to serve as jurors, can in no event be cause for continuance. At most, there should merely have been a postponement of the trial until other panels could be drawn, from which to select a jury." *Thompson v. O'Connor*, 115 Ga. 120, 41 S. E. 242.

6. *Odom v. State*, 51 Fla. 91, 40 So. 182. Refused in *Callahan v. Bilal*, 68 Mo. App. 435, though no substitute.

7. Refused as to the whole cause where some defendants not served. *Sumner v. Coleman*, 20 Ind. 486.

Allowed to serve one of three joint defendants. *Sutton v. Hays*, 7 Blackf. (Ind.) 543.

Granted to perfect service on defendant. *Atlanta & C. Air Line R. v. Harrison*, 76 Ga. 757.

Granted because of delay in return. *Mechanics' Sav. Inst. v. Givens*, 82 Ill. 157.

8. *Bartlett v. Marshall*, 5 Ky. 467. But a continuance may be granted to obtain discovery. *Ridgely v. Campbell*, 1 Har. & J. (Md.) 452; *Shaffer v. Wilcox*, 2 Hall (N. Y.) 502.

Contra.—A continuance to obtain discovery, if material, should be granted. *Brown v. Mercer*, 82 Ga. 550, 9 S. E. 471.

For failure to secure answers to interrogatories a continuance is sometimes allowed,⁹ and sometimes refused.¹⁰

It is within the discretion of the court to grant a continuance for the bankruptcy of defendant after action brought.¹¹

If several are indicted jointly one should have a continuance if there is a continuance as to another.¹²

A failure to file the declaration,¹³ or the instrument sued upon,¹⁴ within proper time has been held to justify a continuance.

Whether or not a continuance will be granted to allow the moving party to amend his pleading is for the court to determine.¹⁵

V. HOW CONTINUANCE OBTAINED.—A. GENERAL STATEMENT.—The court may of its own motion continue a case,¹⁶ although it is not incumbent upon it to offer a continuance.¹⁷ As a rule, to obtain a continuance, a motion,¹⁸ supported by an affidavit,¹⁹ must be made.

9. *U. S.*—Hurst v. Hurst, 3 Dall. 512, 1 L. ed. 700, 12 Fed. Cas. No. 6,929. *Ala.*—*Ex parte* McLendon, 33 Ala. 276. *Ga.*—Lucas v. Tarver, 32 Ga. 262. *Ind.*—Rielay v. Whitcher, 18 Ind. 458, cause must be shown for continuance; the court should specify a time within which to file answers.

10. Rice v. Derby, 7 Ind. 649, where a rule to answer was said to be the remedy.

11. Givens v. Robbins, 5 Ala. 676; Sullings v. Ginn, 131 Mass. 479; Reed v. Paul, 131 Mass. 129; Todd v. Barton, 117 Mass. 291.

12. State v. Brooks, 30 La. Ann. 335; Krebs v. State, 3 Tex. App. 343.

13. Collins v. Tuttle, 24 Ill. 623.

14. Stratton v. Henderson, 26 Ill. 68; Hawthorn v. Cooper, 22 Ill. 225. And see Jefferson v. Alexander, 84 Ill. 278 (transcript in a suit on a judgment); Chicago Stamping Co. v. Mechanical Rubber Co., 83 Ill. App. 230 (copy of account).

15. Baxter v. Rice, 38 Mass. 197; Central Banking & Trust Co. v. Pusey, 22 S. D. 223, 116 N. W. 1126.

Denied in Schultz v. McLean, 109 Cal. 437, 42 Pac. 557.

Under a rule of court continuance was held to follow of necessity when a demurrer to the declaration was sustained in *Ex parte* Hutt, 14 Ark. 368.

16. State v. Lawry, 4 Nev. 161.

Otherwise under statute. State v. Posey, 17 La. Ann. 252, 87 Am. Dec. 525.

Continuance by court *sua motione* in the absence of both parties may be irregular but does not amount to a dis-

continuance. Pocahontas Wholesale Grocery Co. v. Gillespie, 63 W. Va. 578, 60 S. E. 597.

Adjournment by justice of the peace, *sua motione*. Deputy v. Betts, 4 Har. (Del.) 352; Kinniken v. Kinney, 4 Har. (Del.) 313.

17. Rea v. Grubb (Miss.), 39 So. 808, where there was an amendment to a bill of particulars, and the court said that though in Summers v. Brady, 56 Miss. 10, the court did make the offer it did not need to do so.

18. *Ala.*—Rogers v. State, 144 Ala. 32, 40 So. 572. *Ga.*—Johnson v. State, 85 Ga. 561, 11 S. E. 844. *Ill.*—Burlingame v. Turner, 2 Ill. 588, filing affidavit without motion, not sufficient. *Ky.*—Calmes v. Ament, 1 A. K. Marsh. 459. *La.*—State v. Smith, 124 La. 1035, 50 So. 842; State v. Underwood, 44 La. Ann. 1114, 11 So. 823 (motion must be in writing).

In a criminal case motion may be made before arraignment. Anderson v. Com., 84 Va. 77, 3 S. E. 803.

19. *Cal.*—People v. Ward, 105 Cal. 335, 38 Pac. 945; Stewart v. Sutherland, 93 Cal. 270, 28 Pac. 947. *Colo.*—Hamill v. Hall, 4 Colo. App. 290, 35 Pac. 927. *Ga.*—Bailey v. Barnelly, 23 Ga. 582. *Ill.*—Clause v. Bullock Ptg. Press Co., 20 Ill. App. 113. *Ind.*—Montgomery v. Wilson, 58 Ind. 591. *Ia.*—Barnes v. Heckla Fire Ins. Co., 75 Iowa 11, 39 N. W. 122, 9 Am. St. Rep. 450, in equity. *Ky.*—Roach v. T. J. Moss Tie Co., 24 Ky. L. Rep. 1222, 71 S. W. 2; Simms v. Alcorn, 1 Bibb 348. *La.*—Hosea v. Miles, 13

B. AFFIDAVIT SUPPORTING MOTION.—1. General Requisites.—An affidavit in support of a motion for a continuance should state facts, not mere conclusions.²⁰ It should show in what action it is made,²¹ how the party will be prejudiced if the continuance be denied,²² and, in some jurisdictions, that the same is not made for delay,²³ and when

La. 107; *Swilley v. Low*, 13 La. Ann. 412. Mich.—*People v. Mason*, 63 Mich. 510, 30 N. W. 103. Mo.—*Watson v. Walsh*, 10 Mo. 454. Nev.—*Diebold Safe & Lock Co. v. Holt*, 4 Okla. 479, 46 Pac. 512. N. Y.—*Brooklyn Oil Wks. v. Brown*, 38 How. Pr. 451, 7 Abb. Pr. (N. S.) 382; *Edwards v. Drew*, 2 E. D. Smith 55. Tenn.—*Morgan v. Duffy*, 94 Tenn. 686, 30 S. W. 735; *Mitchell v. State*, 92 Tenn. 668, 23 S. W. 68. Tex.—*Price v. State*, 53 Tex. Crim. 428, 111 S. W. 654; *City Loan & Trust Co. v. Sterner* (Tex. Civ. App.), 124 S. W. 207. Utah.—*McGrath v. Tallent*, 7 Utah 256, 26 Pac. 574. Wash.—*State v. Newton*, 29 Wash. 373, 70 Pac. 31. Wis.—*Cottrell v. Giltner*, 5 Wis. 270.

No formal application need be presented when court declares it useless. *Nichols v. Headley Grocer Co.*, 66 Mo. App. 321.

Oath in open court, sufficient, if not objected to. *Mackin v. Cody*, 68 Ill. App. 108.

A mere offer to file the affidavit is not sufficient. *Ryan v. People*, 165 Ill. 143, 46 N. E. 206; *Ryan v. People*, 62 Ill. App. 355.

Mere oral statement of counsel is not sufficient (*Spanghel v. Spanghel*, 39 App. Div. 5, 57 N. Y. Supp. 7), though it has been held otherwise in the absence of objection (*Heyward v. Middleton*, 65 S. C. 493, 43 S. E. 956), and in a justice's court (*Gilman v. Weiser*, 140 Iowa 554, 118 N. W. 774).

Where cause meritorious, court need not require affidavit. *Ex parte Larkin*, 11 Nev. 90.

In Texas, the motion must show whether it is the first or second application for a continuance (*Michell v. State*, 52 Tex. Crim. 37, 106 S. W. 124; *Washington v. State*, 37 Tex. Crim. 156, 32 S. W. 694; *Ming v. State* (Tex. Crim.), 24 S. W. 29); otherwise it will be treated as a second application (*Wade v. State* (Tex. Crim.), 54 S. W. 582; *Logan v. State*, 40 Tex. Crim. 85, 48 S. W. 575).

20. Ga.—*Butler v. Ambrose*, 51 Ga. 152. Ill.—*Harter v. People*, 204 Ill. 158, 68 N. E. 447; *Ilett v. Collins*, 102 Ill. 402. N. M.—*Deemer v. Falkenburg*, 4 N. M. 149, 12 Pac. 717. Tex.—*Rollins v. State*, 32 Tex. Crim. 566, 25 S. W. 125; *Lewallen v. State* (Tex. Crim.), 24 S. W. 907; *Holloway v. State* (Tex. Crim.), 24 S. W. 649; *Earl v. State*, 33 Tex. Civ. App. 161, 76 S. W. 207. Wash.—*State v. Vance*, 29 Wash. 435, 70 Pac. 34.

The court will not go out of the affidavit for an explanation thereof. *Smith v. Barker*, 22 Fed. Cas. No. 13,012.

Under some statutes it is necessary that the party state merely that his presence at the trial is necessary; not the facts showing it to be necessary. *Wicker v. Boynton*, 83 Ill. 545.

21. *Iroy v. Nathan*, 4 E. D. Smith (N. Y.) 68.

22. Ill.—*Dacey v. People*, 116 Ill. 555, 6 N. E. 165. Ind.—*North British & Merc. Ins. Co. v. Rudy*, 26 Ind. App. 472, 60 N. E. 9. Kan.—*Clark v. Ellithorpe*, 7 Kan. App. 337, 51 Pac. 940. La.—*State v. Chitman*, 117 La. 950, 42 So. 437.

23. Ga.—*Aiken v. Carmichael Co.*, 127 Ga. 407, 56 S. E. 440; *Jones v. State*, 126 Ga. 538, 55 S. E. 171; *Cobb v. State*, 110 Ga. 314, 35 S. E. 178; *Farmer v. State*, 95 Ga. 498, 20 S. E. 494; *Burnett v. State*, 87 Ga. 622, 13 S. E. 552; *Runnals v. Aycock*, 78 Ga. 553, 3 S. E. 657; *Newsome v. State*, 61 Ga. 481. Mo.—*State v. Heinze*, 45 Mo. App. 403. Tex.—*Zumwalt v. State*, 5 Tex. App. 521; *Neeper v. Irons*, 3 Wills. Civ. Cas. §179.

This need not be stated if it is apparent to the court that the motion is not made for delay. *Brooks v. State*, 3 Ga. App. 458, 60 S. E. 211.

If there is suspicion that it is made for delay, there must be special affidavits to controvert such propositions. *Brooklyn Oil Wks. v. Brown*, 38 How. Pr. (N. Y.) 451, 7 Abb. Pr. (N. S.) 382.

In Texas it must be shown if any

made by a defendant, that there is a meritorious defense to the action.²⁴

2. Opportunity To Prepare Same.—When the circumstances require it, the court should give a party seeking a continuance reasonable time to prepare the affidavit in support of the motion.²⁵

3. When Continuance Sought Because of Absence of Witness.

a. Requisites Generally.—The essential requisites of such an affidavit have been declared to be these: "First—The name and residence of the witness; that he is really material, and shown to the court, by the affidavit, to be so. Second—That the party who applies has been guilty of no neglect, or, in other words, shows the exercise of proper diligence. Third—That the witness can be had at the time to which it is sought to have the trial of the cause deferred."²⁶

Materiality.—The affidavit must allege²⁷ and show that the desired evidence is material,²⁸ that the witness who is absent is also a compe-

continuanes have been obtained, and how many. *Smalley v. State*, 59 Tex. Crim. 95, 127 S. W. 225; *Sims v. State* (Tex. Crim.), 45 S. W. 705; *Wolf v. State*, 4 Tex. App. 332.

24. Idaho.—*Rankin v. Caldwell*, 15 Idaho 625, 99 Pac. 108. **Ill.**—*Hodges v. Nash*, 141 Ill. 391, 31 N. E. 151, *affirming* 43 Ill. App. 638. **Ind.**—*Miller v. Harker*, 96 Ind. 234. **Mo.**—*State v. Kindred*, 148 Mo. 270, 49 S. W. 845; *Field v. Sanderson*, 34 Mo. 542, 86 Am. Dec. 124. **N. H.**—*State v. Cote*, 74 N. H. 122, 65 Atl. 693.

Before delay can be indulged in either a civil or a criminal case it must appear that there is a meritorious defense and that the applicant will be prejudiced in presenting it unless the delay is granted. *City of Elgin v. Nofs*, 212 Ill. 20, 72 N. E. 43.

What the defense is must be stated. *Pine v. Pro*, 6 Blackf. (Ind.) 426.

25. Williams v. State, 53 Fla. 89, 43 So. 428; *Strange v. Com.*, 23 Ky. L. Rep. 1234, 64 S. W. 980.

Refusal of time to prepare affidavits, held reversible error. *Price v. People*, 131 Ill. 223, 23 N. E. 639.

Time is not demandable as matter of right; a reason must be shown. *Ferguson v. Ramsey*, 41 Ind. 511; *Myers v. Schneider*, 21 Mo. 77; *State v. Heinze*, 45 Mo. App. 403.

Privilege Refused.—*Addington v. Bryson*, 1 White & W. Civ. Cas. (Tex.) §1292.

26. Shirwin v. People, 69 Ill. 55.

"The rule prevailing here in granting continuances in criminal cases is the same as the one that obtains in civil cases, except that in criminal

cases the grounds for the motion should be scanned more closely." *Adams v. State*, 56 Fla. 1, 48 So. 219.

27. Ia.—*State v. Bolds*, 37 La. Ann. 312. **N. M.**—*Dold v. Dold*, 1 N. M. 397. **Tex.**—*White v. Leavitt*, 20 Tex. 703; *Hamilton v. Dismukes*, 53 Tex. Civ. App. 129, 115 S. W. 1181.

28. U. S.—*Stedman v. Hamilton*, 4 McLean 538, 22 Fed. Cas. No. 13,343. **Cal.**—*Kern Val. Bank v. Chester*, 55 Cal. 49. **D. C.**—*Bradshaw v. Stott*, 7 App. Cas. 276. **Ga.**—*Griffin v. State*, 26 Ga. 493. **Ill.**—*Moody v. People*, 20 Ill. 315. **Ind.**—*Lomax v. McKinney*, 61 Ind. 374; *Collins v. Frost*, 54 Ind. 242. **Ia.**—*State v. Williams*, 8 Iowa 533. **Ky.**—*Carr v. Marshall*, 1 Bibb. 362. **La.**—*Raby v. Brown*, 14 La. 247. **Neb.**—*Lomax v. Holbine*, 65 Neb. 270, 90 N. W. 1122. **N. Y.**—*Penoyer v. Phillips*, 10 N. Y. St. 783.

Party must state it is material. **N. Y.**—*First Nat. Bank v. Anderson*, 55 App. Div. 570, 67 N. Y. Supp. 434; *Smith v. Roome*, 20 Misc. 8, 44 N. Y. Supp. 784. **S. C.**—*State v. Pope*, 78 S. C. 264, 58 S. E. 815. **Tex.**—*Bowman v. State*, 40 Tex. 8; *Bruton v. State*, 21 Tex. 337; *Robinson v. State*, 53 Tex. Crim. 565, 110 S. W. 908; *Norton v. State* (Tex. Crim.), 39 S. W. 578. **Va.**—*Schonberger v. Com.*, 86 Va. 489, 10 S. E. 713. **W. Va.**—*Williams v. Free-land*, 2 W. Va. 306.

Affidavit must show materiality, if there are no pleadings; if there are pleadings, the court can determine the question. *Dawson v. Coston*, 18 Colo. 493, 33 Pac. 189.

Where an affidavit was overnarrow in confining the alibi to the day al-

tent witness,²⁹ and that there are no other witnesses obtainable by whom the matter in question could be proved;³⁰ and that the applicant cannot safely go to trial without the witness;³¹ and that the witness is absent without the consent or procurement of the party.³² The facts to which the witness will testify must be stated³³ with definiteness and

leged in the indictment, it was held defective. *Detro v. State*, 4 Ind. 200.

Where repeated affidavits for a continuance have been made, the court may insist on other evidence than the party's own affidavit that the witness was really material. *Boatright v. Linam*, 16 Tex. 243.

29. Ind.—*French v. Blanchard*, 16 Ind. 143. La.—*Winter v. Donaldsonville*, 6 Mart. (N. S.) 534. S. C.—*Gibbes v. Mitchell*, 2 Bay 351. Tex.—*Lewis v. State*, 15 Tex. App. 647.

30. U. S.—*Bennett v. Wilson*, 1 Cranch C. C. 446, 3 Fed. Cas. No. 1,326. Cal.—*People v. Ashnauer*, 47 Cal. 98; *Pope v. Dalton*, 31 Cal. 218; *People v. Gaunt*, 23 Cal. 156; *Pierce v. Payne*, 14 Cal. 419; *People v. Quincy*, 8 Cal. 89. Colo.—*Mutzenburg v. McGowan*, 10 Colo. App. 486, 51 Pac. 523. Ga.—*Macon & B. R. Co. v. Anderson*, 121 Ga. 666, 49 S. E. 791. Ill.—*Dunn v. People*, 109 Ill. 635; *Rau v. Baker*, 118 Ill. App. 150. Ind.—*Jones v. State*, 11 Ind. 357. Ia.—*Thompson v. Abbott*, 11 Iowa 193. Ky.—*Bush v. Com.*, 6 Ky. L. Rep. 51. La.—*State v. Howard*, 120 La. 311, 45 So. 260; *State v. Carter*, 51 La. Ann. 442, 25 So. 385. Mo.—*State v. Simms*, 68 Mo. 305; *Leabo v. Goode*, 67 Mo. 126. Neb.—*Rowland v. Shepard*, 27 Neb. 494, 43 N. W. 344; *Burgo v. State*, 26 Neb. 639, 42 N. W. 701. Nev.—*State v. Marshall*, 19 Nev. 240, 8 Pac. 672. Okla.—*Hyde v. Territory*, 8 Okla. 69, 56 Pac. 851. Tenn.—*Turner v. Lumbrick*, Meigs 7. Tex.—*Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302; *Campion v. Angier*, 16 Tex. 93 (affected by statute); *Searles v. State* (Tex. Crim.), 105 S. W. 191; *Smith v. State*, 22 Tex. App. 316, 3 S. W. 684.

In Missouri the proper allegation is that there is no other witness whose testimony could be easily procured. See *State v. Lett*, 85 Mo. 52; *Manning v. State*, 8 Mo. 615; *Freleigh v. State*, 8 Mo. 606; *State v. Wills*, 106 Mo. App. 196, 80 S. W. 311; *State v. Heinze*, 45 Mo. App. 403. See also *Maloney v. Stetson & Post Mill Co.*, 46 Wash. 645, 90 Pac. 1046.

It has been held in Texas that this allegation is necessary only in subsequent applications. *Fulkerson v. State*, 57 Tex. Crim. 80, 121 S. W. 1111; *Pinckord v. State*, 13 Tex. App. 468.

That no other witnesses would do as well. *Baltimore & O. S. W. R. Co. v. Mullen*, 108 Ill. App. 637.

31. U. S.—*United States v. Frink*, *Brunner Col. Cas.* 90, 4 Day 471, 25 Fed. Cas. No. 15,171. La.—*Mills v. Fellows*, 30 La. Ann. 824. N. Y.—*Burgett v. Edwards*, 4 Lans. 193. W. Va.—*Wilson v. Kochlein*, 1 W. Va. 145.

32. Fla.—*Bynum v. State*, 46 Fla. 142, 35 So. 65; *Bryant v. State*, 34 Fla. 291, 16 So. 177. Ga.—*Polite v. State*, 78 Ga. 347; *Collins v. State*, 78 Ga. 87. Ill.—*North Chicago City R. Co. v. Gastka*, 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481; *Crews v. People*, 120 Ill. 317, 11 N. E. 404; *Kellyville Coal Co. v. Hill*, 94 Ill. App. 89, 95 Ill. App. 660 (held unnecessary). Ind.—*Beavers v. State*, 58 Ind. 530. La.—*Mills v. Fellows*, 30 La. Ann. 824. Miss.—*Carter v. State*, 24 So. 307. Tex.—*Pullen v. State*, 11 Tex. App. 89; *White v. State*, 9 Tex. App. 41.

33. U. S.—*United States v. Schoonmaker*, 93 Fed. 724. Ala.—*Raines v. State*, 147 Ala. 691, 40 So. 932; *Stallworth v. State*, 146 Ala. 8, 41 So. 184. Ark.—*Richie v. State*, 85 Ark. 413, 108 S. W. 511. Cal.—*People v. Ah Fat*, 48 Cal. 61. Colo.—*Cody v. Butterfield*, 1 Colo. 377. Fla.—*Sanford v. Cloud*, 17 Fla. 532. Ga.—*Wiggins v. State*, 101 Ga. 501, 29 S. E. 26. Ill.—*Cassem v. Galvin*, 158 Ill. 30, 41 N. E. 1087; *Hefling v. Van Zandt*, 60 Ill. App. 662, affirmed, 162 Ill. 162, 44 N. E. 424; *Eubanks v. People*, 41 Ill. 486 (witness' means of knowledge). Ind.—*Warner v. State*, 114 Ind. 137, 16 N. E. 189. Ia.—*Jackson v. Boyles*, 64 Iowa 423, 20 N. W. 746; *C. & S. W. R. Co. v. Heard*, 44 Iowa 358. Kan.—*Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983; *Brown v. Johnson*, 14 Kan. 377. Ky.—*Slater v. Sherman*, 5 Bush 206. La.—*State v. Redmond*, 37 La. Ann. 774. Mich.—*McNaughton v. Evert*, 116 Mich. 141, 74 N. W. 486, 4 Det. Leg. N. 1110.

certainty.³⁴ Mere conclusions are not sufficient.³⁵ The affidavit should also state that affiant believes the facts which he expects the absent witness to prove, to be true.³⁶

Due diligence to procure the attendance of the witness must be shown.³⁷ This requires a statement of the facts showing diligence;³⁸

Neb.—*Diedrichs v. Diedrichs*, 68 Neb. 534, 94 N. W. 536; *Life Ins. Clearing Co. v. Altscheeler*, 53 Neb. 481, 73 N. W. 942; *Farmers' & M. Bank v. Buchard*, 32 Neb. 785, 49 N. W. 762; *Jameson v. Butler*, 1 Neb. 115. **N. Y.** *Irroy v. Nathan*, 4 E. D. Smith 68; *In re Brood*, 3 City Hall Rec. 7. **Tenn.** *Shaver v. Southern Oil Co.* (Tenn. Ch. App.), 43 S. W. 736. **Tex.**—*Titus v. Crittenden*, 8 Tex. 139; *Zachary v. State*, 57 Tex. Crim. 179, 122 S. W. 263; *Campbell v. State* (Tex. Crim.), 28 S. W. 808. **Wash.**—*Shannon v. Consolidated Tiger & P. Min. Co.*, 24 Wash. 119, 64 Pac. 169. **Wis.**—*Winslow v. Bradley*, 15 Wis. 394.

In *Macon & Birmingham R. Co. v. Anderson*, 121 Ga. 666, 49 S. E. 791, the affidavit was defective because the affiant did not state that he knew what the witness would swear to, and did not submit the affidavit of his informant.

Favorable and unfavorable facts. *Dean v. Turner*, 31 Md. 52.

Contra.—A few cases assert the contrary. **La.**—*Perillat v. Tiffany*, 2 Mart. O. S. 134. **Neb.**—*Coombs v. Brenkländer*, 29 Neb. 586, 45 N. W. 929 (by statute); *Belcher v. Skinner*, 28 Neb. 91, 44 N. W. 78 (by statute). **N. Y.**—*Hooker v. Rogers*, 6 Cow. 577; *Ogden v. Payne*, 5 Cow. 15; *Pulver v. Hiserodt*, 3 How. Pr. 49. **Tenn.**—*Nelson v. State*, 2 Swan 482, by statute.

Where it is alleged that the witness will testify concerning the insanity of a party, the affidavit must state the acts and things on which the witness bases his opinion. *Harrison v. State*, 44 Tex. Crim. 164, 69 S. W. 500.

And if it is desired to use the absent witness to impeach one who has testified, the falsity of the latter's testimony must be alleged. *Territory v. Barth*, 2 Ariz. 319, 15 Pac. 673.

34. Colo.—*Glenn v. Brush*, 3 Colo. 26. **Fla.**—*Boyd v. State*, 33 Fla. 316, 14 So. 836. **Ia.**—*Olds v. Glaze*, 7 Iowa 86. **Tex.**—*Martel v. Hemscheim*, 5 Tex. 205; *Stepp v. State*, 53 Tex. Crim. 158, 109 S. W. 1093; *Thompson v. State*, 33 Tex. Crim. 217, 26 S. W. 198.

In the same manner as such facts are usually stated in depositions. *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983.

The facts must be stated more definitely than in pleading. *State v. Bennett*, 31 Mo. 462.

35. Colo.—*Chase v. People*, 2 Colo. 509. **Ill.**—*People v. Nall*, 242 Ill. 284, 89 N. E. 1012. **Ky.**—*Mitchell v. Bean*, 13 Ky. L. Rep. 142. **Mo.**—*Wilson v. Purl*, 133 Mo. 367, 34 S. W. 884; *State v. Pinnell*, 93 Mo. 480, 6 S. W. 221. **Okla.**—*Murphy v. Hood & Lumley*, 12 Okla. 593, 73 Pac. 261; *Reed v. Territory*, 1 Okla. Crim. 481, 98 Pac. 583. **Tex.**—*Shirley v. State*, 37 Tex. Crim. 475, 36 S. W. 267; *Evans v. State*, 13 Tex. App. 225.

36. Ill.—*Lichtliter v. Russell*, 89 Ill. App. 62. **Ind.**—*Fausett v. Voss*, 12 Ind. 525. **Ky.**—*Helfrich Saw & Planing Mill Co. v. Everly*, 17 Ky. L. Rep. 795, 32 S. W. 750; *Green v. Com.*, 15 Ky. L. Rep. 536, 24 S. W. 623. **Mo.** *State v. Richardson*, 194 Mo. 326, 92 S. W. 649; *State v. Dusenberry*, 112 Mo. 277, 20 S. W. 461. **N. Y.**—*Smith v. Roome*, 20 Misc. 8, 44 N. Y. Supp. 784. **Okla.**—*St. Louis & S. F. R. Co. v. Cox*, 26 Okla. 331, 109 Pac. 511; *Terrapin v. Barker*, 26 Okla. 93, 109 Pac. 931.

37. Cal.—*People v. Breen*, 130 Cal. 72, 62 Pac. 408. **Colo.**—*Wilson v. People*, 3 Colo. 325. **Ill.**—*Dauids v. People*, 192 Ill. 176, 61 N. E. 537. **Ind.** *Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218. **Ky.**—*Adams v. Mineral Develop. Co.*, 116 S. W. 246. **La.**—*State v. Allen*, 113 La. 705, 37 So. 614; *Daniels v. Andrews*, 7 Rob. 160. **Mo.** *State v. Pagels*, 92 Mo. 300, 4 S. W. 931; *Gibson v. German-American Town Mut. Ins. Co.*, 85 Mo. App. 41. **N. Y.** *People v. Browne*, 118 App. Div. 793, 103 N. Y. Supp. 903. **Tex.**—*Pacific Exp. Co. v. Needham*, 37 Tex. Civ. App. 129, 83 S. W. 22. **Wis.**—*Andrews v. Elderkin*, 24 Wis. 531.

Proper legal means. *Pointer v. Flash, Lewis & Co.*, 2 Posey Unrep. Cas. (Tex.) 742. And see *Anderson v. State*, 28 Ind. 22.

38. U. S.—*Hyde v. Liverse*, 1 Cranch

mere conclusions are not sufficient.³⁹ Full details as to time when process was taken out are necessary in some jurisdictions,⁴⁰ and the time, manner and method of service should be specified;⁴¹ also the name of such witness,⁴² and his place of residence,⁴³ if such place of

U. C. 408, 12 Fed. Cas. No. 6,972. **Ark.** Puckett v. State, 71 Ark. 62, 70 S. W. 1041. **Cal.**—People v. Thompson, 4 Cal. 238. **Ill.**—St. Louis & K. C. R. Co. v. Olive, 40 Ill. App. 82. **Ind.** Chambers v. Butcher, 82 Ind. 508. **Kan.** State v. Johnson, 70 Kan. 861, 79 Pac. 732. **Mo.**—State v. Hays, 24 Mo. 369. **N. Y.**—John T. Noye Mfg. Co. v. Raymond, 8 Misc. 353, 28 N. Y. Supp. 693. **Okla.**—Crutchfield v. Martin, 27 Okla. 764, 117 Pac. 194. **Tex.**—Missouri Pac. R. Co. v. Aiken, 71 Tex. 373, 9 S. W. 437; Texas & P. R. Co. v. Hardin, 62 Tex. 367; Carter v. Eames, 44 Tex. 544. **Wis.**—State v. Lally, 134 Wis. 253, 114 N. W. 447.

39. **Ia.**—Brady v. Malone, 4 Iowa 146. **Kan.**—Struthers v. Fuller, 45 Kan. 735, 26 Pac. 471; Kilmer v. St. Louis, Ft. S. & W. R. Co., 37 Kan. 84, 14 Pac. 465. **Mo.**—State v. Murphy, 46 Mo. 430. **Tex.**—Crawford v. Saunders, 9 Tex. Civ. App. 225, 29 S. W. 102.

40. Harris v. Com., 25 Ky. L. Rep. 297, 74 S. W. 1044; Hogan v. Missouri, K. & T. R. Co., 88 Tex. 679, 32 S. W. 1035, reversing (Tex. Civ. App.), 30 S. W. 686; Townsend v. State, 41 Tex. 134; Johnson v. Evans, 15 Tex. 39.

An affidavit in support of an application by a corporation from which it appears that the absent witnesses were in court at one time or another during the trial, that they are employees of the applicant, and that they have not been subpoenaed is insufficient. Anheuser-Busch Brew. Assn. v. Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575.

41. Anderson v. Territory, 4 Johns. (N. M.) 108, 13 Pac. 21; Atkins v. State, 11 Tex. App. 8; Johnson v. State, 4 Tex. App. 268; Summerlin v. State, 3 Tex. App. 444; Grant v. State, 2 Tex. App. 163; Dill v. State, 1 Tex. App. 278.

In Wade v. Halligan, 16 Ill. 507, it was held sufficient to allege that the witness was subpoenaed. But this is not sufficient elsewhere. Ellis v. Wiley, 17 Tex. 134.

The date of issuance of the subpoena should be given. Gulf, C. & S. F. R. Co. v. Flake, 1 White & W. Civ. Cas.

(Tex.) §253; People v. Garna, 2 Utah 260.

It must show that process was placed in officer's hands (Unsel v. Com., 87 Ky. 368, 8 S. W. 144), and when (Miller v. State, 42 Ind. 544). See also Mackey v. Com., 4 Ky. L. Rep. 179; Brown v. Abilene Nat. Bank, 70 Tex. 750, 8 S. W. 599; Fields v. State, 5 Tex. App. 616; Cauty v. State, 1 Tex. App. 402; Murry v. State, 1 Tex. App. 174.

And that officer was informed where the witnesses could be found. State v. Gray, 19 Nev. 212, 8 Pac. 456.

The date of service of subpoena should be stated. State v. White, 126 Mo. 591, 29 S. W. 591; Tittle v. Vanleer (Tex. Civ. App.), 27 S. W. 736.

42. **Ala.**—White v. State, 86 Ala. 69, 5 So. 674. **Ark.**—Shinn v. State, 93 Ark. 290, 124 S. W. 263. **Cal.**—People v. Putnam, 129 Cal. 258, 61 Pac. 961; Carey v. Philadelphia & C. Petroleum Co., 33 Cal. 694. **Del.**—Gallagher v. Diamond State Steel Co., 4 Penne. 519, 57 Atl. 533. **Ga.**—Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528. **Ill.**—Keith v. Knoche, 43 Ill. App. 161. **Ia.**—Huff v. Freeman, 15 La. Ann. 240. **Mo.**—State v. Henson, 81 Mo. 384 (by statute). **Okla.**—Vance v. Territory, 3 Okla. Crim. 208, 105 Pac. 307; Johnson v. State, 1 Okla. Crim. 321, 97 Pac. 1059. **Tex.**—Martin v. State, 54 Tex. Crim. 439, 113 S. W. 274.

But see King v. Bennett, 4 Dow. & Ry. 832, 16 E. C. L. 225; Smith v. Dobson, 2 Dow. & Ry. 420, 16 E. C. L. 100.

43. **Ill.**—Lee v. Quirk, 20 Ill. 392. **Miss.**—Donald v. State, 41 So. 4. **Tex.** Dittmer v. State, 45 Tex. Crim. 103, 74 S. W. 34; City of San Antonio v. Stevens (Tex. Civ. App.), 126 S. W. 666; San Antonio Tract. Co. v. Davis (Tex. Civ. App.), 101 S. W. 554.

Both name and residence must be stated. **Colo.**—Wilson v. People, 3 Colo. 325. **La.**—State v. Leary, 111 La. 301, 35 So. 559. **Mo.**—State v. Horn, 209 Mo. 452, 108 S. W. 3. **Tex.**—Parker v. McKelvain, 17 Tex. 157. **Wash.** State v. Craemer, 12 Wash. 217, 40 Pac. 944.

residence be known,⁴⁴ and where the witness is.⁴⁵ Under some circumstances the affidavit must show why the witness' deposition was not taken,⁴⁶ and that the witness cannot be readily reached by attachment.⁴⁷

Expectation of Procuring Evidence.—In the affidavit it must appear that the party expects to procure the absent evidence in the future.⁴⁸ Many courts require a statement of the facts upon which such expectation is based,⁴⁹ and of the time when the party expects to procure the evidence.⁵⁰

b. *Affidavit of Absent Witness.*—Although an affidavit of the absent witness need not be made a part of the application for a continuance,⁵¹ it is advisable to produce the same if obtainable.⁵²

That the witnesses are residents of the state. *Burditt v. Glasscock*, 25 Tex. Supp. 45.

44. *State v. Underwood*, 76 Mo. 630; *Stoddart v. Garnhart*, 35 Tex. 300; *Hunter v. Waite*, 11 Tex. 85.

45. *Allison v. State*, 74 Ark. 444, 86 S. W. 409.

46. *McFarland v. State*, 83 Ark. 98, 103 S. W. 169; *John O. Metcalf Co. v. Nystedt*, 203 Ill. 333, 67 N. E. 764.

47. *People v. Weaver*, 47 Cal. 106.

48. *Ariz.*—Territory *v. Dooley*, 3 Ariz. 60, 78 Pac. 138. *Fla.*—*Adams v. State*, 56 Fla. 1, 48 So. 219. *Ga.*—*Quattlebaum v. State*, 119 Ga. 433, 46 S. E. 677. *Ind.*—*Deming v. Patterson*, 10 Ind. 251. *Ia.*—*Thompson v. Lord*, 14 Iowa 591. *Ky.*—*Louisville & N. R. Co. v. Rogers*, 10 Ky. L. Rep. 723.

A mere hope is not sufficient. *Brandner v. Flint*, 10 La. 391; *Franks v. Williams*, 37 Tex. 24; *Beaty v. State*, 16 Tex. App. 421.

An affidavit in the alternative that the party believes he can procure personal attendance of the witness or his deposition is bad. *People v. Francis*, 38 Cal. 183.

49. *U. S.*—*Stewart v. Townsend*, 41 Fed. 121. *Cal.*—*People v. Breen*, 130 Cal. 72, 62 Pac. 408; *People v. Winters*, 125 Cal. 325, 57 Pac. 1067; *People v. Wade*, 118 Cal. 672, 50 Pac. 841; *People v. Ah Yute*, 53 Cal. 613; *People v. Ah Fat*, 48 Cal. 61. *Colo.*—*Purse v. Purcell*, 95 Pac. 291; *Doll v. Stewart*, 30 Colo. 320, 70 Pac. 326. *Ill.*—*Ward v. Yancey*, 78 Ill. App. 368; *Mantonya v. Huertner*, 35 Ill. App. 27. *Ind.*—*Burchfield v. State*, 82 Ind. 580; *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317. *Ky.*—*Louisville Cooperage Co. v. Farmer*, 33 Ky. L. Rep. 180, 109 S. W. 893; *Lisle v. Com.*, 6 Ky. L. Rep. 229;

Smith v. Com., 5 Ky. L. Rep. 776. *La.*—*State v. Mansfield*, 52 La. Ann. 1355, 27 So. 887. *Mo.*—*State v. McKenzie*, 228 Mo. 385, 128 S. W. 948; *Freligh v. Ames*, 31 Mo. 253. *Neb.*—*Good v. Bonacum*, 78 Neb. 792, 111 N. W. 796; *Gatzemeyer v. Peterson*, 68 Neb. 832, 94 N. W. 974; *McClelland v. Scroggin*, 48 Neb. 141, 66 N. W. 1123; *Polin v. State*, 14 Neb. 540, 16 N. W. 898. *N. Y.*—*People v. Browne*, 118 App. Div. 793, 103 N. Y. Supp. 903. *Ore.*—*State v. O'Neil*, 13 Ore. 183, 9 Pac. 294. *Tex.*—*Trammell v. Pilgrim*, 20 Tex. 158; *Ross v. State*, 56 Tex. Crim. 275, 118 S. W. 1034; *Kelly v. State*, 44 Tex. Crim. 390, 71 S. W. 756. *W. Va.*—*State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

When the witness resides in another state, this showing must be made. *Wilhelm v. People*, 72 Ill. 468; *Keffer v. State*, 12 Wyo. 49, 73 Pac. 556.

In *State v. Harrison*, *supra*, it was said that the court must see that the brief is not merely a hope but a well-founded, reasonable expectation.

50. *Colo.*—*Wilson v. People*, 3 Colo. 325. *Fla.*—*Easterlin v. State*, 43 Fla. 565, 31 So. 350. *Ga.*—*Jones v. State*, 128 Ga. 23, 57 S. E. 313. *Ill.*—*Splane v. Byrne*, 9 Ill. App. 392. *Ky.*—*Bell v. Com.*, 3 Ky. L. Rep. 395. *Mo.*—*State v. Wilson*, 85 Mo. 134; *Barker v. Patchin*, 56 Mo. 241. *Tex.*—*Stachely v. Pierce*, 28 Tex. 328.

In some cases it need not be shown when the witness is expected to return. It may be impossible to tell. *Anonymous*, 1 Barn. 39, 94 Eng. Rep. 27.

51. *Kennedy v. State*, 81 Ind. 379.

52. *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 161; *Mendum v. Com.*, 6 Rand. (Va.) 704.

4. **Where Illness Involved.**—When a continuance is sought because of illness, the affidavit and not merely the unsworn statement⁵³ of a physician⁵⁴ or of someone having knowledge of the illness,⁵⁵ should be produced, showing the character of the illness.⁵⁶

5. **Verification.**—The form of verification which is demanded is that the affiant believes⁵⁷ or firmly believes,⁵⁸ the statements therein contained to be true.

A statement on information,⁵⁹ or on information and belief,⁶⁰ is insufficient, unless the party states the source of the information,⁶¹ and sufficient reason for not procuring the affidavit of his informant.⁶²

6. **The Affiant.**—Generally the party himself must make the affidavit.⁶³ Although this may be the general rule, it seems that the circumstances of the case should alter the rule, and it has been held that in special cases an agent of the party,⁶⁴ or his attorney may make the affidavit,⁶⁵ or in cases where that other is better informed than the party, that he instead of the party himself may make the affi-

53. *Black v. Webber*, 1 Neb. (Unof.) 468, 96 N. W. 606; *Randall v. United Life & Acc. Ins. Assn.*, 59 N. Y. Super. 587, 14 N. Y. Supp. 631.

54. *Danielson v. Gude*, 11 Colo. 87, 17 Pac. 283; *Smith v. Smith*, 132 Mo. 681, 34 S. W. 471.

55. *Cutler v. State*, 42 Ind. 244; *Harlow v. Warren*, 38 Kan. 480, 17 Pac. 159.

56. *Pine v. Pro*, 6 Blackf. (Ind.) 426; *Holland v. State*, 38 Tex. 474 (second application).

The affidavit of two persons that a third person had told them that the defendant was sick, and the affidavit of the attorney that the testimony of defendant is material, is an insufficient showing. *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1062.

57. *Lansky v. West End St. R. Co.*, 173 Mass. 20, 53 N. E. 129; *State v. Blitz*, 171 Mo. 530, 71 S. W. 1027.

58. *Smalley v. Anderson*, 4 Mon. (Ky.) 367.

"Every reason to believe," insufficient. *East St. Louis R. Co. v. Gray*, 135 Ill. App. 642.

59. *Brown v. State*, 23 Tex. 195.

60. *International & G. N. R. Co. v. Biles & Ruby* (Tex. Civ. App.), 120 S. W. 952; *St. Louis Southwestern R. Co. v. Harkey*, 39 Tex. Civ. App. 523, 88 S. W. 506; *Gulf, C. & S. F. R. Co. v. Brown* (Tex. Civ. App.), 75 S. W. 807.

61. *Ariz.*—*Eytinge v. Territory*, 12 *Ariz.* 131, 100 Pac. 443. *N. D.*—*State v. Carroll*, 13 N. D. 383, 101 N. W.

317. *Tex.*—*Pullen v. State*, 11 *Tex.* App. 89.

62. The whereabouts of the informant should also be given. *Comstock v. State*, 14 Neb. 205, 15 N. W. 355. See *Thompson v. State*, 24 Ga. 297.

The affidavit of the informant should be submitted. *Bradley v. State*, 128 Ga. 20, 57 S. E. 237; *Clouston v. Gray*, 48 Kan. 31, 28 Pac. 983.

63. *La.*—*Williams v. Brashear*, 16 *La.* 77, party guilty of perjury. *N. C.* *Shepard v. Cook*, 3 N. C. 426. *Tenn.* *Guyer v. Cox*, 1 *Overt.* 184, the affidavit need not be made by the applicant. *Tex.*—*Davis v. State*, 51 *Tex.* *Crim.* 341, 102 S. W. 1122. *Eng.*—*Carter v. Uppington*, *Barnes* 437, 94 *Eng. Reprint* 992.

When a person accused of crime seeks the continuance of his case and does not wish to be subjected to cross-examination as to the grounds of the continuance, he must make the affidavit himself. He alone can testify as to whether the witness is absent by his procurement or consent or that the motion is not made for the purpose of delay only. *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782.

64. *Ill.*—*School Directors of Dist. No. 2 v. Hentz*, 57 *Ill.* App. 648, by statute. *Ind.*—*Espy v. State Bank*, 5 *Ind.* 274. *Tex.*—*Blum v. Bassett*, 67 *Tex.* 194, 3 S. W. 33.

65. *Ga.*—*Roberts v. Moore*, 27 *Ga.* 411; *Christian v. Mansfield*, 25 *Ga.* 628. *Ill.*—*Lockhart v. Wolf*, 82 *Ill.* 37.

davit.⁶⁶ If the affidavit is made by some person other than the party it should generally show in some manner the reason therefor.⁶⁷

7. Construction.—It is presumed that the applicant has stated the facts in the affidavit as strongly in his own favor as he could.⁶⁸ And, therefore, an affidavit for a continuance is construed strictly against the applicant.⁶⁹

8. Statutory Form.—Where the form of affidavit for a continuance is prescribed by statute,⁷⁰ the statute should be strictly followed.⁷¹ If the statute is not followed, the application addresses itself to the discretion of the court.⁷²

9. Leave To Amend.—The allowance of leave to amend the affidavit is a matter of discretion with the court.⁷³ The privilege is generally denied after the court has given an opinion as to the granting of the motion.⁷⁴ For obvious reasons, the privilege should be denied

Ia.—Widner v. Hunt, 4 Iowa 355. **La.**—Lizardi v. Arthur, 16 La. 577; Caulker v. Banks, 3 Mart. (N. S.) 532. **N. Y.**—Seers v. Grandy, 1 Johns. 514. **Tex.**—Robinson v. Martel, 11 Tex. 149.

66. U. S.—Jackson v. Mason, 1 Dall. 135, 1 L. ed. 70; Hunter v. Kennedy, 1 Dall. 81, 1 L. ed. 46. **N. O.**—Wheaton v. Cross, 3 N. C. 334. **Eng.**—Day v. Samson, Barnes 448, 94 Eng. Reprint 997.

67. Clouston v. Gray, 48 Kan. 31, 28 Pac. 983.

The affidavit must state the knowledge of the affiant, not what the client told him. *Read v. Haynie*, Hempst. 700, 20 Fed. Cas. No. 11,608. And an affidavit by attorney "that the facts set forth in the foregoing application are true, to the best of his information and belief," is insufficient. *Gulf, C. & S. F. R. Co. v. Brown* (Tex. Civ. App.), 75 S. W. 807.

The affidavit by the attorney should state why it was not made by the party and also that the party is not seeking to evade the requirements of the law by procuring the affiant to swear to a state of facts to which the client himself cannot swear. *Stinnett v. Rice & Co.*, 36 Tex. 106.

Affidavit by attorney must show that the client is not present or is unable to make the necessary affidavit himself. *Widner v. Hunt*, 4 Iowa 355.

If such verification is under suspicion, continuance may be refused. *Penne v. Tourne*, 2 La. 462.

Affidavit of attorney based on unverified letter of party held insufficient. *Chicago, P. & M. R. Co. v. Kane*, 65 Ill. App. 276.

68. Ill.—*State v. Eisenmeyer*, 94 Ill. 96; *Board v. O'Donovan*, 82 Ill. App. 163. **Okla.**—*Musgraves v. State*, 3 Okla. Crim. 421, 106 Pac. 544. **Tex.**—*Cantu v. State*, 1 Tex. App. 402.

69. Fla.—*Reynolds v. Smith*, 49 Fla. 217, 38 So. 903. **Ia.**—*Brady v. Malone*, 4 Iowa 146. **Ky.**—*Owens v. Starr*, 2 Litt. 230; *Mason v. Anderson*, 3 Mon. 293. **Tex.**—*Van Brown v. State*, 34 Tex. 186; *Thomas v. State*, 17 Tex. App. 437.

70. See State v. Howell, 117 Mo. 307, 23 S. W. 263.

71. Turner v. Eustis, 8 Ark. 119.

72. Jenkins v. State, 30 Tex. 444; *Chilson v. Reeves*, 29 Tex. 275; *Western Union Tel. Co. v. Johnsey*, 49 Tex. Civ. App. 487, 109 S. W. 251.

73. Ia.—*Widner v. Hunt*, 4 Iowa 355. **Ky.**—*Com. v. Hourigan*, 89 Ky. 305, 12 S. W. 550. **N. Y.**—*People v. Horton*, 4 Park. Cr. 222. **N. C.**—*Banks v. Gay Mfg. Co.*, 108 N. C. 282, 12 S. E. 741. **Tex.**—*Green v. Dunman*, 35 Tex. 175; *McKinney v. State*, 8 Tex. App. 626. **Wyo.**—*McNeally v. State*, 5 Wyo. 59, 36 Pac. 824.

The affidavit may be amended to make explanation, but no new fact can be inserted. *Lucas v. Sevier*, 1 Overt. (Tenn.) 105.

74. Ga.—*Aiken v. Carmichael Co.*, 127 Ga. 407, 56 S. E. 440. **Ill.**—*McBain v. Enloe*, 13 Ill. 76. **Ind.**—*Pence v. Christman*, 15 Ind. 257; *Shattuck v. Myers*, 13 Ind. 46, 74 Am. Dec. 236. **Ky.**—*Smalley v. Anderson*, 4 Mon. 367; *Singleton v. Carr*, 1 Bibb 554.

"As a general rule a motion to amend a motion for a continuance, after a ruling thereon based on coun-

when the party seeks to insert a fact that was within his knowledge when the first application was made.⁷⁵

10. Additional Affidavit.—Although the allowance of further and additional affidavits has been declared to be a matter of discretion with the court,⁷⁶ the privilege has generally been denied.⁷⁷

C. WHEN CONTINUANCE IS TO BE SOUGHT.—Due diligence must be exercised in seeking a continuance.⁷⁸ The motion should be made at the earliest practicable moment,⁷⁹ in open court and in the presence of the adversary.⁸⁰

In some jurisdictions, by statute,⁸¹ or by rule of court,⁸² the application must be made at the beginning of the term.⁸³ It is generally held to be too late to seek a continuance after the jury has been impaneled⁸⁴ and sworn,⁸⁵ nor will a postponement be granted unless in

sel's admission that the witnesses would testify as claimed is not in order. At any rate the trial court is vested with a large discretion in such matters." Goldstein v. Morgan, 122 Iowa 27, 96 N. W. 897.

75. Ga.—Robson v. State, 83 Ga. 166, 9 S. E. 610. **Ill.**—Northwestern B. & M. Aid Assn. v. Primm, 124 Ill. 100, 16 N. E. 98. **La.**—Bell v. Williams, 3 La. 447.

In Northwestern B. & M. Aid Assn. v. Primm, *supra*, the court said: "It has been repeatedly held by this court that amendments to affidavits for continuances will not be allowed. The practice is unwarranted by any decisions of this or other courts of which we are aware."

76. Steward v. Miller, 17 Ill. App. 660.

77. U. S.—Norwood v. Sutton, 1 Cranch C. C. 327, 18 Fed. Cas. No. 10,365. **Mo.**—State v. Buckner, 25 Mo. 167. **N. Y.**—*In re Robetaille*, 5 City Hall Rec. 171. **Tenn.**—State v. Evans, 1 Overt. 211, to remedy a defect in the affidavit.

78. Ark.—Merrick v. Britton, 26 Ark. 496. **Colo.**—Koch v. Story, 47 Colo. 335, 107 Pac. 1093, where the motion was made just before hearing on a ground known to applicant from the beginning 20 months earlier. **La.**—Gardner v. O'Connell, 7 La. Ann. 453; Benoist v. Reyburn, 2 La. Ann. 137. **N. Y.**—Walbridge v. I. De Wing Pub. Co., 71 Hun 613, 24 N. Y. Supp. 602. **Tex.**—Texas & P. R. Co. v. Crump, 102 Tex. 250, 115 S. W. 26; Ryall v. Griffin, 2 Posey Unrep. Cas. §680.

Seemle, that a motion for a continuance is premature if made before the

case is set for trial. *McCown v. Hannah*, 3 Ore. 302.

By statute, applications for continuances in capital cases must be made before the drawing of a special venire, unless for good cause shown. *Fletcher v. State*, 60 Miss. 675.

79. Ga.—See *Stokes v. Stokes*, 127 Ga. 160, 56 S. E. 303, where application to procure an additional affidavit on a question of alimony was made after hearing begun. **Ill.**—*McCarthy v. Mooney*, 41 Ill. 300; *Grier v. Gibson*, 36 Ill. 521; *Reynolds v. Frances*, 23 Ill. 61. **Ia.**—*Bays v. Herring*, 51 Iowa 286, 1 N. W. 558. **Wash.**—*Fruitland Irr. Co. v. Smith*, 54 Wash. 185, 102 Pac. 1031.

On the day fixed for trial. *Rosenthal v. Rosenthal*, 117 La. 786, 42 So. 270.

At any time to effect the purposes of justice. *Sheppard v. Wilson*, 6 How. (U. S.) 260, 12 L. ed. 430.

80. Trimble v. Southwest, etc. Light Co., 115 Mo. App. 605, 92 S. W. 346, where the court condemned the practice of applying to the judge outside of the court room.

81. Randall v. Fockler, 52 Iowa 618, 3 N. W. 675; *Lucas v. Casaday*, 12 Iowa 567.

82. Lesh v. Meyer, 63 Kan. 524, 66 Pac. 245.

83. Lehr v. Brooklyn Ferry Co., 115 App. Div. 666, 101 N. Y. Supp. 209.

84. People v. Logan, 123 Cal. 414, 56 Pac. 56; *Parmelee v. Thompson*, 7 Hill (N. Y.) 77 (justice's court).

85. La.—*Broughton v. King*, 2 La. Ann. 569. **N. Y.**—*Fink v. Hall*, 8 Johns. 437. **Pa.**—*Coleman v. Hess*, 1 Browne 240.

exceptional cases, where the application is delayed until after the beginning of the trial.⁸⁶

The party cannot remain silent when the continuance should be granted, and then set up the objection for the first time on a motion for a new trial.⁸⁷ However, where there is a good excuse for failure to make the motion sooner, for example, that the knowledge did not come to the party until the time the motion is made, the motion cannot be regarded as made too late.⁸⁸

And some statutes provide that all grounds for continuance must be presented at once, and that after a decision on one or more grounds no others shall be heard by the court.⁸⁹

VI. MODE OF OPPOSING GRANT OF CONTINUANCE. — A. BY ADMISSION. — 1. In General. — It is well settled that where a continuance is sought on the ground of the absence of a witness, the court may refuse to grant a continuance if the adverse party will admit the statements in the affidavit for a continuance as to what the absent witness would testify, if present, as the testimony of the absent witness.⁹⁰ A conflict of authority, made more intricate by the passing

A justice may adjourn his court after the jury has been sworn. *Griffin v. Spaulding*, 6 Vt. 60.

86. Ill.—*People v. Hanson*, 150 Ill. 122, 36 N. E. 998, 37 N. E. 580; *Porter v. Triola*, 84 Ill. 325; *Leavitt v. Kennicott*, 54 Ill. App. 633. Ind.—*McBride v. Stradley*, 103 Ind. 465, 2 N. E. 358. La.—*Winchester v. Rightor*, 12 La. 255; *Weeks v. Flower*, 9 La. 379; *Broughton v. King*, 2 La. Ann. 569; *Rousseau v. Henderson*, 12 Mart. (O. S.) 635. W. Va.—*Cross v. Cross*, 56 W. Va. 185, 49 S. E. 129.

Not generally allowed after evidence on both sides has been introduced. *Butt v. Carson*, 5 Okla. 160, 48 Pac. 182.

87. *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416; *Doyle v. Sturla*, 38 Cal. 456; *Turner v. Morrison*, 11 Cal. 21; *Corbett v. National Bank of Commerce*, 44 Neb. 230, 62 N. W. 445.

Failure to apply for a continuance in the lower court, held a waiver. *People v. Holden*, 28 Cal. 123.

88. *Hart v. Whitlocke*, Barnes 452, 94 Eng. Reprint 999; *Bacon Abr. Trial* (H).

89. *Aiken v. Carmichael Co.*, 127 Ga. 407, 56 S. E. 440.

90. Ala.—*Stoudenmire v. State*, 145 Ala. 677, 40 So. 48. Cal.—*Simpson v. Simpson*, 41 Pac. 804. Colo.—*Baldwin Coal Co. v. Davis*, 15 Colo. App. 371, 62 Pac. 1041. Fla.—*Green v. King*, 17 Fla. 452. Ga.—*Hood v. State*, 93 Ga.

168, 18 S. E. 553. Idaho.—*State v. Fleming*, 17 Idaho 471, 106 Pac. 305. Ill.—*Montgomery County v. Robinson*, 85 Ill. 174. Ind.—*Carmon v. State*, 18 Ind. 450. Kan.—*State v. Stickney*, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284. Ky.—*Stamper v. Com.*, 33 Ky. L. Rep. 580, 110 S. W. 389; *Hughes v. Waring*, Litt. Sel. Cas. 402. Mont.—*Territory v. Harding*, 6 Mont. 323, 12 Pac. 750. Neb.—*Foster v. State*, 79 Neb. 259, 112 N. W. 656; *Catron v. State*, 52 Neb. 389, 72 N. W. 354. N. Y.—*Brill v. Lord*, 14 Johns. 341 (in a justice's court); *People v. Foot*, 1 Wheeler Cr. Cas. 70. Okla. *Davis v. Territory*, 15 Okla. 462, 82 Pac. 507. S. C.—*State v. Williams*, 76 S. C. 135, 56 S. E. 783. Tex.—*Westerman v. State*, 53 Tex. Crim. 109, 111 S. W. 655. Wash.—*Traynor v. White*, 44 Wash. 560, 87 Pac. 823; *Benson v. Town of Hamilton*, 34 Wash. 201, 75 Pac. 805.

The court may instruct the jury that the statement of what the witness would testify to is entitled to the same consideration by the jury as if the witness had testified to such statement, notwithstanding the fact that a view of the witness is denied the jury and cross-examination is impossible. *Williams v. Anniston Elec. & Gas Co.*, 164 Ala. 84, 51 So. 385.

Where the statement in the affidavit is that A would testify that B told him that he (B) did not see the shoot-

of statutes on the subject in many states, exists as to whether the admission may be simply that the witness if present would testify as alleged,⁹¹ or must be that the expected testimony is absolutely true.⁹²

ing, an admission that the facts are true admits only that B so spoke, not that B did not see the shooting. B may then go on the stand and testify that he did see the shooting and that he made the statement in question because of fear. *Toliver v. Com.*, 104 Ky. 760, 20 Ky. L. Rep. 906, 47 S. W. 1082.

91. An admission that the witness would testify as claimed was held sufficient in the following cases: *Ark.* *Hibbard v. Kirby*, 38 Ark. 102. *Del.* *State v. Ryan*, 75 Atl. 869. *Idaho.* *State v. St. Clair*, 6 Idaho 109, 53 Pac. 1. *Ill.*—*American Car & Foundry Co. v. Hill*, 226 Ill. 227, 80 N. E. 784, affirming judgment, 128 Ill. App. 176; *Utey v. Burns*, 70 Ill. 162 (by statute); *Keith v. Knoche*, 43 Ill. App. 161. *Ind.*—*Pate v. Tait*, 72 Ind. 450; *Whitehall v. Lane*, 61 Ind. 93. *Ia.*—*Zelenka v. Port Huron Mach. Co.*, 144 Iowa 592, 123 N. W. 332; *McBride v. McBride*, 142 Iowa 169, 120 N. W. 709; *State v. McComb*, 18 Iowa 43; *State v. Mooney*, 10 Iowa 506; *State v. Sater*, 8 Iowa 420. *Kan.*—*State v. Dickson*, 6 Kan. 209; *Thompson v. State*, 5 Kan. 159. *Ky.*—*Freeman v. Com.*, 118 S. W. 917; *Continental Casualty Co. v. Semple*, 112 S. W. 1122; *Brock v. Com.*, 33 Ky. L. Rep. 630, 110 S. W. 878; *Leonaora Nat. Bank v. Ragland's Admr.*, 32 Ky. L. Rep. 1403, 108 S. W. 854; *Manders' Committee v. Eastern State Hospital*, 27 Ky. L. Rep. 254, 84 S. W. 761; *Howard v. Com.*, 26 Ky. L. Rep. 148, 80 S. W. 817, order reversed on rehearing, 26 Ky. L. Rep. 465, 81 S. W. 639; *Mise v. Com.*, 25 Ky. L. Rep. 2207, 80 S. W. 457; *Hopkins v. Com.*, 117 Ky. 941, 80 S. W. 156, 25 Ky. L. Rep. 2117; *Leger v. Com.*, 25 Ky. L. Rep. 4, 74 S. W. 704; *King v. Com.*, 8 Ky. L. Rep. 778, 3 S. W. 430. *La.*—*Cole v. LaChambre*, 31 La. Ann. 41; *Pruyn v. Gibbens*, 24 La. Ann. 231; *Powell v. Hopson*, 14 La. Ann. 666; *Folk v. Hough*, 14 La. Ann. 659; *State v. Colbert*, Unrep. Cas. 137. *Mich.*—*People v. Savant*, 112 Mich. 297, 70 N. W. 576, 4 Det. Leg. N. 4. *Miss.*—*Richburger v. State*, 90 Miss. 806, 44 So. 772; *Strauss v. State*, 58 Miss. 53 (by statute). *Mo.*—*State v.*

Jewell, 90 Mo. 467, 3 S. W. 77; *State v. Dawson*, 90 Mo. 149, 1 S. W. 827; *State v. Jennings*, 81 Mo. 185, 51 Am. Rep. 236 (by statute); *State v. Hatfield*, 72 Mo. 518; *Woolwine v. Bick*, 39 Mo. App. 495; *Richey v. Branson*, 33 Mo. App. 418. *Neb.*—*Shumway v. State*, 82 Neb. 152, 117 N. W. 407; *Burris v. Court*, 48 Neb. 179, 66 N. W. 1131. *Nev.*—*O'Neil v. New York & Silver Peak Min. Co.*, 3 Nev. 141. *N. Y.* *People v. Vermilyea*, 7 Cow. 369. *Ohio.* *United States Life Ins. Co. v. Wright*, 33 Ohio St. 533. *Okla.*—*Woodring v. Territory*, 15 Okla. 309, 81 Pac. 631. *Ore.*—*Lew v. Lucas*, 37 Ore. 208, 61 Pac. 344. *S. C.*—*State v. Hutto*, 66 S. C. 449, 45 S. E. 13; *Farrand v. Bouchell*, Harp. 83. *Wash.*—*State v. Lewis*, 31 Wash. 75, 71 Pac. 778. *Wyo.* *McNealley v. State*, 5 Wyo. 59, 36 Pac. 824, by statute.

92. In the following cases it was held that the admission must be that the testimony is true: *Ark.*—*Graham v. State*, 50 Ark. 167, 6 S. W. 721. *Cal.* *People v. Diaz*, 6 Cal. 248; *People v. Fong Chung*, 5 Cal. App. 587, 91 Pac. 105. *Del.*—*Seward v. City of Wilmington*, 2 Marv. 375, 43 Atl. 255. *Fla.* *Newton v. State*, 21 Fla. 70. *Ga.* *Watson v. State*, 118 Ga. 66, 44 S. E. 803; *Klugman v. Gammell*, 43 Ga. 581 (by statute); *Cheney v. Smith*, 42 Ga. 50. *Ind.*—*Wassels v. State*, 26 Ind. 30; *Miller v. State*, 9 Ind. 340; *State v. Schoonover*, 21 Ind. App. 520, 52 N. E. 779. See also *Nave v. Horton*, 9 Ind. 563; *McLaughlin v. State*, 8 Ind. 281; *Wheeler v. State*, 8 Ind. 113; *Hamilton v. State*, 3 Ind. 552. *Ky.* *Darrell v. Com.*, 28 Ky. L. Rep. 27, 88 S. W. 1060; *Robinson v. Com.*, 24 Ky. L. Rep. 564, 68 S. W. 1099 (by statute); *Taylor v. Com.*, 9 Ky. L. Rep. 316; *Smith v. Creason's Exrs.*, 5 Dana 293, 30 Am. Dec. 688. *La.*—*Larrat v. Carlier*, 1 Mart. O. S. 144. *Md.*—*Bryan v. Comsey*, 3 Md. 61. *Miss.*—*Montgomery v. State*, 85 Miss. 330, 37 So. 835 (affected by statute); *Dominges v. State*, 7 Smed. & M. 475, 45 Am. Dec. 315. *Mo.*—*State v. Dyke*, 96 Mo. 298, 9 S. W. 925; *Murphy v. Murphy*, 31 Mo. 322; *Richey v. Branson*, 33 Mo. App. 418. *N. Y.*—*People v. Vermilyea*,

The right to thus defeat a continuance is, however, subject to the following limitation: In criminal cases, the defendant has a right to the *personal* attendance of witnesses,⁹³ and therefore when it is very important to have the witness present in person, the continuance should be granted if a proper showing be made.⁹⁴ The same principle has been applied in civil cases.⁹⁵

2. Effect of Admission.—It is generally held that an admission to prevent a continuance does not prevent the court from excluding parts of the statements in the affidavit on the ground that they are, as evidence, incompetent,⁹⁶ or irrelevant.⁹⁷ However, the admission constitutes a waiver of formal objections to the affidavit,⁹⁸ not specially assigned.⁹⁹

Where the admission is merely that the witness would so testify, the statements may be attacked in the same way in which the testimony of the witness on the stand might be impeached or contradicted,¹ ex-

7 Cow. 369. N. C.—*State v. Twigg*, 60 N. C. 142. S. D.—*State v. Wilcox*, 21 S. D. 532, 114 N. W. 687. Tenn. Louisville & N. R. Co. v. Voss, 109 Tenn. 713, 72 S. W. 983. Tex.—*Skaro v. State*, 43 Tex. 88; *DeWarren v. State*, 29 Tex. 464; *Purvis v. State*, 52 Tex. Crim. 316, 106 S. W. 355; *Horwitz v. LaRoche* (Tex. Civ. App.), 107 S. W. 1148; *Maughmer v. Bekring*, 19 Tex. Civ. App. 299, 46 S. W. 917.

In *Hickam v. People*, 137 Ill. 75, 27 N. E. 88, it appears that by statute, the court may in criminal cases require either an admission that the witness would testify as alleged or that the facts are true, in its discretion.

93. La.—*State v. Fairfax*, 107 La. 624, 31 So. 1011. Miss.—*Scott v. State*, 80 Miss. 197, 31 So. 710. Mo.—*State v. Hickman*, 75 Mo. 416.

94. Kentucky Cent. R. Co. v. McMurry, 3 Ky. L. Rep. (abstract) 625; *Dobbs v. State*, 96 Miss. 786, 51 So. 915; *Walton v. State*, 87 Miss. 296, 39 So. 689; *Caldwell v. State*, 85 Miss. 383, 37 So. 816; *Watson v. State*, 81 Miss. 700, 33 So. 491.

The defendant is not bound to accept the admission. *State v. Baker*, 13 Lea (Tenn.) 326, distinguished from *Petty v. State*, 4 Lea (Tenn.) 326, a decision apparently *contra*. In the latter case the witness resided out of the state and all the defendant could hope for was his deposition.

In *State v. Salge*, 2 Nev. 321, the court declares: "An admission that if a witness were present he would swear

to certain facts is not calculated to have the same effect as if a respectable witness were present in court, swearing to the same state of facts. We think that where a defendant makes out a clear case for a continuance, owing to the absence of a witness, and shows that he is likely to obtain the testimony of that witness by the next term of court, he is entitled to a continuance, notwithstanding the state may be willing to admit that the witness, if present, would swear as claimed by the defendant."

Where the prosecuting attorney desired a continuance the court cannot force an admission from the prisoner and allow the affidavit to be read. The continuance should be granted. *State v. Emerson*, 90 Mo. 236, 2 S. W. 274.

95. *Hopkinson v. Jones*, 28 Ill. App. 409; *Louisville & N. R. Co. v. Carothers*, 23 Ky. L. Rep. 1673, 65 S. W. 833, 66 S. W. 385.

96. *Indiana R. Co. v. Maurer*, 160 Ind. 25, 66 N. E. 156; *Downs v. Opp*, 82 Ind. 166.

97. *State v. Geddis*, 42 Iowa 264; *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297.

98. *Holcomb-Lobb Co. v. Kaufman*, 29 Ky. L. Rep. 1006, 96 S. W. 813.

99. *Beal v. Pratt*, 67 Ill. App. 483.

1. Ala.—*Montgomery & W. Plank-Road Co. v. Webb*, 27 Ala. 618. Idaho. Territory v. Guthrie, 2 Idaho 398, 17 Pac. 39. Ky.—*Risner v. Com.*, 133 Ky. 11, 117 S. W. 318; *Olds v. Com.*, 3 A. K. Marsh. 465. La.—*State v. Col-*

cept in so far as the circumstances of the case make this impracticable.² But having admitted that the witness if present would testify to the statements attributed to him, it is improper to argue to the jury that the witness would not make the statements if present.³

Where the admission is that the statements are true, evidence in any wise contradictory thereto is inadmissible.⁴

This further limitation upon the effect of an admission is to be noted: It is not like a solemn admission in an answer, intended to

bert, 29 La. Ann. 715. **Miss.**—Brent v. Heard, 40 Miss. 370. **Mo.**—Nugent v. Armour Pack. Co., 208 Mo. 480, 490, 81 S. W. 506, *affirmed* (Mo. App.), 106 S. W. 648; State v. Ellis, 74 Mo. 207.

The weight of the testimony is not increased by producing it in this form. Waldron v. Home Mut. Ins. Co., 16 Wash. 193, 47 Pac. 425.

When Cross-Examination Permitted. Where the affidavit is read as a deposition, and the witness subsequently appears, the court may under its power to allow a witness to be cross-examined at any time during the trial, allow the witness to be cross-examined on the statements contained in the affidavit. The law permitting the deposition of an absent witness to be read is not infringed by permitting such cross-examination. Elkins v. New Livingston Coal Co. (Ky.), 115 S. W. 203.

2. The affidavit cannot be impeached by showing: (1) Want of diligence in procuring the testimony; (2) that the party had reason to believe it untrue; (3) that the witness is non-existent. State v. Roark, 23 Kan. 147.

If a party to prevent a continuance admits that the witness would testify to certain facts, he cannot be allowed to adduce proof of counter declarations alleged to have been made by the witness, since the witness could not be asked whether he did make such declarations. Pool v. Devers, 30 Ala. 672.

It cannot be shown that the witness did not so testify at a previous trial. This is a direct assault on the affidavit and has no bearing on the credibility of the witness. Smith v. State, 90 Miss. 111, 43 So. 465, 122 Am. St. Rep. 313.

The adverse party cannot afterwards ask if the witness is black or white, such inquiry being irrelevant, but may

ask concerning his age. Fonville v. State, 91 Ala. 39, 8 So. 688.

3. Howerton v. Com., 129 Ky. 482, 112 S. W. 606, 33 Ky. L. Rep. 1008; Martin v. Com., 121 Ky. 332, 89 S. W. 226; Shepherd v. Com., 119 Ky. 931, 85 S. W. 191.

The attorney for the party making the admission cannot state to the jury that the witness would not have so testified, and that if he had had time he could prove that he would not. Briscoe v. Kinealy, 4 Mo. App. 595.

4. **Ill.**—Fulton County Supervisors v. Mississippi & W. R. Co., 21 Ill. 338. **Ia.**—State v. Shannehan, 22 Iowa 435. **Kan.**—State v. Bartley, 48 Kan. 421, 29 Pac. 701. **Ky.**—Meadows v. Com., 31 Ky. L. Rep. 1159, 104 S. W. 954; Vinegar v. Com., 19 Ky. L. Rep. 840, 42 S. W. 351. **Miss.**—Hubbard v. State, 64 Miss. 315, 1 So. 480. **Tex.**—St. Louis S. W. R. Co. v. Hall (Tex. Civ. App.), 92 S. W. 1079.

The benefit of such an admission is not lost by failure to object to the testimony contradictory thereto. Galveston, H. & S. A. R. Co. v. Lynes (Tex. Civ. App.), 65 S. W. 1119.

The affidavit may be read to the jury and also the admission. Strong v. Hart, 7 Iowa 484.

But counsel must not read to the jury parts of the affidavit intended only for the court. Black Diamond Coal & Min. Co. v. Price, 33 Ky. L. Rep. 334, 104 S. W. 345.

The judge must not attempt to detract from the weight of the statements by instructions. Utley v. Burns, 70 Ill. 162; Ely & Walker Dry-Goods Co. v. McLaughlin, 78 Mo. App. 578.

It is error to charge that the party does not admit the facts in question, but only that the party could produce evidence tending to prove such facts. Elsner v. Supreme Lodge Knights &

be permanent.⁵ The admission cannot be used at a subsequent term,⁶ nor at a second trial,⁷ even though the witness is then dead.⁸

Admission in Evidence. — The effect of admitting the evidence simply authorizes it to be read, and it is no part of the court's duty to require that it be read. If not so read it is no more for the consideration of the jury than a deposition or other evidence not introduced.⁹

Instruction to Jury. — The admission is entitled to the same weight and credit as if the absent witness were present and testified to the fact, and the refusal to so instruct the jury is reversible error.¹⁰

B. COUNTER SHOWING. — In jurisdictions where the application for a continuance is addressed to the discretion of the court, the introduction of affidavits and in some instances of parol testimony in opposition to the motion is permitted.¹¹ But regardless of whether

Ladies of Honor, 98 Mo. 640, 11 S. W. 991.

5. *Cutler v. Cutler*, 130 N. C. 1, 40 S. E. 689, 89 Am. St. Rep. 854, 57 L. R. A. 209.

"The admission ceases when the emergency ceases." *Padgett v. Moll*, 159 Mo. 143, 60 S. W. 121, 81 Am. St. Rep. 347, 52 L. R. A. 854.

6. *State v. Felter*, 32 Iowa 43; *Driggs v. Morgan*, 10 Rob. (La.) 119.

7. *State v. Felter*, 32 Iowa 49; *Cutler v. Cutler*, 130 N. C. 1, 40 S. E. 689, 89 Am. St. Rep. 854, 57 L. R. A. 209.

8. *Powers v. State*, 87 Ind. 144.

9. *Michel v. Boxholm Co-op. Creamery*, 128 Iowa 706, 105 N. W. 323.

10. *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246; *Bloomington & N. R. v. Gabbert*, 111 Ill. App. 147.

Where under the statute it is required that the statement of the witness so admitted be read and treated as the deposition of an absent witness, it is not error for the court to refuse an instruction that the testimony must be considered in the same manner and to the same extent as if such witnesses had been present at the trial and given such testimony from the witness stand. *State v. White*, 17 Kan. 487.

11. **U. S.**—Anonymous, 1 Fed. Cas. No. 434, affidavits are permitted. *Ariz. Territory v. Shankland*, 3 Ariz. 403, 77 Pac. 492, affidavits are permitted. *Cal.*—*Griffin v. Polhemus*, 20 Cal. 180, affidavits are permitted. *Fla.*—*Leslie v. State*, 35 Fla. 171, 17 So. 555. *Ga.*—*Dallas v. State*, 129 Ga. 602, 59 S. E. 279; *Matthews v. Bates*, 93 Ga. 317, 20 S. E. 320 (in Georgia the statute permits the reception of either parol

or written evidence); *Williams v. State*, 69 Ga. 11. **Ia.**—*State v. Baker*, 146 Iowa 612, 125 N. W. 659 (where affidavits were received); *State v. Belvel*, 89 Iowa 405, 56 N. W. 545, 27 L. R. A. 846; *State v. Wells*, 61 Iowa 629, 17 N. W. 90, 47 Am. Rep. 822. **Kan.**—*Cushenberry v. McMurray*, 27 Kan. 328, where oral testimony was received. **Miss.**—*Strauss v. State*, 58 Miss. 53, holding that "other evidence" may be received. **Mo.**—*State v. McCoy*, 111 Mo. 517, 20 S. W. 240; *State v. Bailey*, 94 Mo. 311, 7 S. W. 425 (affidavits are permitted). **N. Y.**—*Weed v. Lee*, 50 Barb. 354 (a justice may allow the introduction of evidence); *Ogden v. Payne*, 5 Cow. 15 (affidavits); *Schaffer v. Schaffer*, 53 Hun 630, 5 N. Y. Supp. 544 (where both affidavits and oral testimony was received). **N. C.**—*State v. Bishop*, 98 N. C. 773, 4 S. E. 357, by oral testimony. **Okla.**—*Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 945, by affidavits. **Ore.**—*State v. Feister*, 32 Ore. 254, 50 Pac. 561, counter affidavits. **S. D.**—*State v. Pinkey*, 22 S. D. 550, 118 N. W. 1042, by affidavits. **Tenn.**—*Shoun v. State*, 111 Tenn. 166, 78 S. W. 91, counter affidavits. **Tex.**—*Bryce v. Jones*, 38 Tex. 205 (affidavit controverting allegation of diligence); *Hyde v. State*, 16 Tex. 445, 67 Am. Dec. 630; *Dean v. State*, 47 Tex. Crim. 243, 83 S. W. 816; *Huling v. State* (Tex. Crim.), 80 S. W. 1006 (by affidavits); *Nelson v. State* (Tex. Crim.), 75 S. W. 502; *Johnson v. State*, 44 Tex. Crim. 332, 71 S. W. 25; *Lane v. State* (Tex. Crim.), 28 S. W. 202 (matter of diligence alone can be controverted). **Wash.**—*Skagit R. & Lumb. Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077, counter affidavits.

written or parol evidence may be received, the sole purpose of evidence is to aid the court in determining whether or not a continuance is necessary, and it cannot go to the extent of presenting the case on its merits, or the materiality of the testimony.¹²

Compare Manning v. Jameson, 1 Cranch C. C. 285, 16 Fed. Cas. No. 9,045, where the reading of a counter affidavit was permitted but was not to be considered as a precedent.

The court declared in Horn v. State, 62 Ga. 362: "The counter-showing contemplated by the law consists of such facts as that the witness has not been subpoenaed, or defendant gave him leave to be absent, or he is out of the state, or dead, or was not present at all on the occasion of the crime; but not that the statement of the absent witness is untrue because the state's witness was not in court and swore differently, both having equal opportunities of knowing the truth."

In Missouri the filing of counter affidavits has been the settled law of the state since the early case of Riggs v. Fenton, 3 Mo. 28; State v. Dettmer, 124 Mo. 426, 27 S. W. 1117; State v. McCoy, 111 Mo. 517, 20 S. W. 240; State v. Bailey, 94 Mo. 311, 7 S. W. 425.

The filing of counter affidavits is a matter of practice to be regulated by the trial court. Riggs v. Fenton, 3 Mo. 28.

In Wisconsin there is no statute "governing the matter of whether counter affidavits are proper or not and no settled judicial policy in respect to the matter found in the adjudications of this court." Miller v. State, 139 Wis. 57, 64, 119 N. W. 850.

Where the illness of the accused in criminal cases is in question, the court may appoint a committee of physicians to report on the matter. Kan.—State v. Rogers, 56 Kan. 362, 43 Pac. 256. Miss.—Lipscomb v. State, 76 Miss. 223, 25 So. 158. E. I.—State v. Silvins, 22 R. I. 322, 47 Atl. 888.

The court may look to the sheriff's return to see if the statement in the affidavit concerning service is correct. Dansey v. State, 23 Fla. 316, 2 So. 692.

If there is a suspicion of delay or mistake, the court may examine the party as to what he expects to prove

by the witness. Harris v. Harris, 2 Leigh (Va.) 584.

In criminal cases, the court may examine the accused under oath as to matters contained in his affidavit on the application for a continuance. State v. Betsall, 11 W. Va. 703.

Refusal to submit to a cross-examination on an affidavit for a continuance was held sufficient reason for denying a continuance in Boatz v. Berg, 51 Mich. 8, 16 N. W. 184.

12. U. S.—Anonymous, 1 Fed. Cas. No. 434. Ia.—State v. Dakin, 52 Iowa 395, 3 N. W. 411. Ky.—Hughes v. Com., 25 Ky. L. Rep. 2153, 80 S. W. 197; Salisbury v. Com., 3 Ky. L. Rep. 211. Tenn.—Shoun v. State, 111 Tenn. 166, 78 S. W. 91. Wis.—Miller v. State, 139 Wis. 57, 119 N. W. 850.

In Missouri counter affidavits "are not permitted to controvert the truth of the allegations made by the applicant for a continuance as to what the testimony of the witnesses would be, . . . except where fraud or imposition is suggested, or there is good reason to believe the object is delay." State v. Good, 132 Mo. 114, 130, 33 S. W. 790. See also State v. Hilsabeck, 132 Mo. 348, 34 S. W. 38, where a counter affidavit was received made by a witness named in the application for a continuance.

Purpose of Counter Showing.—Ordinarily the opposite party will not be permitted to offer testimony to disprove the truth of the facts expected to be established by the absent witness, by way of a counter showing. The question in a motion to continue a case on the ground of the absence of a material witness is, not the truth or falsity of the expected testimony, but whether the witness if present, would swear to the truth. Dallas v. State, 129 Ga. 602, 59 S. E. 279.

Allegations other than those in reference to what the witness will testify may be contradicted by a counter affidavit. State v. Murdy, 81 Iowa 603, 47 N. W. 867.

The use of counter affidavits should be confined to narrow limits. They

In other states the practice has become settled not to permit the reception of *aliunde* proof in opposition to the motion.¹³

Statutes. — There are other jurisdictions where the right to a continuance is statutory, and when the affidavit for the continuance complies strictly with the statute it is held the court must grant the continuance and no counter-showing by affidavits or otherwise can be received.¹⁴

VII. HEARING AND DETERMINING QUESTION OF CONTINUANCE. — **A. GENERAL PRINCIPLES.** — Whether or not a continuance shall be allowed rests largely within the sound judicial discretion of the trial court to be exercised in any given case according to the facts and circumstances thereof.¹⁵ In some jurisdictions, statutes

may be used to show that there is no reason why the witness would so testify, but not to deny the truth of the testimony in question. *Halderman v. Territory*, 7 Ariz. 120, 60 Pac. 876.

In Louisiana counter-affidavits as a rule are not receivable, but may be allowed where repeated continuances or suspicions as to bad faith occur. *Maher v. Pulley*, 8 La. 89.

13. **La.**—*State v. Rugero*, 117 La. 1040, 42 So. 495; *State v. Abshire*, 47 La. Ann. 542, 17 So. 141; *State v. Bolds*, 37 La. Ann. 312; *State v. Simien*, 30 La. Ann. 296. **Neb.**—*Barton v. McKay*, 36 Neb. 632, 54 N. W. 968; *Miller v. State*, 29 Neb. 437, 45 N. W. 451; *Gandy v. State*, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108; *Williams v. State*, 6 Neb. 334.

14. **Ill.**—*Chicago P. E. Exch. v. McClaughry*, 148 Ill. 372, 36 N. E. 88; *Quincy Whig Co. v. Tillson*, 67 Ill. 351; *Wick v. Weber*, 64 Ill. 167. **Ind.**—*Eslinger v. East*, 100 Ind. 434; *Cutler v. State*, 42 Ind. 244; *Linville v. Golding*, 11 Ind. 374; *Hubbard v. State*, 7 Ind. 160. **Wis.**—*Miller v. State*, 139 Wis. 57, 119 N. W. 850.

When Error Harmless. — In Illinois there is no authority for the filing of counter affidavits on a motion for a continuance, and it is usually reversible error to permit it to be done; but where, notwithstanding the reception of the counter affidavits the continuance was granted and for aught that appeared a reasonable time to prepare the defense and to procure the attendance of witnesses was granted, such error was harmless (*Price v. People*, 131 Ill. 223, 23 N. E. 639), nor is there reversible error where the appellate court find that independent of the counter

affidavit so improperly permitted to be filed, the application for the continuance was properly overruled. *Quincy Whig Co. v. Tillson*, 67 Ill. 351.

15. **U. S.**—*Fidelity & D. Co. v. L. Bucki & S. Lumb. Co.*, 189 U. S. 135, 23 Sup. Ct. 582, 47 L. ed. 744. **Ala.**—*Mason v. State*, 53 So. 153. **Ariz.**—*Copper Belle Min. Co. v. Costello*, 12 Ariz. 318, 100 Pac. 807, after supplemental complaint. **Ark.**—*St. Louis, etc., R. Co. v. Grimsley*, 90 Ark. 64, 117 S. W. 1064; *Thompson v. State*, 26 Ark. 323. **Calo.**—*Mount v. Apt*, 119 Pac. 150. **Del.**—*Dulany v. Boston*, 2 Har. 350. **Fla.**—*Clements v. State*, 51 Fla. 6, 40 So. 432. **Ga.**—*Anderson v. State*, 72 Ga. 98; *Hooper v. Memphis Branch R. & S. Co.*, 19 Ga. 85. **Idaho.**—*Storer v. Heltfeld*, 17 Idaho 113, 105 Pac. 55. **Ill.**—*Ault v. Rawson*, 14 Ill. 484; *Brooks v. McKinney*, 5 Ill. 309; *Vickers v. Hill*, 2 Ill. 307; *People v. Crowe*, 130 Ill. App. 349. **Ia.**—*Purinton v. Frank*, 2 Iowa 565. **Kan.**—*McLean v. State*, 28 Kan. 372; *Davis v. Wilson*, 11 Kan. 74; *State v. Stredder*, 3 Kan. App. 631, 44 Pac. 34; *Missouri Pac. R. Co. v. Haynes*, 1 Kan. App. 586, 42 Pac. 259. **Ky.**—*Gaskin v. Georgetown*, 118 Ky. 251, 80 S. W. 821. **La.**—*McCarty v. McCarty*, 19 La. 296; *State v. Celestin*, 48 La. Ann. 272, 19 So. 119; *Rist v. Abbott*, 19 La. Ann. 268. **Mo.**—*Adams Exp. Co. v. Trego*, 35 Md. 47. **Mich.**—*People v. Boyd*, 151 Mich. 577, 115 N. W. 687, 15 Det. Leg. N. 36. **Minn.**—*State v. McCarty*, 17 Minn. 76. **Mo.**—*Seogin v. Hudspeth*, 3 Mo. 123. **Pa.**—*In re Becker*, 3 Pa. Dist. 513; *McDermot v. Dearnley*, 2 Walk. 386. **S. C.**—*Cook v. Cottrell*, 4 Strobb. 61; *Wardlaw v. Hammond*, 9 Rich. L. 454;

exist making a continuance a matter of right in certain cases.¹⁶ The continuance should not be granted on behalf of a party defendant, unless he has a meritorious defense,¹⁷ nor notwithstanding a hearing to the adverse party.¹⁸

Separate Trials to Different Defendants.—Where separate trials are awarded different defendants, the court may grant a continuance as to some of the defendants and refuse it as to others.¹⁹

Hunter v. Glenn, 1 Bailey 542; *Price v. Justrobe*, Harp. 111; *Farrand v. Bouchell*, Harp. 83. **Tex.**—*McCoy v. Jones*, 9 Tex. 363; *Aiken v. State*, 10 Tex. App. 610; *Williams v. State*, 10 Tex. App. 114; *Ward v. Boon*, Dall. Dec. 561. **Utah.**—*Almy v. Hess*, 2 Utah 223. **Vt.**—*Massucco v. Tomassi*, 78 Vt. 188, 62 Atl. 57. **Va.**—*Harman v. Howe*, 27 Gratt. 676; *Syme v. Montague*, 4 Hen. & M. 180; *Hook v. Nanny*, 4 Hen. & M. 157 note. **Wash.** *Spokane v. Costello*, 42 Wash. 182, 84 Pac. 652; *Catlin v. Harris*, 7 Wash. 542, 35 Pac. 385. **W. Va.**—*Mate Creek Coal Co. v. Todd*, 66 W. Va. 671, 66 S. E. 1066; *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821. **Wis.**—*State v. Lally*, 134 Wis. 253, 114 N. W. 447.

Not an Arbitrary Discretion.—*Sun Ins. Office v. Stegar*, 129 Ky. 808, 112 S. W. 922.

"While on the one hand, the court should grant the indulgence where it is necessary to the attainment of justice, on the other hand, they should guard against its being used as an instrument of delay and injustice." *Simms v. Alcorn*, 1 Bibb. (Ky.) 348.

This is especially applicable to criminal prosecutions. *Miller v. State*, 94 Ark. 538, 128 S. W. 353.

It is essentially a matter of discretion where a party applies at the time set for trial without legal showing. *In re Lovern's Estate*, 137 Cal. 680, 70 Pac. 783.

Whether absence of a party is a good cause for continuance is for the trial court to determine, though in Missouri a refusal to continue for unavoidable absence is reversible even if, in the opinion of the appellate court harm has been done. *Riverside Lumb. Co. v. Schmidt*, 130 Mo. App. 227, 109 S. W. 71.

A judge should not permit his discretion to be controlled by his custom which has not the force of law. *Varn v. Green*, 50 S. C. 403, 27 S. E. 862.

Where the court brought in the absent witnesses instead of continuing the case because of their absence, it was held not to be ground for a new trial. *Betts v. State*, 66 Ga. 508.

16. *Maury v. Commercial Bank*, 5 Smed. & M. (Miss.) 41; *Territory v. Kinney*, 3 N. M. 369, 9 Pac. 539.

Under the Illinois statute (Rev. St., ch. 110, §42) a continuance is a matter of right if the affidavit discloses the necessary facts. *Hall v. Hale's Estate*, 202 Ill. 326, 331, 66 N. E. 1060.

Such a statute once existed in Texas (see *Cleveland v. Cole*, 65 Tex. 402; *Austin v. State*, 42 Tex. 345; *Goodson v. Johnson*, 35 Tex. 622; *Hyde v. State*, 16 Tex. 445, 67 Am. Dec. 630; *Prewitt v. Everett*, 10 Tex. 283; *Wilborn v. Elmendorf* (Tex. Civ. App.), 40 S. W. 1059; *Tooney v. State*, 5 Tex. App. 163; *Stephenson v. State*, 5 Tex. App. 79; *Sansbury v. State*, 4 Tex. App. 99; *Swofford v. State*, 3 Tex. App. 76; *Peeler v. State*, 2 Tex. App. 455), but has been repealed (see *Aiken v. State*, 10 Tex. App. 610).

By rule of court, one continuance by consent at the request of the parties, made imperative. See *Schrimpton v. Bertolet*, 155 Pa. 638, 26 Atl. 776, 32 W. N. C. 429.

17. **Ga.**—*Garlington v. Fletcher*, 111 Ga. 861, 36 S. E. 920. **Ia.**—*Duncan v. Hobart*, 8 Iowa 337. **Mo.**—*Calhoun v. Crawford*, 50 Mo. 458. **Tex.**—*White v. Waco Bldg. Assn.* (Tex. Civ. App.), 31 S. W. 58.

18. *Wheeler v. State*, 14 Ind. 573.

19. **Ind.**—*White v. State*, 31 Ind. 262. **Ia.**—*Reed v. Lane*, 96 Iowa 454, 65 N. W. 380. **La.**—*State v. Hampton*, 14 La. Ann. 725.

Joint Liability.—In an action before a justice of the peace against joint makers on a promissory note, a continuance on the cause as to one or of several of the defendants is a nullity. *Root v. Dill*, 38 Ind. 169. It has, however, been held that under such circumstances a

B. WHEN APPLICATION UNDER SUSPICION. — It has been frequently held that where the court is convinced that the application is made merely for delay;²⁰ or, when for any reason, the court suspects the good faith of the party in seeking the continuance,²¹ the continuance may be refused. There is, however, respectable authority to the contrary.²²

C. TIME TO WHICH CONTINUANCE MAY BE GRANTED. — Although a continuance is generally granted only till the next term for the reason that the parties may be ready for trial by the next term,²³ it may be granted in exceptional cases to a term subsequent to the next term.²⁴

D. IMPOSITION AND ENFORCEMENT OF TERMS. — In the exercise of a sound discretion, the court may impose terms or conditions upon the granting of a continuance.²⁵ For example, the court may require the

continuance as to one operates to continue the case as a whole and as to all of the defendants. *Medlock v. Wood*, 4 Ga. App. 368, 61 S. E. 516; *Thompson v. State*, 9 Tex. App. 301.

20. *Alaska*.—*Pratt v. United Alaska Min. Co.*, 1 Alaska 95. *Cal.*—*Benedict v. Cozzens*, 4 Cal. 381. *Ga.*—*Tomlin v. State*, 110 Ga. 268, 34 S. E. 845; *Bog-gess v. Lowrey*, 78 Ga. 353; *Nesmith v. L. Mohr & Sons*, 7 Ga. App. 558, 67 S. E. 221. *Ky.*—*Halsey v. Com.*, 1 Ky. L. Rep. 402. *La.*—*State v. Douglas*, 116 La. 524, 40 So. 860; *Mon-cheux v. Mistrot*, 22 La. Ann. 421. *Tex.*—*Texas & P. R. Co. v. Watson*, 3 Wills. Civ. Cas., §302; *Barth v. Jes-ter Bros.*, 3 Wills. Civ. Cas., §222. *Va.*—*Harman v. Howe*, 27 Gratt. 676; *Hewitt v. Com.*, 17 Gratt. 627. *W. Va.*—*Second Nat. Bank v. Ralphsnyders*, 54 W. Va. 231, 46 S. E. 206.

21. *Ky.*—*Ogles v. Com.*, 11 Ky. L. Rep. 289, 11 S. W. 816. *Pa.*—*Com. v. Gross*, 1 Ashm. 281. *Tex.*—*Myers v. State*, 56 Tex. Crim. 222, 118 S. W. 1032. *Va.*—*Wormeley v. Com.*, 10 Gratt. 658.

The court may consider what he knows judicially. *Black v. Appolonio*, 1 Mont. 342.

When accused is before the court, it may judge of his physical condition and is not bound by affidavits. *Row-land v. State*, 125 Ga. 792, 54 S. E. 694; *Hardwick v. Com.*, 7 Ky. L. Rep. 363.

Moreover, the action of the accused before the court may be taken into account. *People v. Horton*, 4 Park. Cr. (N. Y.) 222.

To assist in determining the truth of the evidence in question, the court may consider the evidence at the trial. *Aiken v. State*, 10 Tex. App. 610.

22. *Ga.*—*Fox v. State*, 9 Ga. 373, holding that court's private knowledge is no ground for refusing a continuance. *Ky.*—*Baker v. Com.*, 10 Ky. L. Rep. 746, 10 S. W. 386; *Halsey v. Com.*, 1 Ky. L. Rep. 121. *La.*—*State v. Bolds*, 37 La. Ann. 312. *Va.*—*Welch v. Com.*, 90 Va. 318, 18 S. E. 273.

In passing on the application the court cannot pass upon the truth of what the absent witness, it is claimed, would testify. This is for the jury. *Roquemore v. State*, 54 Tex. Crim. 592, 114 S. W. 592.

23. *People v. McLane*, 1 Wheeler Cr. Cas. (N. Y.) 31.

24. *Bolanz v. Com.*, 24 Gratt. (Va.) 31.

Rep. of Pr. in C. P. 45, 119; *Bac. Abr. Trial* (H).

The court may continue a cause to an adjourned term, where such term next ensues. *State v. Harris*, 59 Mo. 550.

A justice of the peace must adjourn a cause to a certain day and not indefinitely. *Jaques v. Rice*, 1 Harr. (Del.) 33.

A statutory period fixing a maximum length of adjournment, refers to a single adjournment and not to the aggregate of several. *First Nat. Bank v. Smith*, 24 Misc. 709, 53 N. Y. Supp. 795; *Bryant v. Pember*, 43 Vt. 599. *Contra*, *Cozens v. Allen*, 3 N. J. L. 851; *Steelman v. Cox*, 3 N. J. L. 509; *Bishah v. Tucker*, 2 N. J. L. 237.

25. *Ala.*—*Lewis v. Wood*, 42 Ala.

payment of costs incurred by the continuance,²⁸ or of a sum certain.²⁷

Enforcement.—When terms are imposed, the party seeking the continuance may waive the same or accept it upon the conditions offered. In the absence of a prompt waiver the order must be regarded as absolute.²⁸ The court may enforce the terms upon which the continuance is granted,²⁹ although it is not bound to do so,³⁰ and for failure to comply with such conditions, judgment against the party in default may be entered.³¹

502. **Ill.**—Atchison, T. & S. F. R. Co. v. Jones, 110 Ill. App. 626. **Miss.**—Hamilton v. Cooper, Walk. 542, 12 Am. Dec. 588. **N. J.**—Snedekers v. Allen, 2 N. J. L. 32. **Tenn.**—McFarlane v. Moore, 1 Overt. 32. **Eng.**—Rex v. Morphew, 2 Maule & S. 602, 105 Eng. Reprint 506.

26. **U. S.**—Patton v. Blackwell, Brunner Col. Cas. 125, 18 Fed. Cas. No. 10,831; Beck v. Jones, 1 Cranch C. C. 347, 3 Fed. Cas. No. 1,206. **Ala.**—Alexander v. Moore, 111 Ala. 410, 20 So. 339; Rhea v. Tucker, 56 Ala. 450; Waller v. Sultzbacher, 38 Ala. 318. **Ark.**—Boone v. Skinner, 85 Ark. 200, 107 S. W. 673. **Cal.**—Eltzroth v. Ryan, 91 Cal. 584, 27 Pac. 932. **Ind.**—Makepeace v. State, 8 Ind. 41. **Mo.**—State v. Butler, 118 Mo. App. 587, 95 S. W. 310. **Mont.**—State v. Second Judicial District Court, 10 Mont. 456, 26 Pac. 182. **Nev.**—Luke v. Coffee, 31 Nev. 165, 101 Pac. 555. **N. C.**—Slocumb v. Philadelphia Const. Co., 142 N. C. 349, 55 S. E. 196; Tyce v. Ledford, 2 N. C. 26. **S. C.**—Pullian v. Barteo, 3 Brev. 146.

In criminal cases, the costs may be taxed against the accused as a condition. *In re Esten*, 9 R. I. 191.

In a quasi criminal proceeding such a condition should not be imposed. *City of Boscobel v. Bugbee*, 41 Wis. 59.

27. **Cal.**—Pomeroy v. Bell, 118 Cal. 635, 50 Pac. 683. **N. Y.**—Kennedy v. Wood, 54 Hun 14, 1 Civ. Proc. 375, 7 N. Y. Supp. 90. **Wash.**—Tacoma Nat. Bank v. Peet, 9 Wash. 222, 37 Pac. 426. **Wis.**—Hawkins v. Northwestern U. R. Co., 34 Wis. 302; Knox v. Arnold, 1 Wis. 70.

No refund though the adverse party succeeds in the cause. *Park v. Cochran*, 2 N. C. 410.

Conditions not to be superadded at a subsequent term. *Montgomery & W. Plank Road Co. v. Persse*, 25 Ala. 536.

Conditions Upheld.—Confession of

judgment as to part not in dispute. *Gowen & Co. v. Jones*, 20 Ala. 128. In chancery, execution of bond for fulfillment of decree. *Dudley v. Witter*, 51 Ala. 456. Dispensing with preliminary affidavits in taking a deposition. *Humes v. O'Bryan*, 74 Ala. 64. Stipulations as to future trial. *Ames v. Webbers*, 10 Wend. (N. Y.) 575. Rule for trial at next term. *Todd v. Thompson*, 2 Dall. (U. S.) 106, 1 L. ed. 309. The giving of bail. *Stanley v. Miers*, 1 Brev. (S. C.) 24. That a deposition, which court could not order to be taken, be taken. *Kirby v. Sisson*, 1 Wend. (N. Y.) 83.

28. *Barney v. Love*, 101 Mich. 543, 60 N. W. 58.

The court cannot order the payment of costs directly, but only as a condition of granting the continuance. *Bagley v. Ostrom*, 5 Hill (N. Y.) 516.

29. **N. H.**—Woodbury v. Swan, 59 N. H. 515. See *Murray v. Emmons*, 26 N. H. 523. **N. Y.**—Snodgrass v. Kenkle, 49 How. Pr. 122. **N. C.**—Walker v. Greenlee, 12 N. C. 367.

30. *Dunlap v. Horton*, 49 Ala. 412.

31. *Mauno v. Loeb*, 87 Ala. 374, 6 So. 376; *Booth v. Whitby*, 5 Hill (N. Y.) 446.

But judgment by default cannot be entered if the party is entitled to notice of the application for judgment. *Schlachter v. St. Bernard's Roman Catholic Church of Hoven*, 20 S. D. 186, 105 N. W. 279.

It seems that if for failure to comply with the conditions attached to the continuance, the court proposes to dismiss the action, such penalty should be provided for in express terms in the order of continuance. *Ex parte Abrams*, 48 Ala. 151.

Where a continuance is granted on condition that the costs be paid, the adverse party may, upon the failure to pay same, at his election, insist on having the trial proceed or compel the

E. SETTING ASIDE ORDER OF CONTINUANCE.—As by a continuance till the next term, the court does not lose jurisdiction of the case during the rest of the term,³² it may set aside a continuance during the same term in which it is granted.³³ But such a proceeding is exceptional and strong reason for such action must be shown,³⁴ and due notice thereof given.³⁵

F. FURTHER CONTINUANCE.—Although the granting of a further continuance after the first is a matter of discretion with the court,³⁶ more cogent reasons are generally demanded as the number of continuances increases.³⁷ However, it may be substantial error to refuse a further continuance.³⁸

payment of costs. *Gamble v. Taylor*, 43 How. Pr. (N. Y.) 375.

32. *Ala.*—*Saunders v. Coffin*, 16 Ala. 421. *Ill.*—*Sampson v. People*, 188 Ill. 592, 59 N. E. 427. *Ind.*—*Ralston v. Lothain*, 18 Ind. 303.

See also *Holt v. Gridley*, 7 Idaho 416, 63 Pac. 188.

33. *Ill.*—*Gridley v. Capen*, 72 Ill. 11. *Ind.*—*Amory v. Reilly*, 9 Ind. 490. *Tex.*—*Callahan v. State*, 30 Tex. 488.

34. *Ky.*—*Tunstall v. Barbour*, Hard. 560. *Mo.*—*Marsh v. Morse*, 18 Mo. 477. *Tex.*—*Brown v. State*, 3 Tex. App. 294.

35. *Ark.*—*Simmons v. Kirby*, 83 Ark. 631, 103 S. W. 1153; *Hayes v. Kirby*, 83 Ark. 367, 103 S. W. 1152. *Colo.*—*Chase v. People*, 2 Colo. 509. *Ill.*—*McKee v. Ludwig*, 30 Ill. 28; *Newell v. Clodfelter*, 3 Ill. App. 259. *La.*—*Ogden v. Wilson*, 18 La. Ann. 596. *Miss.*—*Campbell v. State*, 50 So. 499.

It is improper to set aside a continuance in the absence of the party who obtained the same. *Gray v. Ulrich*, 8 Kan. 112.

The continuance was held to have been improperly set aside in the following cases: *Ala.*—*Innerarity v. Fowner*, 2 Ala. 150. *Ga.*—*Wilkes v. Phillips*, 37 Ga. 588. *Mo.*—*State v. Whitsell*, 55 Mo. 430; *Taff v. Westerman*, 39 Mo. 413; *Gillespie v. State*, 12 Mo. 498; *McKay v. State*, 12 Mo. 492.

Proceeding to trial cancels an order of continuance. *Wilson v. Coles*, 2 Blackf. (Ind.) 402.

36. *Cal.*—*Levy v. Baldwin*, 7 Pac. 683. *Del.*—*Mousely v. Allmond*, 4 Harr. 92, before justice of the peace. *Ga.*—*Stanford v. New England Mtg. Sec. Co.*, 110 Ga. 274, 34 S. E. 600. *Ind.*—*Breedlove v. Bundy*, 96 Ind. 319. *Va.*—*Milstead v. Redman*, 3 Munf. 219.

Second application on same ground not ordinarily granted. *Ark.*—*Burris v. Wise*, 2 Ark. 33. *Ga.*—*Johnson v. State*, 58 Ga. 491; *Wilson v. State*, 33 Ga. 207. *Ill.*—*Northwestern, etc., Aid Assn. v. Primm*, 124 Ill. 100, 16 N. E. 98; *Peru Coal Co. v. Merrick*, 79 Ill. 112. *La.*—*State v. Redmond*, 37 La. Ann. 774; *Huff v. Freeman*, 15 La. Ann. 240.

In *Wilson v. Ring*, 83 Ill. 232, an affidavit asked for a continuance on substantially the same ground as before, viz.: that witness was afflicted with epilepsy from which he had intervals of relief, during one of which applicant expected to be able to take his deposition. No reason was given why the deposition had not been taken in one of those intervals after the first continuance. And the application was refused.

Different Grounds.—*Welsh v. Savery*, 4 Iowa 241.

A second affidavit was held bad because it did not show reasonable excuse for the failure to embrace all the reasons for the continuance in the first application. *Shattuck v. Myers*, 13 Ind. 46, 74 Am. Dec. 236.

37. *Fla.*—*Melbourne v. State*, 51 Fla. 69, 40 So. 189; *Sanford v. Cloud*, 17 Fla. 532. *Ill.*—*Birks v. Houston*, 63 Ill. 77; *Shook v. Thomas*, 21 Ill. 86. *La.*—*Turnbull v. Barrow*, 9 La. Ann. 135; *Gay v. Kendig*, 2 Rob. 472. *N. J.*—*Ogden v. Gibbons*, 5 N. J. L. 518, 353. *Tex.*—*McCrimmon v. State*, 52 Tex. Crim. 318, 106 S. W. 1158; *Weaver v. State*, 52 Tex. Crim. 11, 105 S. W. 189. *W. Va.*—*Wilson v. Kochnelein*, 1 W. Va. 145.

38. *State v. Walker*, 69 Mo. 274; *Brooks v. Howard*, 30 Tex. 278; *Hipp v. Huchett*, 4 Tex. 20.

Frequently, a limit is placed on the number of continuances obtainable.³⁹

A continuance by consent should be counted in determining the number of the continuance.⁴⁰

A conflict of authority exists as to whether an application which has been refused should be counted.⁴¹

VIII. EFFECT OF CONTINUANCE.—As to the effect of a continuance it has been held that although the continuance cannot be set aside and the trial proceeded with without due notice, for the consideration of, and action upon, collateral matters, the parties are presumed to continue in court, and much discretion is left to the court as to such matters.⁴²

Operating From Term to Term.—A general continuance operates to continue the case from term to term.⁴³

As a Discontinuance of the Action.—A continuance does not as a rule, operate as a discontinuance of the action,⁴⁴ though it may so result

39. *Young v. Harrison*, 21 Ga. 584.

40. *Cromwell v. State*, 59 Tex. Crim. 525, 129 S. W. 622; *Goode v. State*, 57 Tex. Crim. 220, 123 S. W. 597.

41. It should be counted. *Bice v. State*, 55 Tex. Crim. 529, 117 S. W. 163; *Sullivan-Sabford Lumb. Co. v. Cooper* (Tex. Civ. App.), 126 S. W. 35. *Contra*, *Seale v. Maguire*, 69 Mo. 197.

After the continuances are exhausted by the plaintiff, the court may dismiss the case; when by defendant it may strike out the defense. *Bartee v. Andrews*, 18 Ga. 407.

Continuances are counted from the filing of the suit, not from the reversal of the case on appeal or error. *McMichael v. Truehart*, 48 Tex. 216.

Continuances for "providential causes" (here, illness of attorney) are to be charged against neither party. *Printup v. Mitchell*, 19 Ga. 586.

When the continuances are exhausted it is a matter of discretion for the court to grant further continuances at its own instance. *Wood v. McGuire*, 21 Ga. 576.

42. *Papin v. Buckingham*, 33 Mo. 454.

A justice of the peace who grants a continuance has no right to order a further continuance prior to the day appointed. *Spencer v. Perry*, 17 Me. 413.

After a continuance, the cause cannot be reinstated by agreement of counsel. *Head v. Bridges*, 70 Ga. 729.

Where a rule has been entered to try or non pros., such a rule is not dis-

charged by a continuance. *King of Spain v. Oliver*, Pet. C. C. 217, 14 Fed. Cas. No. 7,812.

Without notice to the other party or his counsel, no further proceedings during the term can be had in a cause continued on the day fixed for trial. *Mooney v. Hooper*, 3 La. 445.

In a criminal case continued till the next term, the court does not lose jurisdiction of the case, where the accused and his attorney consent to the continuance. *Lowe v. State*, 118 Wis. 641, 96 N. W. 417.

When there is a continuance and not a mere adjournment, the jury should be regarded as discharged. It is error to require a party to proceed to try the case before such a jury. *Lyons v. Hamilton*, 69 Iowa 47, 28 N. W. 429.

After a continuance, no proceedings can be had until the term to which the cause was continued. *Lamden v. Hurst*, *Thomp. Tenn. Cas.* 18; *Hurst v. Selvidge*, *Thomp. Tenn. Cas.* 17.

Failure to enter a continuance makes no discontinuance. The case stands continued without further order. *Harrison v. Com.*, 81 Va. 491.

43. *Hair v. State*, 14 Neb. 503, 16 N. W. 829.

A continuance to the next term passes the case to the next regular term, so that judgment at an adjourned term is irregular and will be set aside. *Sawyer v. Bryson*, 10 Kan. 199.

44. *Goff v. Vedder*, 12 Civ. Proc. (N. Y.) 358.

In *Johnston v. Ditty*, 7 Yerg. (Tenn.) 85, by statute, it was held unnecessary

in an action pending in a justice's court, as when the adjournment is without authority.⁴⁵

Error May Be Cured or Waived.—Failure to take an exception to the ruling of the court,⁴⁶ or abandoning the issue waives error in refusing to grant a continuance.⁴⁷ It has also been held that the objection may be waived by voluntarily going to trial,⁴⁸ or by complying with the terms of the continuance.⁴⁹ If the absent witness in question appears and testifies, the error is cured,⁵⁰ nor will a judgment be reversed where such witness appeared but was not called upon to testify.⁵¹

Furthermore, a court of review will not notice the refusal of the court to grant a continuance, unless such refusal was one of the grounds on which the motion for a new trial was based.⁵²

IX. REVIEW OF DECISION.—To warrant a reversal of the decision of the lower court granting or denying a continuance, it must appear that the court has been guilty of an abuse of discretion,⁵³ unless

to enter a continuance of any particular cause; a general continuance at the end of each term will prevent a discontinuance.

45. *School Dist. No. 7 v. Thompson*, 5 Minn. 280; *Mayor, etc., of City of New York v. Husson*, 2 Hilt. (N. Y.) 7.

46. *Cal.*—*People v. Bell*, 36 Pac. 94, 95. *Ill.*—*Pick v. Ketchum*, 73 Ill. 366. *Ky.*—*Owings v. Beall*, 1 Litt. 253. *La.* *State v. Frazier*, 43 La. Ann. 915, 9 So. 926. *Mo.*—*State v. Thompson*, 141 Mo. 403, 42 S. W. 949, *affirmed* in 171 U. S. 380, 18 Sup. Ct. 922, 43 L. ed. 204.

47. *Day v. Mooney*, 3 Okla. 608, 41 Pac. 142.

48. *Ky.*—*Begley v. Duff*, 7 Ky. L. Rep. (abstract) 376. *Mo.*—*Watson v. Walsh*, 10 Mo. 454. *Tex.*—*Harris v. State*, 40 Tex. Crim. 8, 43 S. W. 502.

49. *Smith v. Grant*, 11 Civ. Proc. (N. Y.) 354.

A withdrawal of the plea is not a waiver of the objection. *Wright v. Basye*, 6 Blackf. (Ind.) 419.

50. *Weeks v. State*, 31 Miss. 490.

51. *McGrath v. State*, 35 Tex. Crim. 413, 34 S. W. 127.

52. *Cal.*—*People v. McCrory*, 41 Cal. 458; *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 161. *Ga.*—*Copenhagen v. State*, 14 Ga. 22. *Miss.*—*McDaniel v. State*, 8 Smed. & M. 401, 47 Am. Dec. 93.

53. *U. S.*—*Fidelity & Dep. Co. v. L. Bucki & Son Lumb. Co.*, 189 U. S. 135, 23 Sup. Ct. 582, 47 L. ed. 744; *Hardy v. United States*, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. ed. 1137; *Goldsby v. United States*, 160 U. S. 70, 16

Sup. Ct. 216, 40 L. ed. 343 (held not reviewable); *Isaacs v. United States*, 159 U. S. 487, 16 Sup. Ct. 51, 40 L. ed. 229; *Crumpton v. United States*, 138 U. S. 361, 11 Sup. Ct. 355, 34 L. ed. 958 (not reviewable); *McFaul v. Ramsey*, 20 How. 523, 15 L. ed. 1010 (not reviewable); *Thompson v. Selden*, 20 How. 194, 15 L. ed. 1001 (not reviewable); *Barrow v. Hill*, 13 How. 54, 14 L. ed. 48 (not reviewable); *Simms v. Hundley*, 6 How. 1, 12 L. ed. 319 (not reviewable); *Woods v. Young*, 4 Cranch 237, 2 L. ed. 607 (not reviewable); *Baker v. Texarkana Nat. Bank*, 74 Fed. 593, 20 C. C. A. 545, 41 U. S. App. 185 (not reviewable); *Richmond R. & Elec. Co. v. Dick*, 52 Fed. 379, 3 C. C. A. 149, 8 U. S. App. 99 (not reviewable in court of appeals); *Campbell v. Strong*, Hempst. 265, 4 Fed. Cas. No. 2,367a; *Armour & Co. v. Kollmeyer*, 161 Fed. 78, 16 L. R. A. (N. S.) 1110. *Ala.*—*Trammell v. Vane*, 62 Ala. 301 (held not reviewable); *Dudley v. Witter*, 46 Ala. 664 (held not reviewable, unless abuse of discretion); *Ex parte South & N. A. R. Co.*, 44 Ala. 654; *Ex parte Hunter*, 39 Ala. 560 (held not reviewable); *Planters' & M. Bank v. Walker*, 7 Ala. 926 (held, in equity, not reviewable); *Planters' & M. Bank v. Willis & Co.*, 5 Ala. 770 (held irreversible on error); *Evans v. Bolling*, 5 Ala. 550 (in equity). *Ark.*—*Cone v. Bloomer*, 85 Ark. 334, 108 S. W. 221; *Loftin v. State*, 41 Ark. 153; *Watts v. Corn*, 40 Ark. 114; *McDonald v. Smith*, 21 Ark. 460. *Cal.*—*Frank v. Brady*, 8 Cal. 47. *Colo.*—*Michael v. Mills*, 22

the decision was founded on a mistake.⁵⁴ If the record is silent or uncertain on any point material to establish abuse of discretion the presumptions are all in favor of the correctness of the ruling.⁵⁵

Colo. 439, 45 Pac. 429. Fla.—Clinton v. State, 53 Fla. 98, 43 So. 312; Jones v. State, 44 Fla. 74, 32 So. 793; Gass v. State, 44 Fla. 70, 32 So. 109; Jenkins v. State, 31 Fla. 196, 12 So. 677; Livingston v. Cooper, 22 Fla. 292; McNealy v. State, 17 Fla. 198. Ga. Marshall v. Clary, 44 Ga. 511; Roe v. Doe, 42 Ga. 403; Walker v. Mitchell, 41 Ga. 102. Ill.—Chicago Public Stock Exch. v. McClaughry, 148 Ill. 372, 36 N. E. 88. Ia.—Woolheather v. Risley, 38 Iowa 486; Harrison v. Charlton, 37 Iowa 134; Boone v. Mitchell, 33 Iowa 45; Snediker v. Poorbaugh, 29 Iowa 488; Oonnor v. Griffin, 27 Iowa 248; Avery v. Wilson, 26 Iowa 573. Ky.—Sun Ins. Office v. Stegar, 129 Ky. 808, 112 S. W. 922. La.—State v. Charles, 108 La. 230, 32 So. 354; State v. Spooner, 41 La. Ann. 780, 6 So. 879; State v. George, 37 La. Ann. 786. Mass.—Com. v. Drake, 124 Mass. 21, held not reviewable. Mo.—State v. White, 152 Mo. 159, 53 S. W. 895; State v. Fox, 79 Mo. 109; State v. Klinger, 43 Mo. 127; King v. Pearce, 40 Mo. 223; Johnson v. Strader, 3 Mo. 359. Mont.—Territory v. Perkins, 2 Mont. 467. Neb.—Keens v. Robertson, 46 Neb. 837, 65 N. W. 897; Ingalls v. Nobles, 14 Neb. 272, 15 N. W. 351. N. C.—McCurry v. McCurry, 82 N. C. 296. Ore.—Cole v. Willow Riv., etc., Co., 118 Pac. 1030; State v. O'Niel, 13 Ore. 183, 9 Pac. 284. S. D.—Hannahs v. Provine, 133 N. W. 53; Gaines v. White, 1 S. D. 434, 47 N. W. 524. Tenn.—Walt v. Walsh, 10 Heisk. 315; Rexford v. Pulley, 4 Baxt. 364. Tex.—Burrell v. State, 18 Tex. 713; Green v. Crow, 17 Tex. 180; Hipp v. Bissell, 3 Tex. 18. Wash.—Knapp v. City of Chehalis, 118 Pac. 211. W. Va.—Boyd v. Beebe, 64 W. Va. 216, 61 S. E. 304, 17 L. R. A. (N. S.) 660; Marmet Co. v. Archibald, 37 W. Va. 778, 17 S. E. 299; Buster v. Holland, 27 W. Va. 510; Davis v. Walker, 7 W. Va. 447.

In criminal cases, even more than in civil cases, the motion will be scanned with care. Pittman v. State, 51 Fla. 94, 41 So. 385, 8 L. R. A. (N. S.) 509.

Where the testimony was unimportant, or was not probably true, or would not probably change the result, the application was properly refused. Singleton v. State, 57 Tex. Crim. 560, 124 S. W. 92.

In the following cases the ruling of the trial court was held erroneous: Ark.—Hensley v. Tucker, 10 Ark. 527. Ga.—Compton v. State, 108 Ga. 747, 32 S. E. 843; Barnard v. State, 73 Ga. 803. Ill.—City of Centralia v. Ayres, 133 Ill. App. 290. Ind.—Hurt v. State, 26 Ind. 106; Vanblaricum v. Ward, 1 Blackf. 50. Kan.—State v. Brown, 55 Kan. 766, 42 Pac. 363; State v. Hogan, 22 Kan. 490; West v. Rice, 4 Kan. 563. Ky.—Smith v. Ferguson, 3 Metc. 424; Morgan v. Com., 14 Bush 106. La.—State v. Mills, 123 La. 781, 49 So. 523; State v. Frederick, 48 La. Ann. 1374, 21 So. 23. Mich.—Mercer v. Lowell Nat. Bank, 29 Mich. 243. Miss. White v. State, 45 So. 611; Magee v. State, 45 So. 360; Havens v. State, 75 Miss. 488, 23 So. 181. Mo.—State v. Lewis, 74 Mo. 222; Moore v. McCullough, 6 Mo. 443. N. J.—Midler v. Lazadder, 14 N. J. L. 34.

When a continuance is denied, on appeal the court must not look to subsequent developments to vindicate the ruling. *Contra*, on a motion for a new trial. Hughes v. State, 18 Tex. App. 130.

Where the application for the continuance states the facts to which the absent witness would testify, and on the motion for a new trial an affidavit of such witness is presented in which he states facts contrary to what it was alleged in the moving papers that his testimony would be, the court on review will not say that the continuance was improperly denied. Rush v. State, (Tex. Crim.), 76 S. W. 927; Ransom v. State (Tex. Crim.), 70 S. W. 960; Hinman v. State, 59 Tex. Crim. 29, 127 S. W. 221; Smith v. State, 55 Tex. Crim. 628, 118 S. W. 145; Tune v. State, 49 Tex. Crim. 445, 94 S. W. 231.

54. Maynard v. Cleveland, 76 Ga. 52; Dangerfield v. Paschal, 20 Tex. 536. 55. Adams v. State, 56 Fla. 1, 48 So. 219.

CONTRIBUTION

By H. W. WILLIAMS,
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CROSS-REFERENCES:

Execution;
Indemnity;
Judgment;

Payment;
Subrogation.

I. CONTRIBUTION, NATURE AND WHEN LIES GENERALLY.

The right of contribution is the right of one or more co-obligors, who have paid more than their proportionate share of the obligation, or suffered more than their proportionate share of the loss, to call upon the other co-obligors to bear their proper share of the burden.¹

II. JURISDICTION AND FORM OF PROCEEDING.—**A. AT LAW OR EQUITY.**—Being equitable in its nature,² the right to sue in equity has existed from the earliest times.³ Later courts of law assumed jurisdiction, or were given jurisdiction by statute, but the holdings are uniform that chancery did not thereby lose jurisdiction, but that its jurisdiction is concurrent,⁴ especially where the action at law might not give as complete a remedy,⁵ or where multiplicity of

1. **Ala.**—*Vandiver v. Pollak*, 107 Ala. 547, 19 So. 180. **Del.**—*Eliason v. Eliason*, 3 Del. Ch. 260. **Ky.**—*Dupuy v. Johnson*, 1 Bibb 562. **Minn.**—*Canosia v. Township of Grand Lake*, 80 Minn. 357, 83 N. W. 346. **N. Y.**—*Campbell v. Mesier & Dunstan*, 4 Johns. Ch. 334. **Okla.**—*Strickler v. Gitchel*, 14 Okla. 523, 78 Pac. 94. **Ore.**—*Fischer v. Gaither*, 32 Ore. 161; *Van Winkle v. Johnson*, 11 Ore. 469. **S. C.**—*Screven v. Joyner*, 1 Hill Eq. 252, 26 Am. Dec. 199. **Eng.**—*Sir Will Harbert's Case*, 3 Coke 11, 76 Eng. Reprint 647; *Dering v. Earl of Winchelsea*, 1 Cox 318, 1 Wh. & Tud. Lead. Cas. in Equity 100, 29 Eng. Reprint 1184.

Distinguishing from Subrogation, see *Faires v. Cockrell*, 88 Tex. 428, 31 S. W. 190, 28 L. R. A. 528.

2. **Ga.**—*Sherling v. Long*, 122 Ga. 797, 50 S. E. 935; *Hall v. Harris*, 6 Ga. App. 822, 65 S. E. 1086. **Ind.**—*Sexton v. Sexton*, 35 Ind. 88. **Mich.**—*Kalamazoo Trust Co. v. Merrill*, 159 Mich. 649, 124 N. W. 597. **Mo.**—*Dysart v. Crow*, 170 Mo. 275, 70 S. W. 689. **N. Y.**—*Aspinwell v. Sacchi*, 57 N. Y. 334. **Wash.**—*Caldwell v. Hurley*, 41 Wash. 296, 83 Pac. 318.

It was for this reason, and because the right was based on an implied promise that the early common law did not allow contribution between tortfeasors. *Akeny v. Moffett*, 37 Minn. 109; *Merryweather v. Nixan*, 3 T. R. 186. 101 Eng. Reprint 1337.

This rule still obtains if the wrong is wilful. *Cox v. Cameron Lumb. Co.*, 39 Wash. 562, 82 Pac. 116. But contribution lies as between joint tortfeasors, provided the tort was one of negligence merely, or was committed

in good faith and without any wilful intention to commit a wrong. **Ala.**—*Vandiver v. Pollak*, 107 Ala. 547, 19 So. 180. **Conn.**—*Bailey v. Bussing*, 28 Conn. 455. **Minn.**—*Ankeny v. Moffett*, 37 Minn. 109, 33 N. W. 320. **Pa.**—*Armstrong County v. Clarion County*, 66 Pa. 218. **Utah.**—*Culmer v. Wilson*, 13 Utah 129, 44 Pac. 833, 57 Am. St. Rep. 713. **Eng.**—*Gerson v. Simpson*, L. R. 2 K. B. (1903) 197.

The party mulcted may have contribution, unless the facts connected with the tort were of such a character that the law will refuse the parties in fault any relief as against each other. *Eaton & Price Co. v. Mississippi Val. Trust Co.*, 123 Mo. App. 117, 100 S. W. 551.

3. "The right to sue in chancery for contribution was an established head of chancery jurisdiction in the time of Queen Elizabeth on the plain principles of natural justice." *Couch v. Terry's Admr.*, 12 Ala. 225. See also **Md.**—*Bruns v. Heise*, 101 Md. 163, 60 Atl. 604. **Mass.**—*Whitman v. Porter*, 107 Mass. 522. **N. C.**—*Robinson's Exrs. v. Kenon's Exrs.*, 3 N. C. 379.

4. **Ala.**—*Couch v. Terry's Admr.*, 12 Ala. 225. **Ky.**—*Fritts v. Kirchdorfer*, 136 Ky. 643, 124 S. W. 882. **Mass.**—*Cary v. Holmes*, 16 Gray 127. **Ore.**—*Thompson v. Hibbs*, 45 Ore. 141, 76 Pac. 778; *Fischer v. Gaither*, 32 Ore. 161. **Tex.**—*Mateer v. Cockrill*, 18 Tex. Civ. App. 391, 45 S. W. 751.

5. *Couch v. Terry's Admr.*, 12 Ala. 225.

Wherever the circumstances are such that an action at law will not give a complete remedy, equity may entertain jurisdiction. It is the peculiar cir-

suits may be avoided;⁶ and even where it is conceded that an ample remedy at law exists.⁷ A partner is not obliged to bring a bill in equity, even though partnership property be indirectly involved.⁸

B. ADJUSTING CONTRIBUTION IN MAIN ACTION OR PROCEEDING. Where the court has the parties properly before it, contribution may be enforced in the original proceeding,⁹ but the mere fact that the parties are so before it, does not compel the court to adjudicate the question of contribution.¹⁰ The rule does not permit the mere continuing of the suit by one obligor to force contribution from the other.¹¹ It is not a sufficient reason for settling the equities, that the affidavit of defense does not seem sufficient to the court.¹²

Where Other Parties May Be Involved.—It has been said to be “a safer plan” to adjudicate the question in another proceeding, where

circumstances of the case which enlarge this remedy beyond an action at law for contribution arising from the payment of the joint obligation. *Sherling v. Long*, 122 Ga. 797, 50 S. E. 935.

6. *Dysart v. Crow*, 170 Mo. 275, 70 S. W. 689; *Jarvis v. Matson* (Tex. Civ. App.), 94 S. W. 1079; *Jalufke v. Matejek*, 22 Tex. Civ. App. 384, 55 S. W. 395; *Mateer v. Cockrill*, 18 Tex. Civ. App. 391, 45 S. W. 751. See also, *Hoyt v. Tuthill*, 33 Hun 196.

7. Mo.—*Dysart v. Crow*, 170 Mo. 275, 70 S. W. 689. Va.—*Briggs v. Barnett*, 108 Va. 404, 61 S. E. 797; *Wayland v. Tucker*, 4 Gratt. 267. Wis.—*Bushnell v. Bushnell*, 77 Wis. 435, 46 N. W. 442.

8. As between joint judgment debtors who were sued not as a partnership, but merely as joint owners of the partnership property, the state of the partnership accounts being in no way involved, a common law action for contribution is the proper remedy of that partner who has paid more than his share of the judgment, and he is not obliged to file a bill in equity. *Power v. Rees*, 189 Pa. 496, 42 Atl. 26.

9. As between a tenant in common who is entitled to contribution from the other owners for taxes advanced, and one of such other owners who claims a right of set-off against such taxes to the amount of sums advanced to protect the property from adverse claims, the court having the parties before it for the purpose of adjusting

their equities on a bill praying for partition and for various other reliefs, may adjust and settle such claims for sums advanced to protect the property without obliging the filing of a bill or the bringing of assumpsit. *McClintock v. Fontaine*, 119 Fed. 448. See also, *Fritts v. Kirkdorfer*, 136 Ky. 643, 124 S. W. 882; *Hickey v. Dols*, 66 N. H. 612, 31 Atl. 900.

Allowed by way of set-off. *Mundorf v. Wier*, 38 Pa. Super. 348.

10. *Steele v. Leopold*, 135 App. Div. 247, 120 N. Y. Supp. 569.

Certain stockholders escaped liability in a suit for the dissolution of the corporation because no replication was filed to their sworn answers. On a suit for contribution brought by the other stockholders, it was contended that defendants should have been brought back into the original action by filing a cross-bill therein, instead of waiting until the plaintiffs had paid the decree against themselves and then asserting the right of contribution in a separate suit. *Siegel v. Fish*, 129 Ill. App. 319.

11. One of two joint obligors on a note, the other not having appeared, allowed action on the note to go by default, and then, by agreement with the plaintiff, proceedings were kept alive under color of plaintiff's name. *Hendrickson v. Hutchinson*, 29 N. J. L. 180.

12. Especially where it appeared that the affidavit was *prima facie* sufficient. *Morrison v. Warner*, 197 Pa. 59, 46 Atl. 1030.

it appears there were other participants not before the court,¹³ and where the exact state of accounts does not appear, ancillary proceedings are necessary.¹⁴

C. ADJUSTING IN COURT HAVING PROBATE JURISDICTION. — A court having jurisdiction to determine claims against an estate may pass upon a claim for contribution.¹⁵

D. STATUTORY REMEDY BY SUBROGATION TO JUDGMENT CREDITORS' RIGHTS. — In many states there is a statutory remedy given one who has paid a joint judgment, whereby he files certain notices with the clerk of court, serves notice upon his co-obligors, and becomes subrogated to the rights of the judgment creditor.¹⁶ This remedy is cumulative, and one who has failed therein may, nevertheless, bring an action for contribution.¹⁷

E. REMEDY BY SUMMARY MOTION. — A remedy by summary motion has been employed in some states.¹⁸

F. ASSUMPSIT. — The usual form of action is assumpsit for money paid to the co-obligor's use,¹⁹ and debt is not proper.²⁰

13. While contribution may be enforced between defendants in the same suit in equity in which their common liability is established, as to acts in which others participated, a safer plan is to bring a proceeding in which all the participants in those acts can be made parties. *Gaither v. Bauenschmidt*, 108 Md. 1, 69 Atl. 425.

14. The maker of a note secured by trust deed on property devised to himself and another became bankrupt. On allowing the note as a claim in the bankruptcy proceedings the court attempted to settle the equities between the holder of the note, the bankrupt, and the joint devisee. It was held that the question of contribution could only be adjusted in ancillary proceedings and could not be determined in the bankruptcy proceedings. *In re Straub*, 158 Fed. 375.

15. The county court is vested with authority to determine a claim for contribution from a decedent's estate. It is not necessary to wait until a court of equity has determined the amount due from the estate. *McAllister v. Estate of Irvin*, 31 Colo. 254, 73 Pac. 47. See also, *Eliason v. Eliason*, 3 Del. Ch. 260.

16. Cal.—*Clark v. Austin*, 96 Cal. 283, 31 Pac. 293. Ga.—*Miller v. Perkinson*, 128 Ga. 465, 57 S. E. 787. Kan. City of Ft. Scott v. Kansas City, Ft. S. & M. R. Co., 66 Kan. 610, 72 Pac. 238. Mass.—*Brckett v. Winslow*, 17

Mass. 153. Minn.—*Akeny v. Moffett*, 37 Minn. 109.

See the titles "Execution;" "Judgments;" "Subrogation."

17. There was a failure to give the proper statutory notice. *Dunn v. Stufflebeam*, 17 Idaho 559, 106 Pac. 1129.

18. *Reeves v. Pulliam*, 7 Bart. (Tenn.) 119.

In Mississippi this proceeding was at first held unconstitutional as depriving of a jury trial, see *Smith v. Smith*, 1 How. (Miss.) 102, but it was finally held constitutional provided a trial by jury was preserved of all issues of fact. *Scott v. Nichols*, 27 Miss. 94, 61 Am. Dec. 504; *Woodward v. May*, 4 How. 389. And see *Ison v. Mississippi Cent. R. Co.*, 36 Miss. 300.

19. Ala.—*Roberts v. Adams*, 6 Port. 361. Cal.—*Taylor v. Reynolds*, 53 Cal. 686. Conn.—*Bailey v. Bussing*, 29 Conn. 1. Me.—*Goodall v. Wentworth*, 20 Me. 322. Mass.—*Claflee v. Jones*, 19 Pick. 260.

Where sureties "are such not only upon equitable principles, but by the legal effect of their contract, . . . the suit for contribution can be maintained in assumpsit on the implied contract by the surety satisfying the obligation, but, it is said, cannot be maintained by him as assignee of the original contract." *Kellogg v. Lopez*, 145 Cal. 497, 78 Pac. 1056.

20. *Carroll v. Bowie*, 7 Gill (Md.)

III. WHEN RIGHT ACCRUES.²¹—A. AS DETERMINED BY TIME OF PAYMENT GENERALLY.—The right of action accrues, as between joint obligors in a note, when one pays it,²² and likewise as between co-sureties, when one pays the debt,²³ and as between joint judgment debtors, when the judgment is paid, as distinguished from the time it was rendered,²⁴ or the date when a cross-bill might have been filed to adjust the equities in the main proceeding.²⁵

B. WHERE THERE HAVE BEEN SEVERAL PAYMENTS.—Where payments are made in instalments, the right accrues as each payment is made, in excess of plaintiff's *pro rata* share.²⁶ But if the right arises out of life insurance premiums paid it accrues only on the death of the insured.²⁷

C. AS BETWEEN EXECUTION PURCHASERS, REDEMPTORS, ETC. Where the right of action arises out of a redemption of a mortgage, it accrues on the date of such redemption.²⁸ As between judgment creditors, who buy land of their debtor at sheriff's sale, the right accrues on delivery of the sheriff's deed.²⁹

IV. PARTIES.—A. PLAINTIFF.—Where parties pay out of a joint fund, or the right to contribution grows out of an express promise to pay, they may join as parties plaintiff,³⁰ but where each has paid merely a *pro rata* share of their co-obligors' part, each should maintain his action separately.³¹

35. See also *Jones v. McNally*, 53 Misc. 59, 103 N. Y. Supp. 1011.

21. Necessity that partnership matters be adjusted before suit for contribution can be brought, see the title "Partnership."

See also, *Pona v. Rees*, *supra*, II, B.

22. *Sherling v. Long*, 122 Ga. 797, 50 S. E. 935; *Brady v. Brady*, 110 Md. 656, 73 Atl. 567.

23. *Mentzer v. Burlingame*, 78 Kan. 219, 97 Pac. 371.

24. *Reeves v. Pulliam*, 7 Baxt. (Tenn.) 119; *Culmer v. Wilson*, 13 Utah 129, 44 Pac. 833, 37 Am. St. Rep. 713.

Several Judgments.—*Singleton v. Moore*, Rice Eq. (S. C.) 110.

25. Where stockholders might have brought other stockholders back into the main action by cross-bill, but waited until final judgment against them, their right of action for contribution accrued at the time they paid such judgment, and not at the time they might have filed the cross-bill had they desired to avail themselves of that form of remedy. *Siegel v. Fish*, 129 Ill. App. 319.

26. *Faires v. Cockrill*, 88 Tex. 428, 31 S. W. 190; *Jarvis v. Matson*, 52 Tex.

Civ. App. 170, 113 S. W. 326; *Bushnell v. Bushnell*, 77 Wis. 435, 46 N. W. 442.

27. One of joint beneficiaries paid the premiums as they became due from time to time. *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 198, 73 Pac. 833.

28. *Schroeder v. Bozarth*, 224 Ill. 310, 79 N. E. 583.

29. Judgment creditors bought under an agreement to buy for their joint benefit. One paid more than his proportionate share. *McCormich v. Sener*, 200 Pa. 11, 49 Atl. 311.

30. *Wright v. Post*, 3 Conn. 142; *Adams v. De Frehn*, 27 Pa. Super. 184; *Lowry v. Lumberman's Bank*, 2 Watts & S. (Pa.) 210; *Boggs v. Curtin*, 10 Serg. & R. (Pa.) 211. But see *Gould v. Gould*, 8 Cow. (N. Y.) 168.

31. There was no express promise, nor joint fund. Each paid what the proportionable share of the liability on him amounted to in consequence of their co-obligor's failure to pay his portion. Therefore each must sue separately to recover the amount paid by him for such other. *Lindell v. Brant*, 17 Mo. 150.

B. DEFENDANT.—1. **Generally.**—Co-obligors who have paid their share may be joined as defendants,³² but insolvent co-obligors need not be joined,³³ nor need subsequent wrongdoers,³⁴ nor the assignee of a mortgage given to secure performance of the joint obligation.³⁵

2. **At Law or in Equity.**—If the action be brought at law, each must be sued separately for his aliquot part,³⁶ and plaintiff may proceed against any, or all, persons from whom contribution is due,³⁷ but in equity the proceedings must be against all the co-sureties jointly,³⁸ and even where the distinction between law and equity no longer prevails, it has been held proper to join all parties interested.³⁹

V. **DEMAND OR NOTICE.**⁴⁰—No demand, or notice to defendant to pay the common creditor, need be shown,⁴¹ nor need there be any demand for contribution as between sureties.⁴²

VI. **PLEADING.**—A. **FORM GENERALLY.**—It is proper to draw pleadings in an equitable form, even where the distinction between suits in equity, and actions at law, has been abolished.⁴³

B. **SUFFICIENCY OF COMPLAINT.**—When the claim for contribution is based upon a joint judgment, the complaint must do something more than state that defendant is liable thereon;⁴⁴ but having al-

32. *Dysart v. Crow*, 170 Mo. 275, 70 S. W. 689.

33. Because of the rule that the other co-obligors must assume the shares of the insolvents. *Gross v. Davis*, 87 Tenn. 226, 11 S. W. 92.

34. In an action between parties who jointly levied a wrongful attachment, creditors who subsequently levied other attachments on the same property are not necessary parties. *Vandiver v. Pollak*, 107 Ala. 547.

35. There was nothing to show that such assignee had assumed the personal liability. *Payne v. Payne*, 129 Wis. 450, 109 N. W. 105.

36. *Thompson v. Hibbs*, 45 Ore. 141, 76 Pac. 778; *Fischer v. Gaither*, 32 Ore. 161.

An action against several co-obligors must be brought severally against each and not jointly. *Hall v. Harris*, 6 Ga. App. 822, 65 S. E. 1086.

37. *Payne v. Payne*, 129 Wis. 450, 109 N. W. 105.

38. *Thompson v. Hibbs*, 45 Ore. 141, 76 Pac. 778; *Fischer v. Gaither*, 32 Ore. 161.

39. *Jarvis v. Matson* (Tex. Civ. App.), 94 S. W. 1079; *Jalufke v. Matejek*, 22 Tex. Civ. App. 384, 55 S. W. 395; *Mateer v. Cockrill*, 18 Tex. Civ. App. 391, 45 S. W. 751.

40. As laying foundation for subrogation to judgment creditors' rights see the titles "**Execution**;" "**Judgment**;" "**Subrogation**."

Notice of suit in which judgment rendered, see the titles "**Judgment**;" "**Summons**."

41. *McGonnigle v. McGonnigle*, 5 Pa. Super. 168.

42. *Taylor v. Reynolds*, 53 Cal. 686; *Chaffee v. Jones*, 19 Pick. (Mass.) 260.

43. Equity pleadings are especially applicable, and hence the bill is not demurrable because the subject-matter might have been made the occasion of numerous suits at law. *Mateer v. Cockrill*, 18 Tex. Civ. App. 391, 45 S. W. 751. See also, *Jarvis v. Matson* (Tex. Civ. App.), 94 S. W. 1079; *Jalufke v. Matejek*, 22 Tex. Civ. App. 384, 55 S. W. 395.

Harmless Error.—Defendant is not prejudiced by averments in complaint claiming contribution for sums to which he is not bound to contribute, where the court did not base its judgment thereon. *Wolters v. Henningson*, 114 Cal. 433, 46 Pac. 277.

44. A general averment that defendant was liable to pay thereon a certain part, is fatally defective as stating merely conclusions of law. There should be such special averments of

leged that the judgment was for a death by negligence, it is not necessary to set forth the particular facts constituting the negligence.⁴⁵ Where the judgment is shown to have been for a "debt," it is not necessary to deny that plaintiff was primarily liable, or to allege defendant's equitable obligation to contribute.⁴⁶

C. AMENDMENT. — An amended complaint may state particularly what the original states generally,⁴⁷ and may set forth a cause of action, though the original did not.⁴⁸ On a proper showing the name of the nominal plaintiff may be substituted.⁴⁹

D. AFFIDAVIT OF DEFENSE. — An affidavit of defense is sufficient which alleges facts impugning plaintiff's good faith in his conduct of the suit in which the judgment was rendered, on which the right of action is based.⁵⁰

VII. TRIAL. — A. RIGHT TO JURY TRIAL. — A suit for contribution, being equitable in its nature, defendant is not entitled as of right to a jury trial.⁵¹

B. PRESUMPTIONS AND BURDEN OF PROOF. — The burden is on plaintiff to show payment.⁵² The mere possession of a cancelled promissory

fact as will show the defendant's liability. For it is not every judgment that will support an action for contribution. *Bailey v. Bussing*, 29 Conn. 1.

45. *Eaton & Prince Co. v. Mississippi Val. Trust Co.*, 123 Mo. App. 117, 100 S. W. 551.

46. These are matters of defense. The petition showing that the judgment was against the parties jointly, and has been paid by plaintiff, a *prima facie* case is made out. *Gaster v. Waggoner*, 26 Ohio St. 450.

47. The original complaint and bill of particulars were filed for half of certain sums of money paid on certain notes "upon which the plaintiff and defendant were jointly liable." The amendment alleged the parties "had indorsed sundry accommodation notes for a corporation, under an agreement that, as between themselves, they should be equally and jointly liable upon such paper without regard to the order in which the indorsements were made; that the plaintiff had had to pay certain of these notes; and that he had received no contribution therefor." *Pratt v. Stoner*, 78 Conn. 310, 61 Atl. 1009. See generally the title "Amendments and Joinders."

48. The complaint did not state facts

sufficient to constitute a cause of action at law, or a suit in equity for contribution, but manifestly attempted to state such a cause, and amendment was permitted, "under the liberal rules which prevail in this state." *Thompson v. Hibbs*, 45 Ore. 141, 76 Pac. 778.

49. "Some showing must be made that some right of the original plaintiff is connected with the cause of action he desires to assert in the name of the nominal party to be substituted." *Hall v. Harris*, 6 Ga. App. 822, 65 S. E. 1086.

50. The affidavit alleged that defendant had been informed that the proceedings had been abandoned; that he was not notified of a revival thereof, and that plaintiff's attorneys, though assuming to act also for defendant, failed to set up certain defenses. *Flanagan v. Duncan*, 133 Pa. 373, 19 Atl. 405.

51. *Merrill v. Prescott*, 67 Kan. 767, 74 Pac. 259. But see, *supra*, II, E.

52. *Adam v. DeFrehn*, 27 Pa. Super. 184.

But the general rule as to presumption of payment has been followed, where a joint maker sought to enforce contribution. The court says there was some other evidence of payment

note signed by plaintiff and defendant, is not even *prima facie* evidence that plaintiff is entitled to contribution,⁵³ but where there were two sureties, and two notes, each of equal amount, the possession of both by one of the sureties was held to be presumptive evidence of his right of contribution against the other.⁵⁴ A joint indorser is not conclusively bound by the waiver of notice of non-payment contained in the note.⁵⁵

C. FILLING BLANKS AT TIME OF TRIAL. — The ordinary rule as to filling blanks does not apply.⁵⁶

VIII. FINDINGS⁵⁷ AND JUDGMENT. — The judgment may be for less than the proportionate share, where plaintiff prayed for less,⁵⁸ but cannot be for more than asked for.⁵⁹

IX. APPELLATE JURISDICTION. — Jurisdictional amount will

by the party claiming contribution. *Brady v. Brady*, 110 Md. 656, 73 Atl. 567.

53. Though admitting that the weight of authority is that the possession of a cancelled obligation by one liable thereon is presumptive evidence of payment by him, the court in *Bates v. Cain's Estate*, 70 Vt. 144, 40 Atl. 36, follows *Mills v. Hyde*, 19 Vt. 59, where the court comments on the further fact that a number of years having elapsed, there is quite as strong a presumption that the parties had adjusted the equities between themselves.

The rule as to presumption of payment from possession of a cancelled obligation does not extend to an inference of exclusive payment. *Heald v. Davis*, 11 Cush. (Mass.) 318.

54. Both on the ground of the general presumption of payment, and while doubting the authority of *Heald v. Davis*, *supra*, the natural inference would be that under the peculiar circumstances the sureties would each have taken one of the notes. *Chandler v. Davis*, 47 N. H. 462.

55. The action was contribution by one accommodation indorser against the heirs of another accommodation indorser, and the question was as to the effect of the long lapse of time without any notice of non-payment having been given. *Clevenger v. Matthews* (Ind. App.), 75 N. E. 836.

56. The right of a holder of a note to fill in blanks such names of payees,

or other proper entries, to show the real liability, does not extend to a case where one party to the note is suing the other for contribution. *Keyser v. Warfield*, 103 Md. 161, 63 Atl. 217.

57. Findings To Be Consistent.—A finding that the payment of certain life insurance premiums for which contribution is claimed was made by plaintiff's husband for the purpose "of saving to the plaintiff as well as other beneficiaries, the benefits and amounts by said policy secured," and that said premiums were so paid by him "at the instance and request and for the benefit of his wife," is not inconsistent. *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 198, 73 Pac. 833.

A variance is immaterial where the finding is that plaintiff bought the notes from the holder, it appearing that he paid as their purchase price their face and part of the interest, all but one being overdue. *Pratt v. Stoner*, 78 Conn. 310, 61 Atl. 1009.

58. *Dunn v. Stufflebeam*, 17 Idaho 559, 106 Pac. 1129.

59. *Weyburn v. Kipp's Estate*, 63 Mich. 79, 29 N. W. 517.

Entry of Judgment in Wrong Form. Assuming that the judgment is erroneous in permitting plaintiffs to recover the amount paid out by them as individuals, and not as a joint fund, such error is wholly without prejudice, since defendants can be subjected to but one satisfaction, and they have been adjudged to pay no greater sum

be ascertained by adding together the amounts due from each appellee as his share of the contribution.⁶⁰

than that for which they were liable. | 60. *Jarvis v. Matson* (Tex. Civ. App.), 94 S. W. 1079; *Jalufke v. Matejek*, 22 Tex. Civ. App. 384, 55 S. W. 395.

CONTRIBUTORY NEGLIGENCE. — See **Negligence.**

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Vol. V

COPYRIGHT PROCEEDINGS

By H. R. BRILL, Jr.,
Of the St. Paul Bar.

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I. REMEDIES FOR INFRINGEMENT. — A. GENERAL STATEMENT.

The federal copyright statutes afford all the relief to which a party is entitled, and no action outside of those provided therein will lie.¹

B. INJUNCTION.² — One whose copyright is infringed is entitled to an injunction against further infringement.³

In determining whether an injunction shall issue the relative injury that will result to the respective parties from granting or refusing it may be considered.⁴ That the part of the work reproduced is comparatively small does not necessarily prevent the issuance of an injunction.⁵ But an injunction would be unconscionable where the proportion is insignificant in comparison with the injury that would result to defendant.⁶

Injunction Unavailing. — Injunctive relief will not be granted where it would be of no avail.⁷

Question of Fact. — Whether there is a substantial similarity between the two works is a question of fact.⁸ The situation of the parties at the date of the decree, rather than at the time the bill is filed, is controlling.⁹

Preliminary Injunction.¹⁰ — The granting or refusing of a preliminary injunction rests in the sound discretion of the chancellor, to be exercised in view of all the circumstances of the particular case,¹¹

1. *Hills & Co. v. Hoover*, 220 U. S. 329, 31 Sup. Ct. 402, 55 L. ed. 485; *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 28 Sup. Ct. 726, 52 L. ed. 1096, *reversing* 140 Fed. 305, 72 C. C. A. 77, 2 L. R. A. (N. S.) 913, which *reversed* 130 Fed. 593; *Ohman v. City of New York*, 168 Fed. 953.

2. See also the title "**Injunctions.**"

3. Act March 4, 1909, §25, 35 St. at L. 1081; Fed. St. Ann. Supp. 1909, p. 87.

Act March 4, 1909, §36, 35 St. at L. 1084, provides that any court given jurisdiction by the act, or any judge thereof shall have power upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by the act, according to the course and principles of courts of equity on such terms as such court or judge shall deem reasonable.

4. Three instances of copying without explanation or excuse were held insufficient to justify an injunction, in view of the disproportionate injury that would result to defendant. *Record & Guide Co. v. Bromley*, 175 Fed. 156.

5. Temporary injunction granted in a suit to enjoin the infringement of

a copyright covering cuts in a catalogue where complainant's catalogue contained 2,813 cuts, of which 18, which were legally copyrighted, were reproduced in defendant's catalogue, which contained 393 cuts. *De Prato Statuary Co. v. Ginaliani Statuary Co.*, 189 Fed. 90.

6. *Dun v. Lumbermen's Credit Assn.*, 144 Fed. 83, 75 C. C. A. 241, *affirmed* 209 U. S. 20, 28 Sup. Ct. 335, 52 L. ed. 663, *citing* *Mead v. West Pub. Co.*, 80 Fed. 380.

7. *Hartford Printing Co. v. Hartford Directory & Pub. Co.*, 146 Fed. 332. See also the title "**Injunctions.**"

8. *Dam v. Kirke La Shelle Co.*, 166 Fed. 589.

9. Republication, after the institution of the suit, in quarterlies and an annual volume which were copyrighted in the name of another person was held to be a proper basis for holding that the original publication thereby ceased to be protected. *Record & Guide Co. v. Bromley*, 175 Fed. 156.

10. See also the title "**Injunctions.**"

11. *Werner Co. v. Encyclopaedia Britannica Co.*, 134 Fed. 831, 67 C. C. A. 281, *affirming* 130 Fed. 460; *Samp-*

and his action will not be disturbed on review unless it is clearly shown that there has been an abuse of such discretion or that he was mistaken in his view of the situation with reference to which the order was made.¹² The relative injury that will result to the respective parties from granting or refusing it,¹³ and the ability of defendant to respond to any damages that may be assessed against him on final hearing,¹⁴ may be taken into consideration. Such an injunction will ordinarily be granted where there is no doubt of the infringement and no defense rendering such relief inequitable,¹⁵ but the facts must be clear and complainant's right free from doubt.¹⁶ A preliminary injunction will not be granted to protect a work not yet published or copyrighted,¹⁷ nor to protect the copyright of one who has himself pirated a large part of his work from others.¹⁸

C. DAMAGES AND PROFITS. — The proprietor of a copyright which has been infringed is entitled to recover such damages as he has suf-

son & Murdock Co. v. Seaver-Radford Co., 129 Fed. 761.

Denied to restrain the production of an opera in view of the showing as to negotiations for the granting of a license to defendant, and of complainant's failure to sooner object. *G. Ricordi & Co. v. Hammerstein*, 150 Fed. 450.

12. *Werner Co. v. Encyclopedia Britannica Co.*, 134 Fed. 831, 67 C. C. A. 281, *affirming* 130 Fed. 460.

13. *Sampson & Murdock Co. v. Seaver-Radford Co.*, 129 Fed. 761; *Hanson v. Jaccard Jewelry Co.*, 32 Fed. 202.

Rule held not to require the withholding of an injunction. *Encyclopedia Britannica Co. v. American Newspaper Assn.*, 130 Fed. 460.

14. This is an important consideration. *Hanson v. Jaccard Jewelry Co.*, 32 Fed. 202.

Preliminary injunction may be refused on condition that defendant give bond conditioned for the payment of any sum finally decreed against him. *Louis De Jonge & Co. v. Brenker & Kessler Co.*, 147 Fed. 763; *Sampson & Murdock Co. v. Seaver-Radford Co.*, 129 Fed. 761; *Ladd v. Oxnard*, 75 Fed. 703.

15. *Encyclopedia Britannica Co. v. American Newspaper Assn.*, 130 Fed. 460, *affirmed* 134 Fed. 831, 67 C. C. A. 281.

Injury resulting from continued improper publication is irreparable, and cannot be adequately compensated in

damages. *Encyclopaedia Britannica Co. v. American Newspaper Assn.*, 130 Fed. 460, *affirmed* 134 Fed. 831, 67 C. C. A. 281.

Injunction Granted.—*Bisel Co. v. Bender*, 190 Fed. 205; *Green v. Luby*, 177 Fed. 287; *George T. Bisel Co. v. Welsh*, 131 Fed. 564.

16. *Sweet v. G. W. Bromley & Co.*, 154 Fed. 754.

Will be denied where complainant's title is doubtful (*Savage v. Hoffman*, 159 Fed. 584); or where it is doubtful whether the work claimed to be infringed is copyrightable (*Louis De Jonge & Co. v. Brinker & Kessler Co.*, 147 Fed. 763); or where the issues of infringement and the validity of the copyright are impossible of determination on the motion (*Nixon v. Doran*, 168 Fed. 575).

Where infringement is in doubt (*Green v. Minzensheimer*, 177 Fed. 286; *Benton v. Van Dyke*, 170 Fed. 203; *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 Fed. 262; *Hughes v. Belasco*, 130 Fed. 388; *Dun v. International Mercantile Agency*, 127 Fed. 173; *Colliery Engineer Co. v. United Correspondence Schools Co.*, 94 Fed. 152), or is not shown (*Maloney v. Foote*, 101 Fed. 264), injunction will be denied.

17. *Sweet v. G. W. Bromley & Co.*, 154 Fed. 754.

18. *Edward Thompson Co. v. American Law Book Co.*, 122 Fed. 922, 59 C. C. A. 148, *reversing* 121 Fed. 907.

ferred by reason of such infringement,¹⁹ together with all the profits which the infringer shall have made from such infringement.²⁰

D. IMPOUNDING INFRINGING ARTICLES PENDING SUIT. — Defendant may be required to deliver up on oath, to be impounded during the pendency of the action, upon such terms as the court may prescribe, all articles alleged to infringe a copyright.²¹

E. DESTRUCTION OF INFRINGING ARTICLES. — Defendant may be required to deliver up on oath for destruction, all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies.²² Provision is also made for the seizure, condemnation and destruction of piratical copies of books imported during the existence of the American copyright therein, or of copies which have not been produced in accordance with the manufacturing provisions of the act, or for the return of copies so imported to the country of export where such importation does not involve wilful negligence or fraud.²³

Relief by way of forfeiture will be denied as unnecessary where it appears that the articles sought to be forfeited have been destroyed pending suit.²⁴

Equity has no jurisdiction to enforce a forfeiture of copies of the infringing work.²⁵

F. CRIMINAL LIABILITY. — The wilful infringement of a copyright for profit,²⁶ and the inserting or impressing of a copyright notice

19. Act March 4, 1909, §25, 35 St. at L. 1081; Fed. St. Ann. Supp. 1909, p. 87. This section contains a schedule of amounts that the court may in its discretion allow for the infringement of copyrights covering various classes of articles, and specifically provides that such sums shall be regarded as damages rather than penalties.

20. Act March 4, 1909, §25, 35 St. at L. 1081; Fed. St. Ann. Supp. 1909, p. 87.

21. Act March 4, 1909, §25c, 35 St. at L. 1081; Fed. St. Ann. Supp. 1909, p. 88.

22. Act March 4, 1909, §25d, 35 St. at L. 1081; Fed. St. Ann. Supp. 1909, p. 88. For cases dealing with forfeitures under the old law see *Hills & Co. v. Hoover*, 220 U. S. 329, 31 Sup. Ct. 402, 55 L. ed. 485; *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 28 Sup. Ct. 726, 52 L. ed. 1096, reversing 140 Fed. 305, 72 C. C. A. 77, 2 L. R. A. (N. S.) 913, which reversed 130 Fed. 593; *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. ed. 208, affirming 146 Fed. 375, 76 C. C. A. 647.

23. Act March 4, 1909, §32, 35 St. at L. 1083; Fed. St. Ann. Supp. 1909, p. 90.

This section provides that such articles are to be seized and condemned by like proceedings as those provided by law for the seizure and condemnation of property imported in violation of the customs laws, and that when forfeited they shall be destroyed in such manner as the secretary of the treasury or the court, as the case may be, shall direct.

24. *Scribner v. Clark*, 50 Fed. 473.

25. *Stevens v. Gladding*, 17 How. (U. S.) 447; *Gilmore v. Anderson*, 38 Fed. 846.

26. Act March 4, 1909, §28, 35 St. at L. 1082; Fed. St. Ann. Supp. 1909, p. 89.

Exception.—§25c provides that where the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, no criminal action shall be brought for violation of the copyright by the unauthorized manufacture, use, or sale of interchangeable parts for use in me-

in or upon any uncopyrighted article, or the altering of the copyright notice upon any article duly copyrighted,²⁷ are made misdemeanors, and any person knowingly issuing, selling or importing any article bearing a notice of United States copyright which has not been copyrighted in this country is subject to a fine.²⁸

II. JURISDICTION OF ACTIONS AND SUITS FOR INFRINGEMENT. — The federal courts have exclusive jurisdiction of all cases arising under the copyright laws of the United States,²⁹ regardless of the amount involved,³⁰ or the citizenship of the parties.³¹ To confer such exclusive jurisdiction, however, it must appear that the right sought to be enforced is actually based upon the copyright laws,³² and if it is not, the federal courts have no jurisdiction of the case unless there is diverse citizenship and the jurisdictional amount prescribed by the statute generally is involved.³³ The question is to be determined solely from the allegations of the complaint,³⁴ and without regard to any defenses set up in the answer.³⁵

Jurisdiction of Particular Courts. — Original jurisdiction of all actions, suits or proceedings under the copyright laws is vested in the district courts of the United States,³⁶ the district courts of any territory, the district courts of Alaska, Hawaii and Porto Rico, the supreme court of the District of Columbia, and the courts of first instance of the Philippine Islands.³⁷

chanical musical producing machines adapted to reproduce the copyrighted music.

27. Act March 4, 1909, §29, 35 St. at L. 1082; Fed. St. Ann. Supp. 1909, p. 89.

28. Act March 4, 1909, §29, 35 St. at L. 1082; Fed. St. Ann. Supp. 1909, p. 89.

29. Act March 3, 1911, §256, subd. 5; 36 St. at L. 1161. *Outcault v. Lamar*, 135 App. Div. 110, 119 N. Y. Supp. 930; *Potter v. McPherson*, 21 Hun 559. See also *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. ed. 1211, and the title "Federal Courts."

30. *Miller-Magee Co. v. Carpenter*, 34 Fed. 433. See also *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. ed. 1211.

31. *Little v. Hall*, 18 How. (U. S.) 165, 15 L. ed. 328.

32. *Outcault v. Lamar*, 135 App. Div. 110, 119 N. Y. Supp. 930.

"A suit, the primary and controlling purpose of which is to enforce a right secured by the copyright laws which is being infringed by the defendants, is a suit under those laws, . . . though it incidentally draws in question the validity, interpretation and

effect of a contract through which the complainant derives title." *Wooster v. Crane & Co.*, 147 Fed. 515, 77 C. C. A. 211.

33. As where the case presents an issue of title solely (*Hoyt v. Bates*, 81 Fed. 641), or involves merely the enforcement of a contract relating to copyrighted articles (*Scribner's Sons v. Strauss*, 210 U. S. 352, 28 Sup. Ct. 735, 52 L. ed. 1094, *affirming* 147 Fed. 28, 78 C. C. A. 122, *affirming* 139 Fed. 193; *Silver v. Holt*, 84 Fed. 409).

On holding that there is no valid copyright the federal court cannot grant an injunction on the ground of breach of trust where there is no diversity of citizenship. *Larrowe-Loissette v. O'Loughling*, 88 Fed. 896.

34. *Hoyt v. Bates*, 81 Fed. 641; *Outcault v. Lamar*, 135 App. Div. 110, 119 N. Y. Supp. 930.

35. *Outcault v. Lamar*, 135 App. Div. 110, 119 N. Y. Supp. 930. A defense based upon the copyright law.

36. Act March 3, 1911, §24, par. 7; 36 St. at L. 1092. See also the title "Federal Courts."

37. Act March 4, 1909, §34, 35 St. at L. 1084; Fed. St. Ann. Supp. 1909,

III. VENUE.—Civil actions, suits or proceedings arising under the copyright laws must be brought in the district of which defendant is an inhabitant.³⁸

IV. LACHES AND LIMITATIONS.³⁹—The right to equitable relief may be lost by laches.⁴⁰ Laches is not a mere matter of time, but rather a question of the inequity of granting the relief.⁴¹ Knowledge of the infringement or notice of facts sufficient to put complainant on inquiry is essential.⁴²

Criminal proceedings under the act must be commenced within three years after the accrual of the cause of action.⁴³

V. PARTIES.⁴⁴—The holder of the legal title may sue in equity,⁴⁵

p. 90. See also the title "Federal Courts."

38. Act of Cong. Mch. 3, 1911, §51, 36 St. at L. 1101; Act March 4, 1903, §35; 35 St. at L. 1084; Fed. St. Ann. Supp. 1909, p. 91, read of which defendant or his agent is a resident, or where he may be found, but this appears to have been repealed by the act of 1911, which, by its terms, applies to all civil suits. See also the title "Federal Courts."

Before the adoption of the act of 1911 it was held that the provision of the Act of Aug. 13, 1888, c. 866, 25 St. at L. 434, amending Act March 3, 1887, c. 373, §1, that no suit should be brought against any person in the circuit or district court in any other district than that of which he was an inhabitant had no application to patent or copyright suits, which could be brought in any district where he could be found and served.

In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. ed. 1211; *Lederer v. Ferris*, 149 Fed. 250; *Spears v. Flynn*, 102 Fed. 6; *Lederer v. Rankin*, 90 Fed. 449. See also *In re Keasbey & Mattison*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. ed. 402. But see *Fraser v. Barrie*, 105 Fed. 787.

39. See also the titles "Laches;" "Limitation of Actions."

40. In a suit involving an infringement of a copyright on law books it was held that a delay of 16 years, during which time defendant had published almost all of the remaining volumes of its work was a bar to relief by way of injunction and an accounting of profits. *West Pub. Ct. v. Edward Thompson Co.*, 176 Fed. 833, 100 C. C. A. 303, *modifying* 169 Fed. 833.

Excuses for Delay.—A delay of a year in instituting suit was held to be excused where it was due to the fact that complainant was actively engaged in defending a suit to cancel the contract which made him the equitable owner of the copyright. *Wooster v. Crane & Co.*, 147 Fed. 515, 77 C. C. A. 211.

41. *Encyclopedia Britannica Co. v. American Newspaper Assn.*, 130 Fed. 460, *affirmed* 134 Fed. 831, 67 C. C. A. 281.

Delay will not operate as a bar where no prejudice results to defendant therefrom. *Hein v. Harris*, 175 Fed. 875. See also *Gilmore v. Anderson*, 38 Fed. 846, where there was "no proof of acquiescence in, or failure in objecting to, anything done by the defendants constituting the infringement complained of," or that defendant's conduct had been induced or their liability varied by anything done or omitted to be done by those interested in the copyright.

42. *Encyclopaedia Britannica Co. v. American Newspaper Assn.*, 130 Fed. 460, *affirmed*, 134 Fed. 831, 67 C. C. A. 281.

43. Act March 4, 1909, §39; 35 St. at L. 1084; Fed. St. Ann. Supp. 1909, p. 91.

44. See also the title "Parties."

45. *Hanson v. Jaccard Jewelry Co.*, 32 Fed. 202. See *Scribner v. Clark*, 50 Fed. 473.

This includes a publisher who procured a copyright in his own name pursuant to a parol authorization by the author, who afterwards gave him a written authorization. *White-Smith Music Pub. Co. v. Apollo Co.*, 139 Fed. 427.

One not the legal owner of the copy-

even though the beneficial ownership is in another.⁴⁶ An action at law must be brought in the name of the person holding the legal title to the copyright,⁴⁷ and in such case it is no defense that he holds such title in trust for another.⁴⁸

As a general rule a mere licensee cannot in his own name sue strangers who infringe,⁴⁹ but the contrary is true in equity as to one who has the full equitable title, where the holder of the legal title is one of the infringers, and occupies a position hostile to the complainant.⁵⁰

An administrator must take out ancillary letters of administration in order to maintain a suit in a state other than that where he was appointed for an infringement of a copyright owned by his intestate.⁵¹

Joinder.—The holder of the legal title and licensees and persons having an equitable interest may properly join as complainants,⁵² but the contrary is true as to persons having no community of interest in the subject-matter.⁵³

VI. PLEADING.⁵⁴—The bill, declaration, or complaint must affirmatively show that the necessary statutory steps to secure a valid copyright were complied with,⁵⁵ that the subject-matter is such as is copyrightable,⁵⁶ that complainant belongs to the class of persons entitled

right is not entitled to an injunction. *Little v. Hall*, 18 How. (U. S.) 165, 15 L. ed. 328.

Fictitious Name.—In *Scribner v. Henry G. Allen Co.*, 49 Fed. 854, it was held unnecessary for the bill in an infringement suit brought by one doing business in New York under a fictitious firm name to allege the filing of the certificate required by the laws of that state.

46. *Hanson v. Jaccard Jewelry Co.*, 132 Fed. 202.

47. *Lederer v. Saake*, 166 Fed. 810.

48. *Lederer v. Saake*, 166 Fed. 810.

49. *Wooster v. Crane & Co.*, 147 Fed. 515, 77 C. C. A. 211; *Empire City Amusement Co. v. Wilton*, 134 Fed. 132.

50. *Wooster v. Crane & Co.*, 147 Fed. 515, 77 C. C. A. 211.

51. He may take out letters before answer filed and after demurrer, and show that fact by amendment. *Black v. Henry G. Allen Co.*, 42 Fed. 618, 9 L. R. A. 433.

52. *Black v. Henry G. Allen Co.*, 42 Fed. 618.

53. Causes of action to recover penalties for the infringement of different copyrights to which the legal title is in different persons cannot be joined. *Lederer v. Saake*, 166 Fed. 810.

54. See also the titles "Answers;" "Bills and Answers;" "Declaration and Complaint."

55. *National Cloak & Suit Co. v. Kaufman*, 189 Fed. 215; *Edward Thompson Co. v. American Law Book Co.*, 119 Fed. 217; *Burnell v. Chown*, 69 Fed. 993; *Chicago Music Co. v. J. W. Butler Paper Co.*, 19 Fed. 758; *Boucicault v. Hart*, 13 Blatchf. 47, 3 Fed. Cas. No. 1,692.

Allegations Must Be Specific.—It is insufficient to allege generally that all conditions required by the laws of the United States to obtain a copyright were complied with. *Ohman v. City of New York*, 168 Fed. 953; *Ford v. Charles E. Blaney Amusement Co.*, 148 Fed. 642.

Conclusions of law are, as usual, bad. *Trow City Directory Co. v. Curtin*, 36 Fed. 829.

Averment following the language of the statute is sufficient. *Scribner v. Henry G. Allen Co.*, 49 Fed. 854.

Matters of evidence need not and should not be stated. *Trow City Directory Co. v. Curtin*, 36 Fed. 829.

56. *National Cloak & Suit Co. v. Kaufman*, 189 Fed. 215. The petition must allege the existence of facts of originality, of intellectual production, and of thought and conception on the part of the author. "An averment

to procure a copyright,⁵⁷ and is the owner thereof,⁵⁸ and that the copyright has been infringed.⁵⁹

A copy of the alleged infringement of copyright, if actually made, and a copy of the work alleged to be infringed, should accompany the petition, or its absence be explained; except in cases of alleged infringement by the public performance of dramatic and dramaticomusical compositions, the delivery of lectures, sermons, addresses, and so forth, the infringement of copyright upon sculptures and other similar works, and in any case where it is not feasible.⁶⁰

Alleging in Alternative. — Where the facts in regard to the transfer of an interest are stated, the conclusions therefrom as to the effect of the transfer may be stated in an alternative form.⁶¹

that the petitioner is 'the author, inventor, designer, and proprietor of a photograph' of a person which photograph is alleged to be copyrighted, is not sufficient." *Falk v. City Item Printing Co.*, 79 Fed. 321. See also *Henderson v. Tompkins*, 60 Fed. 758.

57. *National Cloak & Suit Co. v. Kaufman*, 189 Fed. 215; *Falk v. Schumacher*, 48 Fed. 222 (where the bill was held to show sufficiently that complainant, at the time when he produced the photograph which was the subject of the suit, was a citizen of the United States and a resident therein).

One relying on a copyright obtained by him as proprietor must show how he became such. *Chicago Music Co. v. J. W. Butler Paper Co.*, 19 Fed. 758.

Where the author sold a novelette to a publisher, reserving all rights of dramatization, and the publisher procured a copyright, it was held that the complaint in an action by the author for infringement of the dramatic rights should have specifically alleged that the copyright was sold or transferred as well as the right to print. *Ford v. Charles E. Blaney Amusement Co.*, 148 Fed. 642.

58. An allegation that complainant was "the author, inventor, designer and proprietor of a certain photograph and negative thereof, known and entitled 'Photograph No. 23 of Lillian Russell, by J. B. Falk, N. Y.'" was held "sufficient without entering into a detailed description of the *modus operandi* adopted by him in taking the photograph." *Falk v. Schumacher*, 48 Fed. 222.

The chain of title need not be set out. *Lillard v. Sun Printing & Pub.*

Assn., 87 Fed. 213. But a mere averment that complainant is the proprietor without more is insufficient. *Yuen-gling v. Schile*, 12 Fed. 97.

Where the proprietors of the legal title are made parties, it is unnecessary to allege the formalities or the mode of conveyance whereby equitable interests became vested in their complainants. *Black v. Henry G. Allen Co.*, 42 Fed. 618, 9 L. R. A. 433.

59. An averment of infringement made positively as a fact is sufficient. *Black v. Henry G. Allen Co.*, 42 Fed. 618, 9 L. R. A. 433.

Where defendant's engraving was a close reproduction of that of complainant, it was held that the bill would not be dismissed on demurrer though it seemed highly probable that when the proofs were taken it would appear that it was not an original production of complainants. *Lillard v. Sun Printing & Pub. Assn.*, 87 Fed. 213.

60. Rule 2 of rules adopted by the U. S. supreme court pursuant to act March 4, 1909, §25, 35 St. at L., 1081, Fed St. Ann. Supp. 1909, p. 96. In effect July 1, 1909. See *Lesser v. Borgfeldt & Co.*, 188 Fed. 864.

Even before the adoption of the rule it was held proper to attach to the bill copies of the infringed and infringing works. *Black v. Henry G. Allen Co.*, 42 Fed. 618, 9 L. R. A. 433.

May Be Required to Attach Copy on Motion.—*Lesser v. Borgfeldt & Co.*, 188 Fed. 864.

61. It is proper to allege the terms of the agreement of assignment, and then say that if, by such agreement, an interest in the copyright was not transferred and assigned, the agree-

Joinder of Causes of Action.⁶² — Proceedings for an injunction, damages, and profits, and those for the seizure of infringing articles may be united in one action.⁶³

Except as prescribed by the act, joinder in actions at law in the federal courts is governed by the statutes of the state where the action is brought.⁶⁴

In equity the objection of multifariousness is one that addresses itself to the discretion of the court, and no rule can be laid down to govern every case. The matter is largely one of convenience, the purpose being to avoid needless expense, complexity of the issues, prolixity, delay and annoyance.⁶⁵

Supplemental Bill. — Further infringements occurring after the filing of the original bill may be set up by supplemental bill.⁶⁶ Such a bill must be consistent with the allegations of the original bill.⁶⁷

Answer. — The answer must respond fully to all the matters of the bill,⁶⁸ and this is equally true under the practice prevailing in the federal courts though an answer under oath is waived.⁶⁹

Verification. — Where a bill in equity is to be used as evidence it must be verified, but there is no imperative rule requiring it to be verified at the time it is filed.⁷⁰

VII. MISCELLANEOUS RULES OF PRACTICE. — **A. PRACTICE IN GENERAL.** — The statute provides that rules and regulations for practice and procedure in infringement cases shall be prescribed by the federal supreme court,⁷¹ and it has provided that the existing rules of

ment was an exclusive license. *Black v. Henry G. Allen Co.*, 42 Fed. 618.

62. See also the titles "Joinder and Splitting of Actions," "Multifariousness."

63. Act March 4, 1909, §27; 35 St. at L. 1082; Fed. St. Ann. Supp. 1909, 89.

64. *Ohman v. City of New York*, 168 Fed. 953.

65. Examples of bills held not to be multifarious:

A bill alleging that a book infringed four copyrights and a trade-mark. *Harper v. Holman*, 84 Fed. 222.

A bill alleging infringement of 30 different copyrights covering 30 indexes constituting a single system of indexing. *Amberg File & Index Co. v. Shea, Smith & Co.*, 78 Fed. 479.

A bill seeking to restrain the infringement of four copyrights and to set aside a copyright of the defendants as having been obtained by fraud, where the parties and the general method of alleging infringement were the same, the witnesses would probably be the same, and a conspiracy on the part of defendants was alleged.

Bracken v. Rosenthal, 151 Fed. 136.

It has been held within the discretion of the court to permit causes of action for infringement based upon certain cartoons and a play founded thereon to be joined. *Empire City Amusement Co. v. Wilton*, 134 Fed. 132.

66. *Banks Law Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 139 Fed. 701, involving a series of books.

67. Allegations of a confirming assignment of the copyrights to complainant were held not to be inconsistent with and contradictory of the allegations of title in the original bill. *Banks Law Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 139 Fed. 701.

68. *John Church Co. v. Zimmerman*, 131 Fed. 652.

69. *John Church Co. v. Zimmerman*, 131 Fed. 652.

70. *Black v. Henry G. Allen Co.*, 42 Fed. 618. See also the title "Verification."

71. Act March 4, 1909, §25, 35 St. at L. 1081. For the rules adopted pursuant to this section see Fed. St. Ann. Supp. 1909, p. 96.

equity practice shall be enforced in such proceedings in so far as they may be applicable.⁷² Rules of practice in patent cases may be applied by analogy.⁷³

A case will not be opened after the hearing for newly discovered evidence which is wholly immaterial.⁷⁴

B. IMPOUNDING INFRINGING ARTICLES PENDING SUIT. — Proceedings for the impounding of alleged infringing articles may be instituted at the commencement of a suit or action for infringement, or at any time before the entry of final judgment or decree therein, by the filing of an affidavit and bond with the clerk.⁷⁵

The affidavit may be made by the complainant or plaintiff or by his authorized agent or attorney,⁷⁶ and must state upon the best of affiant's knowledge, information and belief the number and location, as near as may be, of the alleged infringing copies, plates, records, molds, matrices, or other means of making such copies, and the value of the same.⁷⁷

The bond must bind the sureties in a specified sum, to be fixed by the court, but not less than twice the reasonable value of the property to be seized,⁷⁸ and conditioned for the prompt prosecution of the action, suit, or proceeding; for the return of the seized articles to the defendant, if they or any of them are adjudged not to be infringements, or if the action abates, or is discontinued before they are returned to the defendant; and for the payment to the defendant of any damages which the court may award to him against the plaintiff or complainant.⁷⁹ It must be executed by at least two sureties, and approved by the court or a commissioner thereof.⁸⁰

Defendant may except to the amount of the penalty of the bond or to the sureties by serving a notice to that effect on the clerk within three days after the articles are seized and a copy of the affidavit, writ and bond are served.⁸¹ If the exceptions are sustained, the court may order a new bond to be executed, or in default thereof within a time to be named by the court, the property to be returned to the defendant.⁸² Within ten days after the service of such notice, the attorney of the

72. Rule 1 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

73. *Scribner v. Straus*, 130 Fed. 389.

74. *Gilmore v. Anderson*, 38 Fed. 846.

75. Rule 3 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

76. Rule 3 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

77. Rule 3 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

78. Rule 4 of rules adopted by the

supreme court pursuant to Act March 4, 1909, §25.

79. Rule 4 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

80. Rule 3 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

81. Otherwise he is deemed to have waived all objection to the amount of the penalty and the sufficiency of the sureties. Rule 7 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

82. Rule 7 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

plaintiff or complainant is required to serve upon the defendant or his attorney a notice of the justification of the sureties, and the sureties are required to justify before the court or a judge thereof at the time therein stated.⁸³

Writ, Seizure and Return. — Upon the filing of the affidavit and bond, and the approval of the bond, the clerk is required to issue a writ directed to the marshal of the district where the articles to be seized are stated in the affidavit to be located, and generally to any marshal of the United States, directing him to forthwith seize and hold the same subject to the order of the court issuing said writ, or of the court of the district in which the seizure shall be made.⁸⁴ The marshal is thereupon required to seize such articles or any smaller or larger part thereof he may then or thereafter find, using such force as may be reasonably necessary in the premises,⁸⁵ and to make immediate return of such seizure or attempted seizure to the court.⁸⁶ He is also required to attach to the articles seized a tag or label stating the fact of such seizure, and warning all persons from in any manner interfering therewith,⁸⁷ and to retain them in his possession, keeping them in a secure place, subject to the order of the court.⁸⁸ At the time of the seizure the marshal is required to serve on defendant a copy of the affidavit, writ, and bond.⁸⁹

Release on Bond. — If defendant does not except to the bond, he may apply to the court for the return to him of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that they are not infringing copies or means for making the copies alleged to infringe the copyright.⁹⁰ Thereupon the court in its discretion, and after such hearing as it may direct, may order such return upon the filing by the defendant of a bond executed by at least two sureties, binding them in a specified sum to be fixed in the discretion of the court, and conditioned for the delivery of said specified articles to abide the order of the court.⁹¹ The complainant or plain-

83. Rule 8 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

84. Rule 4 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

85. Rule 5 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

86. Rule 5 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

87. Rule 5 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

88. Rule 6 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

89. Such service is to be made by

delivering such copy to him personally, if he can be found within the district, or if he can not be found, to his agent, if any, or to the person from whose possession the articles are taken, or if the owner, agent, or such person can not be found within the district by leaving said copy at the usual place of abode of such owner or agent with a person of suitable age and discretion, or at the place where said articles are found. Rule 5 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

90. Rule 9 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

91. Rule 10 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

tiff may require such sureties to justify within ten days of the filing of such bond.⁹²

Upon the granting of such application and the justification of the sureties on the bond, the marshal is required to immediately deliver the articles seized to the defendant.⁹³

C. FORFEITURE OF INFRINGING ARTICLES.—The copyright act requires the infringer to deliver up on oath for destruction all the infringing copies or devices and the means of making the same as the court may order.⁹⁴ It also provides for the seizure and condemnation of articles imported in violation of its terms by like proceedings as those provided by law for the seizure and condemnation of articles imported in violation of the customs laws, and for the destruction of the articles so forfeited in such manner as the secretary of the treasury or the court shall direct.⁹⁵

D. CRIMINAL PROSECUTIONS.—The usual rules of criminal procedure apply.⁹⁶

VIII. DECREE OR JUDGMENT.—**A. IN GENERAL.**⁹⁷—The copyright act provides that any court given jurisdiction thereunder may proceed in any suit, action, or proceeding for violation of any provision of the act to enter a judgment or decree enforcing the remedies therein provided.⁹⁸

In a suit for an injunction and damages the usual practice is to enter an interlocutory decree providing for an injunction and to send the case to a master to take proof of damages or profits, and to enter a final decree disposing of the question of damages on the coming in of his report.⁹⁹

B. SCOPE AND EXTENT OF RELIEF.—Where equity obtains jurisdiction it will do complete justice between the parties and dispose of the case finally though in so doing it grants purely legal relief.¹ And

92. Rule 10 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

93. Rule 11 of rules adopted by the supreme court pursuant to Act March 4, 1909, §25.

94. Act March 4, 1909, §25d, 35 St. at L. 1081; Fed. St. Ann. Supp. 1909, p. 88. For the method of seizing such devices pending suit see §VII, B, *supra*.

For cases dealing with forfeitures under the old law see *Hills & Co. v. Hoover*, 220 U. S. 329, 31 Sup. Ct. 402, 55 L. ed. 485; *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 28 Sup. Ct. 726, 52 L. ed. 1096, *reversing* 140 Fed. 305, 72 C. C. A. 77, 2 L. R. A. (N. S.) 913, which *reversed* 130 Fed. 593; *American Tobacco Co. v. Werekmeister*, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. ed. 208;

affirming 146 Fed. 375, 76 C. C. A. 647; *Richardson v. Bosselman & Co.*, 164 Fed. 781; *Stern v. Remick & Co.*, 164 Fed. 781; *Rinehart v. Smith*, 121 Fed. 148.

95. Act March 4, 1909, §32, 35 St. at L. 1083; Fed. St. Ann. Supp. 1909, p. 90.

96. See various titles of criminal law throughout this work.

97. See also the titles "Decrees;" "Injunctions;" "Judgment."

98. Act March 4, 1909, §26, 35 St. at L. 1082; Fed. St. Ann. Supp. 1909, p. 89.

99. *Patterson v. Ogilvie Pub. Co.*, 119 Fed. 451.

1. *West Pub. Co. v. Edward Thompson Co.*, 176 Fed. 833, 100 C. C. A. 303.

this is true even to the extent that it may award damages where equitable relief might be granted, but is withheld for some satisfactory reason.²

An injunction must be specific and must inform defendant with reasonable certainty what he is forbidden to do.³ Ordinarily it should be limited to the portions of the work which constitute an invasion of the complainant's copyright,⁴ but where the proper and improper matter are so interwoven in a single publication that defendant, without elimination, cannot use or employ what is his own without employing or using that which is not, the injunction may extend to the entire work,⁵ with leave to the defendant to apply for a modification or restriction thereof after he has made the proper erasures.⁶

Accounting.—The right to an account of profits is an incident to the right to an injunction,⁷ and where the bill states a case proper for an account, one may be ordered under the prayer for general relief,⁸ even though the occasion for an injunction has ceased to exist.⁹

2. *West Pub. Co. v. Edward Thompson Co.*, 176 Fed. 833, 100 C. C. A. 303, *modifying* 163 Fed. 833.

3. A preliminary injunction merely restraining the defendants from making any unlawful use of the complainant's publication; or from making use of any duly copyrighted matter from said publication will not be granted, since in that form it would be argumentative and inspecific. *Sweet v. G. W. Bromley & Co.*, 154 Fed. 754. See also the title "Injunctions."

4. *Park & Pollard v. Kellerstrass*, 181 Fed. 431; *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 Fed. 539, 72 C. C. A. 55, *reversing* 134 Fed. 890 on another point; *Social Register Assn. v. Murphy*, 128 Fed. 116.

The rule of the text is true particularly where an injunction is likely to lead to consequences to the defendant out of all proportion to the damage done to plaintiff. *Farmer v. Elstner*, 33 Fed. 494.

If it is possible for an infringing play to be revamped so as to eliminate the objectionable portions, this should be done. *Dam v. Kirke La Shelle Co.*, 166 Fed. 589.

Temporary injunction to restrain infringement of a copyright covering cuts in a catalogue was limited to the 18 cuts which were actually copied by defendant in its catalogue. *Da Prato Statuary Co. v. Giuliani Statuary Co.*, 189 Fed. 90.

5. *Frank Shepard Co. v. Zachary P. Taylor Pub. Co.*, 185 Fed. 941; *Park & Pollard v. Kellerstrass*, 181 Fed. 431; *Social Register Assn. v. Murphy*, 128 Fed. 116; *Edward Thompson Co. v. American Law Book Co.*, 119 Fed. 217; *Williams v. Smythe*, 110 Fed. 961; *Farmer v. Elstner*, 33 Fed. 494.

Where the objectionable parts are so intermingled with the other parts that it is impossible satisfactorily to separate them, the publication of the whole of the literary matter in which the piracy is found will be enjoined. *Encyclopaedia Britannica v. American Newspaper Assn.*, 130 Fed. 460, *affirmed* 134 Fed. 831, 67 C. C. A. 281.

6. *Frank Shepard Co. v. Zachary P. Taylor Pub. Co.*, 185 Fed. 941; *Park & Pollard v. Kellerstrass*, 181 Fed. 431; *Social Register Assn. v. Murphy*, 128 Fed. 116; *Williams v. Smythe*, 110 Fed. 961.

7. *Stevens v. Gladding*, 17 How. (U. S.) 447, 15 L. ed. 155; *Gilmore v. Anderson*, 38 Fed. 846. See also the titles "Account and Accounting;" "Injunctions."

8. *Stevens v. Gladding*, 17 How. (U. S.) 447, 15 L. ed. 155; *Gilmore v. Anderson*, 38 Fed. 846.

9. As where the infringement has ceased, since such cessation merely takes away the occasion for an injunction and not the right to one. *Gilmore v. Anderson*, 38 Fed. 846.

Where the proper and improper parts of a work are inextricably interwoven and defendant has made no effort to separate them, relief by way of accounting for profits will extend to the entire publication.¹⁰

C. OPERATION AND ENFORCEMENT. — An injunction against infringement is operative throughout the United States, and may be served on the parties against whom it is issued anywhere within the United States.¹¹ It may be enforced by proceedings in contempt or otherwise by any court or judge possessing jurisdiction of the defendants,¹² and provision is made for a transmission of a certified copy of all the papers on file in the case where enforcement is sought before a court or judge other than the one granting the injunction.¹³

IX. COSTS.¹⁴ — The statute provides that full costs shall be allowed in all actions, suits, or proceedings thereunder, except when brought by or against the United States, or any officer thereof,¹⁵ and that the court may award to the prevailing party a reasonable attorney's fee as part of the costs.¹⁶ The allowance and apportionment of costs in equity is largely discretionary with the chancellor.¹⁷

X. APPEALS. — The circuit court of appeals has appellate jurisdiction to review by appeal or writ of error final decisions of the district court in copyright cases,¹⁸ and its judgments and decrees therein are final,¹⁹ subject to its general right to certify questions of law to the supreme court,²⁰ and the right of the latter court to require the case to be certified to it for review.²¹

Similar jurisdiction is conferred on the court of appeals of the

10. *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. ed. 547; *Hartford Printing Co. v. Hartford Directory & Pub. Co.*, 146 Fed. 332; *Edward Thompson Co. v. American Law Book Co.*, 119 Fed. 217.

11. Act March 4, 1909, §36, 35 St. at L. 1084; Fed. St. Ann. Supp. 1909, p. 91. See also the title "Injunctions."

12. Act March 4, 1909, §36, 35 St. at L. 1084; Fed. St. Ann. Supp. 1909, p. 91. See also *Eisfeldt v. Campbell*, 171 Fed. 594; *Encyclopaedia Britannica Co. v. American Newspaper Assn.*, 130 Fed. 493; *Chicago Directory Co. v. United States Directory Co.*, 122 Fed. 189, and the title "Contempt."

13. Act March 4, 1909, §37, 35 St. at L. 1084; Fed. St. Ann. Supp. 1909, 91, requires the clerk of the court, or judge granting the injunction to transmit such copy without delay when required to do so by the court hearing the application for its enforcement.

14. See also the title "Costs."

15. Act March 4, 1909, §40, 35 St. at L. 1084; Fed. St. Ann. Supp. 1909, p. 91.

16. Act March 4, 1909, §40; 35 St. at L. 1084; Fed. St. Ann. Supp. 1909, p. 91.

17. In *Record & Guide Co. v. Bromley*, 175 Fed. 156, the bill was dismissed with the direction that each party pay half the total costs of the suit in view of the showing as to infringement, though the complainant was not entitled to relief because of insufficiency of notices and abandonment.

18. Act March 3, 1911, §128, 36 St. at L. 1133. See also the title "Appeals."

19. Act March 3, 1911, §128; 36 St. at L. 1133.

20. Act March 3, 1911, §239; 36 St. at L. 1157. See the title "Cases and Questions Certified, Reserved and Reported."

21. Act March 3, 1911, §240; 36 St. at L. 1157. See the title "Cases and

District of Columbia to review final decisions of the supreme court of the district.²²

Questions Certified, Reserved and Re-ported." 22. Act March 3, 1911, §§250 (d), 251; 36 St. at L. 1159.

CORAM NOBIS. — See **Error, Writ of.**

Vol. V

CORONER'S INQUEST

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I. POWERS AND DUTIES OF CORONERS.—Originally, in England, the office of coroner was one of great dignity and authority, but the power and authority of the coroner, from usage and statute, has been much curtailed, and statutes in the various states now provide under what circumstances coroners may hold inquests.¹

In no case, however, has a coroner jurisdiction to hold an inquest where there has been no death,² or merely because requested to do so by third persons.³ Contrary to the rule of the common law it is the law in this country that unless authorized by statute,⁴ the coroner

1. *Young v. Pulaski County*, 74 Ark. 183, 85 S. W. 229; *Lancaster County v. Holyoke*, 37 Neb. 328, 55 N. W. 950, 21 L. R. A. 394.

"Formerly no person was eligible to the appointment of coroner under the degree of a knight. See 3 Edw. 1, c. 10; 4 Inst. 271. And by the 14 Ed. 3, s. 1. c. 8, no coroner shall be chosen, unless he has land in fee sufficient to answer to all manner of people, and be of sufficient ability and knowledge to do his office. See 2 Inst. 176. And where a common merchant was chosen a coroner, he was removed, on the ground that he was *communis mercator*. See 2 Inst. 32. But his being *minus idoneus*, is no ground for his discharge. F. N. B. 163." 6 Petersdorff's Com. Law 581.

Illustrations.—Statutes in most of the states require inquests only in cases of deaths caused, or supposed to be caused, by criminal means, though statutes in some of the states provide for inquests in cases of accident and suicide. Thus the statutes authorize the coroner to hold inquests whenever a dead body of any person is found within the coroner's jurisdiction supposed to have come to his death by violence or casualty (*Stultz v. Board of Comrs.*, 168 Ind. 539, 81 N. E. 471; *State v. Marshall*, 82 Mo. 484); or where any person is found dead or dies under circumstances indicating foul play (*Young v. Pulaski County*, *supra*); or that he has been killed, committed suicide, or if the circumstances of his death afford a reasonable ground to suspect death by criminal means (*Morgan v. San Diego County*, 3 Cal. App. 454, 86 Pac. 720; Pen. Code, §1510); or it is apparent that violence caused the death (*Floyd County v. Miller*, 4 Ga. App. 1, 60 S. E.

823); or where a person has been killed under circumstances indicating a criminal act of another (*In re Sly*, 9 Idaho 779, 76 Pac. 766); death by violence, casualty or undue means (*Palenzke v. Bruning*, 98 Ill. App. 644); unlawful means (*Finarty v. Marion County*, 127 Iowa 543, 103 N. W. 772); or violent, mysterious or unknown means (*Moore v. Box, etc., Co.*, 78 Neb. 561, 111 N. W. 469); or if there are reasonable grounds for believing that death was caused by violence or unlawful means (*State v. Bellows*, 15 Ohio C. C. 504, 8 Ohio C. D. 376, "violence" does not mean accident or casualty), or that it was caused by accident, unlawful, violence, or by any suspicious cause (*Galloway v. Shelby County*, 7 Lea [Tenn.] 121).

Statutory provisions are set out at length in an annotation to *Lancaster County v. Holyoke*, 37 Neb. 328, 55 N. W. 950, 21 L. R. A. 394.

2. As to determine the cause of a fire from which death did not result. *Reg. v. Herford*, 3 El. & El. (Eng.) 115, 107 E. C. L. 113.

3. *McFadgen v. Chester County*, 10 Pa. Co. Ct. 124.

4. *Morgan v. San Diego County*, 3 Cal. App. 454, 86 Pac. 720, Pen. Code, §1510.

At common law the coroner was required to hold an inquest over the body of a person who had died from visitation of God, by chance or accident, by his own hand, by the hand of another (2 Hale P. C. 62). But at common law suicide was a crime punishable by forfeiture of goods, and for this reason the coroner was required to investigate the death. *Lancaster County v. Holyoke*, 37 Neb. 328, 55 N. W. 950, 21 L. R. A. 394. And see *Walden v. Bankers' Life Assn (Neb.)*, 131 N. W. 962.

has no jurisdiction to hold an inquest in the case of a person who has committed suicide, "and all of the facts are known, and there is no question but that the deceased came to his death by a self-inflicted wound."⁵ Nor is an inquest authorized in the case of sudden deaths, where there is no reasonable ground for suspicion that death was unnatural.⁶

This duty to hold inquests is to be exercised within the limits of a sound discretion, and only when, after making some inquiry, there is reasonable ground for suspicion that death resulted from one of the means contemplated by the statute.⁷ The coroner need not wait, how-

5. *Winger v. McKean County*, 26 Pa. Co. Ct. 126, per Morrison, J. And see *Lancaster County v. Holyoke*, 37 Neb. 328, 55 N. W. 950, 21 L. R. A. 394; *Witmore's Inquest*, 14 Pa. Co. Ct. 463.

In New York, the statute requires the coroner to hold an inquest, where the person committed suicide. Code Crim. Proc., §773.

Cause Unknown.—In several of the states (as, for example, Arkansas, Colorado, Delaware, Kansas and Montana), an inquest is to be held when a dead body is found and the cause of death is unknown. See also note 1, *supra*.

6. *Ark.*—*Clark County v. Calloway*, 52 Ark. 361, 12 S. W. 756 (death from apoplexy). *Pa.*—*McFadgen v. Chester County*, 10 Pa. Co. Ct. 124. *Eng.*—*Rex v. Kent*, 11 East 229, 103 Eng. Reprint 992.

See also *Fayette County v. Button*, 108 Pa. 531.

7. 1 East P. C. 382 and the following cases: *Ark.*—*Young v. Pulaski County*, 74 Ark. 183, 85 S. W. 229; *Clark County v. Calloway*, 52 Ark. 361, 12 S. W. 756. *Cal.*—*Morgan v. San Diego County*, 3 Cal. App. 454, 86 Pac. 720. *Ind.*—*Sandy v. Morgan County*, 171 Ind. 674, 87 N. E. 131; *Stultz v. Board of Comrs.*, 168 Ind. 539, 81 N. E. 471 (must base his judgment upon the facts). *Ia.*—*Finarty v. Marion County*, 127 Iowa 543, 103 N. W. 772. *Pa.* *County of Lancaster v. Mishler*, 100 Pa. 624, 45 Am. Rep. 402; *Miller v. Cambria County*, 29 Pa. Super. 166. *N. C.*—*State v. Knight*, 84 N. C. 789. *Ohio.*—*State v. Bellows*, 62 Ohio St. 307, 56 N. E. 1028. *Eng.*—*Reg. v. Great West. R. Co.*, 3 Ad. & El. 333, 43 E. C. L. 759, 762.

Holding Inquest Over Bones Washed Ashore.—The coroner has no right, by

virtue of his authority to hold an inquest over "dead bodies," to hold an inquest over a lot of bones, bleached by time, and constituting parts of a human skeleton. *Meads v. Dougherty County*, 98 Ga. 697, 25 S. E. 915.

Coroner Allowed Latitude in Deciding Necessity for Inquest.—In deciding this question some latitude should, of course, be allowed the coroner. It should not be held, that, simply because at the conclusion of an inquest it has been determined that the deceased died a natural death, he had no right to hold an inquest. *Morgan v. San Diego County*, 3 Cal. App. 454, 86 Pac. 720.

He has a very wide discretion in deciding whether the circumstances are such as to require an official investigation at his hands. *Moore v. Box Butte County*, 78 Neb. 561, 111 N. W. 469.

And see *Lancaster County v. Holyoke*, *supra*.

Mystery Around Cause of Death as Justifying Inquest.—The cause of death may be shrouded in such mystery as to warrant the tentative assumption that death was occasioned by violence or casualty, and thus justify the holding of an inquest to subserve the public ends for which the statute was enacted. *Stultz v. Board of Comrs.*, *supra*.

Violent Death Raising Presumption of Crime.—It is the duty of the coroner to hold an inquest over the body of a deceased person upon the receipt of information of the circumstances of his death which indicate that some one might be criminally liable; for, the killing being known, the presumption is that the slayer is guilty of crime. *Jefferson County v. Cook*, 65 Ark. 557, 47 S. W. 562; *Floyd County v. Miller*, 4 Ga. App. 1, 60 S. E. 823.

ever, until he is in possession of some evidence or information sufficient to raise a positive presumption, or at least a reasonable suspicion of death from violence or other unnatural cause.⁸ When he receives from the police authorities information of a sudden death, and there is no medical certificate of death from any natural cause, or other ground on which he can reasonably form an opinion as to the actual cause of death, he should hold an inquest.⁹ In such a case he has no discretion to act to the contrary unless (by inquiry or otherwise) he has obtained credible information sufficient to satisfy a reasonable mind that death arose from illness or some other cause making an inquest unnecessary.¹⁰

II. PURPOSE OF INQUEST.—The object of an inquest is to obtain and secure evidence by means of an immediate investigation, in case of death by violence or other undue means, and thus “prevent the escape of the guilty.”¹¹

III. WHO MAY HOLD INQUEST.—A. **DEPUTY CORONERS.** At common law a coroner could not appoint a deputy to perform his judicial duties.¹² In many jurisdictions, however, by constitutional provision,¹³ or by statutory enactment, deputy coroners are provided for to act in the absence of the coroner, or when the latter is unable to act.¹⁴ In such case the deputy coroner may issue the certificate of death.¹⁵ And if the deputy coroner begins the inquest he should proceed to the end of the inquiry, and the coroner should not come

8. *In re Hull*, L. R. 9 Q. B. D. (Eng.) 689, 700.

9. *In re Hull*, L. R. 9 Q. B. D. (Eng.) 689, 700.

10. *In re Hull*, L. R. 9 Q. B. D. (Eng.) 689, 700.

11. **Ark.**—*Young v. Pulaski County*, 74 Ark. 183, 85 S. W. 229; *Jefferson County v. Cook*, 65 Ark. 557, 47 S. W. 562; *Clark County v. Calloway*, 52 Ark. 361, 12 S. W. 756. **Ga.**—*Floyd County v. Miller*, 4 Ga. App. 1, 60 S. E. 823. **Ind.**—*Indiana Board of Comrs. v. Van Cleave*, 19 Ind. App. 643, 49 N. E. 978. **Ohio.**—*State v. Bellows*, 62 Ohio St. 307, 56 N. E. 1028. **Eng.**—*In re Hull*, L. R. 9 Q. B. Div. 689.

As Evidence.—The coroner's verdict, while it is competent to be considered in connection with other evidence in subsequent proceedings, is not sufficient to establish even *prima facie* the fact found by it; as, for example, that the deceased committed suicide. *Peckham v. Modern Woodmen*, 151 Ill. App. 95, an action on an insurance policy. See the title “*Coroner's Inquest*” in the *ENCYCLOPÆDIA OF EVIDENCE*.

12. *Fayette County Deputy Coroner's*

Case, 7 Pa. Dist. 568, 20 Pa. Co. Ct. 641, 642, citing *King v. Farrant*, 1 Chit. (Eng.) 745, 13 E. C. L. 220, 3 B. & A. 260; 1 East P. C. 383; 2 Hale P. C. 58.

13. *State v. Hopkins*, 118 La. 99, 42 So. 660; *State v. Duffy*, 39 La. Ann. 419, 2 So. 184.

14. **Pa.**—*Fayette County Deputy Coroner's Case*, 7 Pa. Dist. 568, 20 Pa. Co. Ct. 641. **S. C.**—*Buttz v. Charleston County*, 17 S. C. 585, the appointment should be made in writing or at least the evidence of such appointment should be in writing and furnished to the deputy. **Eng.**—*Reg. v. Perkin*, 7 Ad. & El. (N. S.) 165, 19 Jur. 636, 53 E. C. L. 163 (where the coroner was holding another inquest); *Reg. v. Johnson*, 12 Cox C. C. 264.

Question for Jury.—It is a question for the judge and not the jury as to what is a lawful or reasonable cause for the coroner's absence to authorize the deputy coroner to act. *Reg. v. Johnson*, 12 Cox C. C. (Eng.) 264.

15. *State v. Hopkins*, 118 La. 99, 42 So. 660.

in himself and take up the inquiry which the jury has already begun.¹⁶

B. JUSTICE OF PEACE. — A justice of the peace, in the absence of statute authorizing him to perform the duties of coroner, cannot hold an inquest.¹⁷ But in some states, by statute, the duties of coroner are placed upon justices of the peace.¹⁸ In others a justice of the peace is authorized to hold the inquest under specified circumstances.¹⁹

IV. INQUEST SHOULD BE HELD IN REASONABLE TIME.

The inquest should be held within a reasonable time after the death,²⁰ though compliance with this rule requires that it be held on Sunday.²¹ But in those jurisdictions where the inquisition is an indictment, the act is judicial and an inquest held on Sunday is invalid.²²

V. WHERE INQUEST SHOULD BE HELD. — A coroner is authorized to act when there is found within his county the body of a person who has apparently come to his death by violence, mysterious or unknown means,²³ though the violence was inflicted beyond his

16. *Reg. v. Perkin*, 7 Ad. & El. (N. S.) 165, 53 E. C. L. 163; *King v. Farrant*, 1 Chit. (Eng.) 745, 18 E. C. L. 220, 223.

The accidental presence of the coroner at the inquest after the deputy has commenced can make no difference. *Reg. v. Perkin*, *supra*.

17. *Colo.*—Board of Comrs. v. Wilson, 26 Colo. 29, 55 Pac. 1082. *N. C.* State v. Knight, 84 N. C. 789, 792. *Pa.*—*Ex parte* Schultz, 6 Whart. 269.

18. *Edwards v. Auditor General*, 161 Mich. 639, 126 N. W. 853; *Turner v. Smith*, 101 Mich. 212, 59 N. W. 398; *Stewart v. State*, 6 Tex. App. 184.

19. Statutes variously provide that a justice of the peace may hold the inquest only when there is no coroner in office or he is absent from the county (*Colo.*—Board of Comrs. v. Wilson, 26 Colo. 29, 55 Pac. 1082. *Ga.*—*Early County v. Jones*, 94 Ga. 679, 21 S. E. 828. *Ill.*—*Iroquois County v. Viets*, 59 Ill. App. 175. *Ind.*—*Stevens v. Harrison County*, 46 Ind. 541. *Mo.*—*Houts v. McCluney's Admr.*, 102 Mo. 13, 14 S. W. 766. *Pa.*—*Metzger's Inquest*, 8 Pa. Dist. 573. *Va.*—*Wormeley v. Com.*, 10 Gratt. 659), or is unable to attend the inquest (Board of Comrs. v. Wertz, 112 Ind. 268, 13 N. E. 874), or cannot be had in due time (*State v. Erickson*, 40 N. J. L. 159), or where his office is a certain distance from the place where the body is found (*Coroner's Inquest*, 20 Pa. Co. Ct. 660 (ten miles); *Metzger Inquest*, 8 Pa. Dist. 573).

Such statutes must be given a rea-

sonable construction. Their indirect intent is to provide for a case where the inquest cannot be held by a coroner. Board of Comrs. v. Wilson, *supra*.

20. *In re Hull*, L. R. 9 Q. B. D. (Eng.) 689; *Rex v. Bond*, 1 Str. 22, 93 Eng. Reprint 360; *Rex v. Clerk*, 1 Salk. 377, 91 Eng. Reprint 322.

Holding Body for Identification.—A coroner is not justified in holding a body in a state of decomposition for five days before holding an inquest in order that the body may be identified, buried and registered under the right name. *In re Hull*, *supra*.

21. *Blaney v. State*, 74 Md. 153, 21 Atl. 547, citing *State v. Sneed*, 84 N. C. 816, and saying that the inquest by the jury and the commitment by the coroner are rather ministerial than of that "judicial character which precludes their being performed on Sunday."

22. *In re Cooper*, 5 Prac. Rep. (Can.) 256.

By Licensing Act, 1902, 2 Edw. VII, ch. 28, §21, no inquest can be held on Sunday.

23. *Colo.*—Board of Comrs. v. Wilson, 26 Colo. 29, 55 Pac. 1082. *Neb.* *Moore v. Box Butte County*, 78 Neb. 561, 111 N. W. 469. *N. Y.*—*People v. Jackson*, 191 N. Y. 293, 84 N. E. 65, construing Code Cr. Proc. §773.

In *People v. Jackson*, *supra*, affirming 121 App. Div. 856, 106 N. Y. Supp. 1046, which reversed 47 Misc. 60, 95 N. Y. Supp. 286, it was held that the coroner was punishable for bribery, though he acted in excess of jurisdiction in as-

jurisdiction.²⁴ If death takes place in one county and deceased is removed to another county for burial, the coroner of the latter county may hold an inquest.²⁵

VI. NUMBER OF INQUESTS.—In holding an inquest, the coroner performs a judicial duty and he is *functus officio* as soon as the verdict has been returned, and can hold no second inquest in the same case unless the first has been quashed and a new inquiry ordered,²⁶ or unless the first inquest was void for some defect in the

suming to hold in New York an inquest over the body of a person who had been wounded in New York but died in New Jersey. The case was distinguished from a case where there could be no jurisdiction in any case, because "every function he attempted to discharge belonged to the office," and there lacked only the presence of the body to draw down the full sanction of the law.

If death occurs in a county prison situated within a borough, the county coroner and not the borough coroner has jurisdiction to hold the inquest. *Reg. v. Robinson*, L. R. 19 Q. B. D. 322.

Though inquest was held in United States arsenal subject to exclusive control of United States, but within county, the coroner could recover fees therefor. *Allegheny County v. McClung*, 53 Pa. 482.

24. *Moore v. Box Butte County*, 78 Neb. 561, 111 N. W. 469.

In *Reg. v. Great Western R.*, 3 D. B. (Eng.) 33, 2 S. & D. 773, 11 L. J. M. C. 86, 6 Jur. 8234, it was held that the coroner of a borough had no jurisdiction to hold an inquest on a party dying within the borough from injuries received in the county.

25. *Jameson v. Board of Comrs.*, 64 Ind. 524, 541 (body buried and exhumation necessary); *Pickett v. Erie County*, 3 Pa. Co. Ct. 23 (removal for burial).

Under St. 6 and 7 Vict., ch. 12, though the cause of death and death occurred in the county, an inquest was held proper in the city to which the body was removed (*Reg. v. Ellis*, 2 Car. & K. 470, 61 E. C. L. 468), and a city coroner had no authority to hold an inquest on a body removed to and lying outside of the city limits, though found in the bed of a river inside of the city (*Reg. v. Hinde*, 5 Ad. & El. 944, 48 E. C. L. 944).

But under a statute providing for coroner's inquests (1.) if the dead body of any person be found and the circumstances of his death be unknown; and (2.) if any person die and the circumstances of his death indicate that he has been foully dealt with, it was held that under the former provision the inquest might be held wherever the body was found without reference to where the crime was committed; but that under the latter only the coroner of the county where the body was found or where the crime was committed, had jurisdiction, and not the coroner of the deceased's home county to which the body was removed for burial. *Young v. Pulaski County*, 74 Ark. 183, 85 S. W. 229.

26. *Cal.*—*Morgan v. County of San Diego*, 3 Cal. App. 454, 86 Pac. 720; *Pen. Code* §1511a. *Ind.*—*Board of Comrs. v. Van Cleave*, 19 Ind. App. 643, 49 N. E. 978, though requested by friends. *N. Y.*—*People v. Budge*, 4 Park. Cr. 519, where the first verdict was suicide, and the second rendered four months later, was murder, and a commitment thereunder was void. *Eng.* *Reg. v. White*, 3 El. & El. 137, 107 E. C. L. 137, 29 L. J. Q. B. 257, 6 Jur. (N. S.) 868; 2 L. T. 463, 8 W. R. 580; *Reg. v. Clarke*, 1 Salk. 376, 91 Eng. Reprint 328; 2 Hale P. C. 59.

"We hold," said the court in *Morgan v. San Diego County*, *supra*, "that one inquest duly and lawfully held in accordance with the law upon one body, is sufficient, and he who undertakes to hold a second inquest has the burden to show that the first inquest, for some reason, was not lawful," in an action to recover fees for the second inquest.

In *The Protector & Blackwell*, Style 461, 82 Eng. Reprint 862, the court was moved for a *melius inquirendum* to be directed to the coroner of Middlesex to inquire of what goods one

proceedings.²⁷ One undertaking to hold a second inquest has the burden of showing that the first inquest, for some reason, was not lawful.²⁸

Calling the second verdict a supplemental verdict does not make it relate back to and become a part of, the first verdict so as to validate the second verdict.²⁹

A single inquest may be held over the bodies of several persons killed at one time by the same cause,³⁰ though not where the deaths occur several days apart.³¹ It has been held proper to hold a separate inquest over each body.³²

VII. CONSIDERATIONS RELATIVE TO THE JURY.—A. CORONER CAN ACT ONLY WITH JURY.—The coroner can act only with the aid of a jury, and if he acts without one, such acts are without authority of law, and void.³³

B. NUMBER OF JURORS.—At common law the jury consisted of not less than twelve and not more than twenty-three, and the concurrence

T that hanged himself did die possessed of, because the inquisition returned did only find the goods he was possessed of in London. Glynn, Chief Justice said: "You may have a *melius inquirendum*, it being for the protector, if the practice of the court will allow it, but it must be directed to the sheriff because the coroner hath done his office already and hath nothing now to do with it."

Hasty Consideration Not Excuse.—"The length of time to be taken in the inquest proceedings and the thoroughness of the investigation are matters to be determined by the coroner, and if he returns a verdict upon an investigation too hurriedly made, the matter is at an end so far as he is concerned." Board of Comrs. v. Van Cleave, 19 Ind. App. 643, 49 N. E. 978.

Writ of Melius Inquirendum in United States.—The writ of *melius inquirendum* does not lie to the verdict of a coroner's jury in this country. Smalls v. State, 101 Ga. 570, 28 S. E. 981.

27. If an inquest was made without a view of the body, a second inquest might be made with a view of the body as the first inquest was bad. Board of Comrs. v. Van Cleave, 19 Ind. App. 643, 49 N. E. 978; 2 Hale P. C. 58.

28. Morgan v. County of San Diego, 3 Cal. App. 454, 86 Pac. 720.

29. This is especially true where the first verdict was to the effect that deceased had committed suicide and the second that deceased had been mur-

dered. Board of Comrs. v. Van Cleave, 19 Ind. App. 643, 49 N. E. 978.

30. Cal.—Penal Code §1511a. Ill. St. Clair Co. v. Bollman, 15 Ill. App. 279. Pa.—Francis v. Tioga Co., 8 Pa. Co. Ct. 163. Eng.—Reg. v. West, 1 Gale & D. 481, 1 Q. B. 826, 5 Jur. 484, 41 E. C. L. 796.

31. Where in an affray in which A, B and C took part, A was killed and B and C wounded, and the jurors were summoned and sworn by the coroner and after a view of the body of A adjourned, and B died the following day, whereupon the above jury was sworn to hold the inquest on the body of B, and then C died and the same jury proceeded to inquire into the cause of the deaths of A, B and C, the inquisition was irregular. *In re Michelstown Inquisition*, 22 L. R. Ir. 279.

32. Fayette County v. Batton, 108 Pa. 591, an action to recover fees by the coroner where the bodies had been removed to their respective homes and the same jury held separate inquests over each body. The deceased, said the court, were not to be treated like cattle.

33. National Gross Loge v. Jung, 65 Ill. App. 313; Lancaster County v. Holyoke, 37 Neb. 328, 55 N. W. 950, 21 L. E. A. 394 (action for recovery of fees).

A coroner's inquest has always meant a judicial investigation with the aid of a jury. People v. Coombs, 158 N. Y. 538.

of at least twelve jurors was required to make a valid finding,³⁴ but the number has been reduced by statute in several states.³⁵

C. WHO SHOULD SUMMON JURY.—At common law the coroner issues a warrant to his constable to summon the jury,³⁶ but it has been held that the coroner personally may summon the jury.³⁷

D. WHO SHOULD SWEAR JURY.—The jury should be sworn by the coroner when he is holding the inquest.³⁸

E. MANNER OF SWEARING JURY.—The jurors need not all be sworn at the same time.³⁹ Nor is it necessary that the jurors should be sworn in the immediate presence of the body.⁴⁰

F. JURY NOT DISCHARGED WITHOUT INQUEST.—After summoning a jury, the coroner has no discretion as to going on with the inquest, and cannot discharge them until the inquest is completed.⁴¹

VIII. PROCEDURE AT INQUEST.—A. MANNER OF VIEWING BODY.—At common law, it was absolutely essential to the validity of the coroner's inquisition that the coroner and jury view the body

34. 1 East P. C. 383; 2 Hale P. C. 59; Reg. v. Golding, 39 U. C. Q. B. 259 (concurrence of eight only made inquisition void); Lambert v. Taylor, 6 D. & R. (Eng.) 188, 196.

The court will presume after verdict that the inquisition was found by the requisite number of jurors. Taylor v. Lambert, 6 D. & R. (Eng.) 188, 4 Barn. & Cres. 138, 10 E. C. L. 293.

Challenges.—If the jurors summoned appear they are not challengeable by either party, at common law. 2 Hale P. C. 59.

35. Penal Code (Cal.) §1511 (six); Moore v. Box Butte County, 78 Neb. 561, 111 N. W. 469 (six).

In several states not less than nine nor more than fifteen. Cal. Pen. Code, §1510; N. Y. Code Crim. Proc., §773.

See the statutes of various states, and the title "Jury."

36. 1 East P. C. 380; 2 Hale P. C. 59; Cunningham v. Coroner, 2 Nott. & McC. (S. C.) 454 (verbal summons by coroner insufficient where statute declaratory of common law required coroner to issue his warrant to a constable).

Jurors regularly summoned by a lawful officer must obey without regard to the propriety of issuing the summons. Levy Court v. Woodward, 2 Wall. 501, 17 L. ed. 851.

Constable as Juror.—Though a constable summons the jury, he is eligible as a juror. Reg. v. Winegarner, 17 Ont. (Can.) 208.

37. Ga.—Davis v. Bibb County, 116 Ga. 23, 42 S. E. 403 (not entitled to fees); Ex parte M'Annully, T. U. P. Charlt. 310 (by statute). Pa.—Metzger's Inquest, 8 Pa. Dist. 573. Can. Davidson v. Garrett, 30 Ont. 653.

Oral Summons Sufficient.—Davidson v. Garrett, 30 Ont. 653.

Fining Juror for Non-Attendance. Ex parte M'Annully, T. U. P. Charlt. (Ga.) 310.

38. State v. Knight, 84 N. C. 789, 792 (holding that in such a case a justice has no authority); Rex v. Ferand, 3 B. & Ald. 260, 5 E. C. L. 274.

39. Reg. v. Ingham, 5 Best & S. 257, 117 E. C. L. 255, 33 L. J. Q. B. 183, 10 Jur. (N. S.) 968, 9 Cox C. C. 508.

40. Clay County v. Thornton, 90 Ark. 372, 119 S. W. 246; Reg. v. Ingham, 5 Best & S. 257, 117 E. C. L. 255, 33 L. J. Q. B. 183, 10 Jur. (N. S.) 968, 9 Cox C. C. 508.

Though it was said in King v. Farant, 1 Chit. (Eng.) 745, 18 E. C. L. 220, 3 B. & Ald. 260, 5 E. C. L. 274, "The form of oath is 'You are sworn to inquire of the death of A here lying dead.' That implies that the dead body is to be there at the time the jury are sworn."

41. In re Ward, 3 DeG. F. & J. 700, 45 Eng. Reprint 1049, 30 L. J. Ch. 775, 7 Jur. (N. S.) 853, 9 W. R. 843.

The coroner cannot discharge the jury where they cannot agree, but they must be remitted to the judges

together,⁴² and this is expressly provided for by some statutes,⁴³ though some statutes provide that all need not view the body at the same time where all view the body at the first sitting.⁴⁴

Exhumation.—If an inquisition is quashed and a *melius inquirendum* issued for a new inquest, exhumation is necessary as the new inquiry must also be *super visum corporis*.⁴⁵

B. NECESSITY FOR HOLDING INQUEST SUPER CORPUS.—The inquisition need not be actually held *super corpus*.⁴⁶

C. PUBLICITY OF INQUEST.—Though a coroner's inquest is a judicial proceeding and within the policy of a statute declaring that the sittings of the court shall be public and that every citizen may freely attend the same,⁴⁷ the coroner, by virtue of the power which every court has to prevent disorder in its presence, may exclude particular individuals if good order requires it.⁴⁸

IX. AUTOPSY.—**A. NECESSITY FOR AUTOPSY.**—Though an autopsy is not absolutely essential,⁴⁹ statutes in some states provide for autopsies by physicians or surgeons employed by the coroner.⁵⁰

of the next assizes for the county, and if they cannot agree then, the judge of assizes trying prisoner will discharge them. *Reg. v. Reinheatz*, 4 F. & F. (Eng.) 1094.

42. *Ind.*—Board of Comrs. *v. Van Cleave*, 19 Ind. App. 643, 49 N. E. 978. *Neb.*—Lancaster County *v. Holyoke*, 37 Neb. 328, 55 N. W. 950, 21 L. R. A. 394. *N. Y.*—People *v. Budge*, 4 Park. Cr. 519. *N. O.*—State *v. Knight*, 84 N. C. 789. *Pa.*—Lancaster County *v. Mishler*, 100 Pa. 624, 45 Am. Rep. 402; *Burnett v. Lackawanna County*, 9 Pa. Co. Ct. 95. *Eng.*—*Reg. v. Ingham*, 5 Best & S. 257, 117 E. C. L. 255, 33 L. J. Q. B. 183; *Rex v. Ferrand*, 3 B. & Ald. 260, 5 E. C. L. 274.

"The reason is, because oftentimes much of the evidence ariseth upon the view, for the inquisition ought to contain the manner of death, the place, length and depth of wound, etc. As far as regards the jurisdiction of the coroner, the body is part of the evidence." *Reg. v. Ingham*, 5 Best & S. 257, 117 E. C. L. 255, 33 L. J. Q. B. 183.

Merely seeing the face of the body after it has been buried a great many days is not a sufficient view of the body. *King v. Farrant*, 1 Chit. 745, 18 E. C. L. 220, 224.

43. *Ark.*—Clay County *v. Thornton*, 90 Ark. 372, 119 S. W. 246, holding that failure in this respect does not

prevent physician holding autopsy from receiving fees. *Cal.*—Penal Code, §1511b. *N. Y.*—*Crisfield v. Perine*, 15 Hun 200, 202.

44. *Reg. v. Ingham*, 5 Best *v. S.* 257, 117 E. C. L. 255, 10 Jur. (N. S.) 968, 9 Cox C. C. 508.

45. *Reg. v. Carter*, 13 Cox C. C. 220, 24 W. R. 882, 45 L. J. Q. B. 711, 34 L. T. 849.

46. 2 Hale, P. C., 66.

47. *Crisfield v. Perine*, 15 Hun (N. Y.) 200, *affirmed*, 81 N. Y. 622.

48. *Crisfield v. Perine*, 15 Hun (N. Y.) 200, *affirmed*, 81 N. Y. 622; *Garnett v. Ferrand*, 6 B. & C. 611, 9 D. & R. 657, 13 E. C. L. 277.

Ground of Doctrine.—But in *Garnett v. Ferrand*, 6 B. & C. 611, 13 E. C. L. 277, 9 D. & R. 657, this right was placed on the ground that a coroner's inquest was a preliminary examination only (though in England the coroner's court is a court of record) and the public could be excluded should the coroner deem it necessary.

49. *Crisfield v. Perine*, 15 Hun (N. Y.) 200, 202, *affirmed*, 81 N. Y. 622.

50. *Ala.*—*Naftel v. Montgomery County*, 127 Ala. 563, 29 So. 29. *Ia.*—*Finarty v. Marion County*, 127 Iowa 543, 103 N. W. 772; *Sanford v. Lee County*, 49 Iowa 148. *Mich.*—*Turner v. Smith*, 101 Mich. 212, 59 N. W. 398. *N. Y.*—*Crisfield v. Perine*, 15 Hun 200, *affirmed*, 81 N. Y. 622.

But even without such a statute the coroner, in pursuance of the duty to do all things whatsoever that are reasonably necessary to the discharge of his duty, may order an examination of the body of a deceased,⁵¹ without the consent of the family or of any member thereof,⁵² unless restrained by statute to the holding of autopsies in cases of death from specified causes only.⁵³

B. EMPLOYMENT OF PHYSICIAN OR CHEMIST TO MAKE AUTOPSY.
The coroner, whenever he deems it necessary in holding an inquest, may employ a physician or surgeon to make a *post mortem* examination of the body,⁵⁴ or he may employ a chemist to assist in the post

Extent of Coroner's Right To Make Autopsy Under Statute.—If the statute provides for an autopsy as a part of the inquest only, while the statute should not be strictly construed so as to defeat its purpose, yet it must not be extended beyond its evident purpose, and the coroner is not the sole arbiter of its necessity. "Being a ministerial power, it must be exercised with some reasonable presumption that death has resulted from violence or casualty." *Sandy v. Morgan County*, 171 Ind. 674, 87 N. E. 131. See also *Palenzke v. Bruning*, 98 Ill. App. 644.

51. **Ark.**—*Kempner v. Pulaski County*, 64 Ark. 139, 41 S. W. 50; *St. Francis County v. Cummings*, 55 Ark. 419, 18 S. W. 461. **Colo.**—*Pueblo County Comrs. v. Marshall*, 11 Colo. 84, 1d Pac. 837. **Idaho.**—*Fairchild v. Ada County*, 6 Idaho 340, 55 Pac. 654. **Ind.**—*Lang v. Perry County Comrs.*, 121 Ind. 133, 22 N. E. 667; *Dearborn County Comrs. v. Bond*, 88 Ind. 102; *Gaston v. Marion County Comrs.*, 3 Ind. 497. **Md.**—*Young v. College of Physicians & Surg.*, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540, annotated case. **Pa.**—*Lancaster County v. Mishler*, 100 Pa. 624, 627; *North County v. Innes*, 34 Pa. 301; *Com. v. Harman*, 4 Pa. 263. **Tex.**—*Polk County v. Phillips*, 92 Tex. 630, 51 S. W. 328; *Fears v. Nacogdoches County*, 71 Tex. 337, 9 S. W. 265.

Court Cannot Appoint Physician.
Kempner v. Pulaski County, 64 Ark. 139, 41 S. W. 50.

Statute Requiring Written Consent of Crown Attorney.—A statute providing that "no coroner has jurisdiction to direct a post mortem to be made without the consent in writing of the County Crown Attorney, unless an inquest is actually held," does not re-

quire the written consent of the Crown Attorney where an inquest is actually held but only where a post mortem is held to determine whether the inquest should be held. *Davidson v. Garrett*, 30 Ont. (Can.) 653, 658.

52. *Young v. College of Phys. & Surg.*, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540.

53. *Farrell v. Floyd County*, 57 Ga. 347, restricted to death by poisoning by statute.

54. **Ark.**—*Clay County v. Thornton*, 90 Ark. 372, 119 S. W. 246; *Kempner v. Pulaski County*, 64 Ark. 139, 41 S. W. 50; *St. Francis County v. Cummings*, 55 Ark. 419, 18 S. W. 461. **Colo.**—*Pueblo County Comrs. v. Marshall*, 11 Colo. 84, 1d Pac. 837. **Idaho.**—*Fairchild v. Ada County*, 6 Idaho 340, 55 Pac. 654. **Ind.**—*Jameson v. Board of Comrs.*, 64 Ind. 524 (physician for another county employed); *Board of Comrs. v. Van Cleave*, 19 Ind. App. 643, 49 N. E. 978. **Ia.**—*Moser v. Boone County*, 91 Iowa 359, 59 N. W. 39, 55 N. W. 327. **Md.**—*Young v. College of Phys. & Surg.*, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540. **Pa.**—*Northampton County v. Innes*, 26 Pa. 156; *In re Coroner's Inquest*, 1 Pa. Co. Ct. 14, 3 Kulp 451. **Tex.**—*Polk County v. Phillips*, 92 Tex. 630, 51 S. W. 328; *Fears v. Nacogdoches County*, 71 Tex. 337, 9 S. W. 265.

County Liable for Reasonable Fee Only.—*Fairchild v. Ada County*, 6 Idaho 340, 55 Pac. 654.

Employment of Two Physicians.—It was held in *Clay County v. Thornton*, 90 Ark. 372, 119 S. W. 246, that two physicians might be employed to make the autopsy and the county would be liable for the reasonable value of their services. But in *In re Coroner's Inquest*, 1 Pa. Co. Ct. 14, 3 Kulp 451,

mortem, and the county is liable to pay the value of such services, where it is not shown that there were no grounds justifying the inquest.⁵⁵ And if the coroner determines that a post mortem is necessary, neither the coroner,⁵⁶ the undertaker,⁵⁷ nor a physician or surgeon taking part in the post mortem is liable, where the examination is made in a decent and scientific manner without undue mutilation of the body.⁵⁸ And the surgeons may enter the house where the dead body lies for the purpose of making the post mortem examination, without being liable therefor.⁵⁹

C. TIME FOR HOLDING AUTOPSY. — The post mortem may be held before the impaneling of the jury.⁶⁰

D. AUTOPSY NOT TO BE BEFORE JURY. — The post mortem should not be in the presence of the jury.⁶¹

E. AUTOPSY NEED NOT BE PUBLIC. — The post mortem examination by surgeons employed by the coroner holding the inquest is not a part of the inquest, in the sense that every citizen has a right freely to attend it.⁶² Even the suspected person has no right to be present at the post mortem.⁶³

it is held that the county is liable for the expenses of one physician only.

Statistical statutes do not authorize autopsy if there is no reasonable suspicion of death from casualty or violence. *Sandy v. Morgan County*, 171 Ind. 726, 87 N. E. 131.

If the administrator pays the physician the latter cannot recover a fee from the county. *Naftel v. Montgomery County*, 127 Ala. 563, 29 So. 23.

55. *Board of Comrs. v. Jameson*, 86 Ind. 154, where the remains were sent for chemical analysis to a non-resident chemist.

In *Rhode Island* a statute provides for charging a chemist's fee upon the estate of decedent, to be sued for only after the statutory prerequisites are complied with. *Hill v. Mowry*, 7 R. I. 167.

56. *Young v. College of Phys. & Surgs.*, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540.

Nor is the coroner or a party permitting their room to be used for the post mortem liable for anything irregular or improper occurring in the prosecution of the autopsy, where he appears to have had no further connection with the matter. *Young v. College of Phys. & Surgs.*, *supra*.

57. *Cook v. Walley*, 1 Colo. App. 163, 27 Pac. 950.

58. *Cook v. Walley*, 1 Colo. App. 163, 27 Pac. 950.

Liable for Improper Mutilation. — *Palenzke v. Bruning*, 98 Ill. App. 644, 649.

59. *Davidson v. Garrett*, 30 Ont. (Can.) 653, 659.

60. "The matter is one of procedure, . . . to be determined on the facts of each case by the coroner in the exercise of his discretion." *Davidson v. Garrett*, 30 Ont. (Can.) 653.

In *People v. Fitzgerald*, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483, the point is said to be debatable, but would not be decided to support an indictment for body stealing by the coroner because of his having exhumed a body and made a post mortem before having a jury impanelled, as the finding was not as in England equivalent to an indictment.

61. *People v. Fitzgerald*, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483; *Crisfield v. Perine*, 15 Hun (N. Y.) 200, *affirmed*, 81 N. Y. 622.

62. *Crisfield v. Perine*, 15 Hun (N. Y.) 200, *affirmed*, 81 N. Y. 622, where it was said that even the jurors are to be informed of what it discloses by the testimony of the surgeons. *Crisfield v. Perine*, 15 Hun (N. Y.) 200, *affirmed*, 81 N. Y. 622.

63. *Crisfield v. Perine*, 15 Hun (N. Y.) 200, 203, *affirmed*, 81 N. Y. 622.

The suspected person loses no legal

X. THE INQUISITION. — A. ESSENTIALS. — It was necessary at common law that the inquisition be on parchment and not on paper.⁶⁴ It should state that it was upon the oath of the jurors,⁶⁵ and should also sufficiently identify the body viewed as that of the person found to have been unlawfully killed.⁶⁶ Under some statutes the necessity for the inquest must also appear in the return.⁶⁷

B. NECESSITY FOR SEAL. — The inquisition need not be under seal, but the practice of sealing is universal, and had better not be departed from.⁶⁸

C. DATING INQUISITION. — While the inquisition should state the time of holding the inquest,⁶⁹ if two dates appear in the certificate, one incorrect and the other correct, the correct date cures the former.⁷⁰ If there has been an adjournment, it is better to set it out in the

right by being excluded from the *post mortem*. "He has no right to dissect the body. If the coroner's jury pronounces him guilty, the inquest, like the indictment of a grand jury, or sworn complaint before a magistrate, simply makes him liable to arrest; it is not even *prima facie* evidence against him on the trial." *Crisfield v. Perine*, 15 Hun (N. Y.) 200, 203, *affirmed*, 81 N. Y. 622.

64. *Rex v. Beavers*, 1 East P. C. 383; *Reg. v. Whalley*, 7 D. & L. 317, 19 L. J. Q. B. 14.

65. 1 East P. C. 383; 2 Hale P. C. 59.

It is sufficient where the caption states that it is upon the oath of twelve men, setting out their names in full. *Reg. v. Winegarner*, 17 Ont. (Can.) 208.

66. *Reg. v. Winegarner*, 17 Ont. (Can.) 208.

Amendable as to form but not as to substance. *Rex v. Saloway*, 3 Mod. 100. And so an inquisition was quashed because the jury said, "We believe it to be the cause of his death," instead of precisely alleging the cause. *Anon.*, 12 Mod. 112.

67. Under this statute it has been held necessary to state the circumstances giving rise to the suspicion of unlawfulness (*In re Stoeker's Inquest*, 5 Kulp. (Pa.) 487); but the return should state simply the facts and need not include the notes of testimony of the witnesses (*Marvin Shaft's Inquest*, 3 Pa. Co. Ct. 10; *In re Coroner's Inquest*, 1 Pa. Co. Ct. 14, 3 Kulp 451).

Return Where Coroner Decides Inquest Not Necessary. — The presumption being in favor of the regularity of the return, the return, under the act of 1897 requiring coroner to certify and return the fact when he views the body and decides no inquest is necessary, need not necessarily show on its face when, where and how the coroner was called in, nor set forth that there were suspicions of foul play, but as the presumption of regularity is rebuttable, it would be wise for each return to set forth particularly and specially by whom, when and where and how he was called, and a brief of the statement made to him by the party calling, before proceeding to the body. *Fayette County Coroner's Returns*, 24 Pa. Co. Ct. 498.

68. *Reg. v. Winegarner*, 17 Ont. (Can.) 208; 1 East P. C. 383.

69. *Rex v. Philips*, 1 Str. 261, 93 Eng. Reprint 510; Hale P. C. 166.

The time is sufficiently stated where the caption of the inquisition states that the inquest was held at H., in the county of B., on the 11th and 15th days of Jan., in the 51st year of the reign of our sovereign Lady Victoria. *Reg. v. Winegarner*, 17 Ont. (Can.) 208.

In *Rex v. Philips*, 1 Str. 261, 93 Eng. Reprint 510, the inquisition was quashed because the year of our Lord in the caption was in common figures, on the ground that it ought to have been in words at length, or at least in Roman numerals.

70. *State v. Hopkins*, 118 La. 99, 42 So. 660.

caption; but it is sufficient to describe the inquisition as being held on the first day of the sitting.⁷¹

D. SIGNING INQUISITION.—1. **In General.**—The verdict must be signed by the jurors as well as by the coroner,⁷² by writing their names in full,⁷³ unless their names appear in full in the body of the inquisition.⁷⁴ It is not necessary, however, where several persons have the same Christian names and surnames, for the caption of the inquisition to distinguish them by abode or addition.⁷⁵ And if the jurors sign the inquisition with their marks, they should be verified by an attestation.⁷⁶ But a juror who put his mark to the inquisition must be taken *prima facie* to have made it in the presence of the other jurors.⁷⁷ Likewise the signature of the officer authorized to sign the certificate will be presumed genuine.⁷⁸

71. Reg. v. Winegarner, 17 Ont. (Can.) 208.

72. Rex v. Norfolk, 1 East P. C. 383.

Form of inquisition signed by jurors: State of Illinois, County of Cook—ss.: An inquisition was taken for the people of the State of Illinois, at 38 Grant Place, in the City of Chicago, in said County of Cook, on the 18th day of January, A. D. 1885, before me, Henry L. Hertz, coroner in and for said county, upon view of the body of Otto W. Kielgast, then and there lying dead, upon the oaths of six good and lawful men of the said county, who being duly sworn to inquire on the part of the people of the state of Illinois into all the circumstances attending the death of the said Otto W. Kielgast, and by whom the same was produced, and in what manner and when and where the said Otto W. Kielgast came to his death, do say, upon their oaths as aforesaid, that the said Otto W. Kielgast, now lying dead at 38 Grant Place, in said City of Chicago, County of Cook, State of Illinois, came to his death on the 17th day of January, A. D. 1885; and we, the jury, find that O. W. Kielgast came to his death on the night of January 17, 1885, by a pistol shot fired by his own hand while laboring under a fit of temporary insanity. In testimony whereof the said coroner and the jury of this inquest have hereunto set their hands the day and year aforesaid.

Douglas Barstow, Foreman.

Louis Gasselin,

O. W. Haynie,

H. M. Gillette,

Angelo Faiel,

M. J. Shute,

Henry L. Hertz, Coroner.

P. Knoff, Deputy.

United States Life Ins. Co. v. Kielgast, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65.

Signature of Coroner and Foreman Insufficient.—Reg. v. Winegarner, 17 Ont. (Can.) 208.

Pencil.—Though depositions, finding and signatures are all written in pencil, the inquisition is sufficient, but this is inexcusable carelessness. Reg. v. Winegarner, 17 Ont. (Can.) 208.

Other evidence admissible to show jurors though the names of the jurors should be given in the certificate. State v. Hopkins, 118 La. 99, 42 So. 660.

73. Rex v. Bowen, 3 Car. & P. 602, 14 E. C. L. 475; Rex v. Nicholas, 7 Car & P. 538, 32 E. C. L. 747.

74. Rex v. Bennett, 6 Car. & P. 179, 25 E. C. L. 343 (Christian names need not be signed at length where full names are set out in body of inquisition); Rex v. Bowen, 3 Car & P. 602, 14 E. C. L. 475; Reg. v. Evett, 6 B. & C. 247, 13 E. C. L. 160; Reg. v. Golding, 39 U. C. Q. B. (Can.) 259.

75. Rex v. Nicholas, 7 Car & P. 538, 32 E. C. L. 747.

76. Reg. v. Brown, 3 Car. & P. 602, 14 E. C. L. 475; Reg. v. Stockdale, 8 Dowl. P. C. 517.

Coroner's Certificate Sufficient.—State v. Evans, 27 La. Ann. 297.

77. Lewen's Case, 2 Lewin C. C. (Eng.) 125.

78. State v. Hopkins, 118 La. 99, 42 So. 660.

The court may take judicial notice

2. Where Deputy Holds Inquest.—If the inquisition is held by a deputy coroner, it should be described as having been taken before the principal coroner and signed in the coroner's name.⁷⁹

E. EFFECT OF INQUISITION.—At common law the verdict of a coroner's jury was, when it contained the subject-matter of an accusation, equivalent to an indictment of the accused and the party named therein could be tried without the intervention of a grand jury.⁸⁰ But the inquisition in this country is advisory merely to the officers charged with the execution of the public law, and is not a sufficient basis for information by the public prosecutor,⁸¹ though in many states if the person accused in the inquisition is not in custody, it is made the duty of the coroner to issue process for his apprehension.⁸²

of the signature of the officer authorized to issue the certificate. *State v. Hopkins*, 118 La. 99, 42 So. 660.

79. *Reg. v. Perkin*, 7 Ad. & El. (N. S.) 163, 53 E. C. L. 165.

80. *Hawk*, P. C. 104, 1 East P. C. 383, 389. And see: *Ga.*—*Smalls v. State*, 101 Ga. 570, 28 S. E. 981. *Idaho.* *In re Sly*, 9 Idaho 779, 76 Pac. 766. *N. Y.*—*People v. Collins*, 20 How. Pr. 111, 116, 11 Abb. Pr. 406.

England—Procedure Upon Indictment and Inquisition.—And "in cases of murder or manslaughter where, besides the indictment there is also a coroner's inquisition, it is usual to arraign the inquisition immediately after arraigning him on the indictment, and to try him on both at the same time." *People v. Collins*, *supra*, 1 East P. C. (London ed. 1803) 371.

Necessity for Presence of Accused. In New York "there is no statute that directs the coroner to take the testimony of the witnesses in the presence of the party accused, who are examined before the jury; or that requires him to examine any witnesses to establish the guilt of such party, when brought before him by virtue of process issued after the finding of the inquisition; or that permits such party to produce witnesses before the coroner to show himself innocent of the crime charged upon him." *People v. Collins*, 20 How. Pr. (N. Y.) 111; *s. c.*, 11 Abb. Pr. 406, *citing* Hale's Pl. of the Crown (Phil. ed.) 1847, with notes by Stokes and Ingersoll, Vol. 1, p. 415, Vol. 2, pp. 60, 61. See also 3 Encyc. Ev. 571, *et seq.*

81. *Ga.*—*Smalls v. State*, 101 Ga. 570, 28 S. E. 981. *Idaho.*—*In re Sly*, 9 Idaho 779, 76 Pac. 766. *N. Y.*

People v. Collins, 20 How. Pr. 111. *Tenn.*—*Galloway v. Shelby County*, 7 Lea 121.

"In this country no person can be tried upon a coroner's inquisition, yet the inquisition of a coroner's jury, finding a person guilty of murder, has about the same force against him, until the grand jury passes upon his case, that an indictment found by them has thereafter prior to his trial." *People v. Collins*, 20 How. Pr. (N. Y.) 111.

82. *Ark.*—*Jefferson County v. Cook*, 65 Ark. 557, 47 S. W. 562; *Bass v. State*, 29 Ark. 142. *Cal.*—*Penal Code*, §1517. *N. Y.*—*People v. Collins*, 20 How. Pr. 111, 11 Abb. Pr. 406; *Gubson v. McDonald*, 139 App. Div. 51, 123 N. Y. Supp. 504. *Tenn.*—*Galloway v. Shelby County*, 7 Lea 121.

And see the statutes of the various states.

By statutes in New York the coroner has the power of a magistrate when some person has been killed or dangerously wounded by another; and in that class of cases he has the right to issue warrants, hold examinations, and commit or discharge the accused the same as any of the regular magistrates. *People v. Jackson*, 191 N. Y. 293, 84 N. E. 65, 15 L. R. A. (N. S.) 1173.

He issues this process solely upon the inquisition, and also his *mittimus* for sending him to prison. *People v. Collins*, 20 How. Pr. (N. Y.) 111, 11 Abb. Pr. 406.

Waiver of Objection.—It is too late to object that the coroner could not commit the accused to jail after he has been regularly examined and sent on for trial, and indicted. *Wormeley v. Com.*, 10 Gratt. (Va.) 658.

XI. PRESUMPTIONS.—A coroner will be presumed until the contrary appears, to have acted within the limits of a sound discretion.⁸³ But there is no presumption in favor of the justice's jurisdiction when he is acting as coroner, and the return of the justice must show on its face all jurisdictional facts;⁸⁴ but it may be amended to show jurisdiction.⁸⁵

83. **Ark.**—Clark County *v.* Callaway, 52 Ark. 361, 12 S. W. 756. **Ga.** Floyd County *v.* Miller, 4 Ga. App. 1, 3, 60 S. E. 823. **Ind.**—Stultz *v.* Board of Comr's., 168 Ind. 539, 81 N. E. 471; Jameson *v.* Board of Comrs., 64 Ind. 524. **Pa.**—County of Lancaster *v.* Mishler, 100 Pa. 624, 45 Am. Rep. 402, presumption not conclusive.

See generally the title "**Coroner's Inquest**" in the *ENCYCLOPEDIA OF EVIDENCE*.

84. *In re* Coroner's Inquest, 3 Kulp (Pa.) 451, 1 Pa. Co. Ct. 14; Reit-

linger's Inquest, 2 Kulp (Pa.) 127; Coroner's Inquest, 28 Pa. Co. Ct. 428; Metzger Inquest, 8 Pa. Dist. 573; Coroner's Inquest, 7 Pa. Dist. 566, 20 Pa. Co. Ct. 660.

Justice Acting as Coroner.—"If a justice of the peace has held an inquest, in the absence of anything to show otherwise, it will be presumed in a collateral action that that officer proceeded according to his duty in the premises, as he is acting in a special capacity." *Morgan v. County of San Diego*, 3 Cal. App. 454, 86 Pac. 720.

85. *Lee's Case*, 9 Pa. Co. Ct. 474.

CORPORATIONS

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I. CAPACITY TO SUE AND TO BE SUED. — A. IN GENERAL.

It is an elementary principle of law that corporations may sue and be sued in their corporate names, and this capacity is one of the powers of every corporation.¹

Implied Power. — It is true that in many states among the enumerated powers of corporations, as found either in the provisions of the constitution,² or of the statutes,³ the right to sue and to be sued is expressly declared.

1. *Estell v. The Knightstown & Middletown Tpk. Co.*, 41 Ind. 174.

Essential to Corporate Existence. It is very obvious that a corporation would be entirely incapacitated to manage its concerns and to carry into effect the objects for which it is constituted, if it had not the capacity of protecting its rights and of enforcing the just claims in its favor, by ordinary judicial process. Angell & Ames Corp., p. 395, 10th ed.

Roman Law.—That the power of a corporation to sue and to be sued is fundamental is seen in the notion of a corporation (or *universitas*) in the Roman law. The Digest recognizes the right of a corporation to sue and be sued as a person. Dig. III., 4, 1, 1; III., 4, 6, 3. Furthermore, it is said that "as to corporations, it matters not whether all the members remain the same, or a part remain, or all are changed, since even if the corporation is reduced to but one member that member can sue and be sued as a corporation, because the legal rights of all the members have devolved upon him alone, and the corporation yet exists." Dig. III., 4, 7, 2. Translation by author.

Inability To Sue in Corporate Name. In the case of *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566, 19 L. ed. 1029, it was argued that the insurance company was not a corporation since there was no provision in the English law creating the company for suits in its artificial name, but, on the contrary, suits by and against the company were authorized in the name of its principal officer. The supreme court held, however, that this made no real distinction, since if the company "can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer,

even if the suit were in the artificial name."

2. See *Smith v. Louisville & N. R. Co.*, 75 Ala. 449; *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487.

Constitutional Provisions. — Among the states containing constitutional provisions to the effect that corporations may sue and be sued in the courts of the state like natural persons, may be cited Alabama, California, Kansas, Michigan, Minnesota, Nebraska, New York, Nevada and North Carolina. See Stimson's Am. St. Law.

Kansas.—All corporations may sue and be sued in their corporate name. Const., Art. 12, §6. It is held that only corporations proper are included within the scope of this article, and that a school district is only a *quasi* corporation, and is not covered by the article. *Beach v. Leahy*, 11 Kan. 23.

3. See the statutes of the various states.

Act of Congress.—An act of congress creating a corporation may also expressly authorize it to sue and to be sued, as, for example, the act of July 1, 1862, incorporating the Union Pacific Railroad Company. See *Smith v. Union Pac. R. Co.*, 2 Dill. 278, 22 Fed. Cas. No. 13,121; *Land v. Coffman*, 50 Mo. 243.

Federal Banking Law.—Under the federal banking act it is expressly provided that national banks shall have power to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons. U. S. Rev. St., §5136.

Designating Officials. — A statute, however, that merely authorizes an action against certain specified officers of a corporation, as, for example, trustees, directors, managers, or other officers, does not by such terms authorize an action against the corporation itself. *Jacobs v. Mexican Sugar Refining Co.*, 104 App. Div. 242, 93 N. Y. Supp. 776.

A corporation, however, possesses those properties that are incidental to its very existence,⁴ and it is not necessary that a statute should expressly authorize a corporation to sue or to be sued,⁵ since the right to sue and the liability to be sued is a power incidental to all corporations whether mentioned or not either in the charters or in the general statutes creating them.⁶ In other words, these powers are necessary implications resulting from the very fact of incorporation.⁷

Corporation a Person.—A corporation is a person created by law, and has the same right as a natural person to appeal to all the courts of the country,⁸ and like a natural person it may sue and be sued either

Likewise, where the charter provides that suit shall be brought by trustees or other officers, the corporation is held to be impliedly prohibited from suing in its own name. *Marsh v. Astoria Lodge*, 27 Ill. 421.

4. Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

5. *McLoud v. Selby*, 10 Conn. 390, 27 Am. Dec. 689.

6. *Marsh v. Astoria Lodge*, 27 Ill. 420.

Express Provision Unnecessary.—It is true "that a corporation is the creature of the charter that institutes and gives it being; yet it is equally true that some things by the common law are incident to a corporation, which it may do without any express provision in the charter of incorporation; as to sue and be sued." *Mayor & Aldermen, etc., v. McKee*, 2 Yerg. (Tenn.) 167. And see cases in following note.

7. "After a corporation is formed and named, it acquires many powers, rights, capacities, and incapacities. . . . Some of these are necessarily and inseparably incident to every corporation. As . . . (2) To sue or be sued, implead, or be impleaded." 1 Blk. Com. 475.

Incidental Power To Sue and Be Sued.—*Colo.*—*Breene v. Merchants'*, etc. Bank, 11 Colo. 97, 17 Pac. 280. *Conn.*—*Proprietors of White School House v. Post*, 31 Conn. 240. *Ind.*—*Heaston v. Cincinnati, etc.*, R. Co., 16 Ind. 275. *Ky.*—*Sinking Fund Comrs. v. Northern Bank*, 1 Met. 174. *Me.*—*Bangor, etc.*, R. Co. *v. Smith*, 47 Me. 34. *Md.*—*McKim v. Odom*, 3 Bland 407. *N. H.*—*Libbey v. Hodgdon*, 9 N. H. 394. *N. J.*—*Leggett v. New Jersey Mfg. Co.*, 1 N.

J. Eq. 541, 23 Am. Dec. 728. *N. Y.*—*Delafield v. Kinney*, 24 Wend. 345; *Thomas v. Dakin*, 22 Wend. 9; *New York Sharon Canal Co. v. Fulton Bank*, 7 Wend. 412. *Ore.*—*Grant County v. Lake County*, 17 Ore. 453, 21 Pac. 447. *Tenn.*—*Jonesborough v. McKee*, 2 Yerg. 167. *Va.*—*Baltimore, etc., R. Co. v. Gallahue's Admr.*, 12 Gratt. 655; *Duningtons v. Western Turnpike Road*, 6 Gratt. 160. *Eng.*—*Conservators v. Ash*, 10 B. & C. 349, 21 E. C. L. 97, 109 Eng. Reprint 479.

Power Necessarily Implied.—There are attributes so universally incident to private corporations in modern times that it would be totally at variance with the probabilities to presume otherwise. Indeed, it is said by the text writers that it is necessarily implied that a corporation, from the mere fact of its incorporation, may sue and be sued. *Keyser v. Shute*, 3 Ariz. 336, 29 Pac. 386, 37 Am. & Eng. Corp. Cas. 61, citing *Field Corp.*, §360; *Mor. Priv. Corp.*, §356.

8. *Mr. Justice Hunt in Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445, 23 L. ed. 365.

Justice of the Peace Court.—In an early New York case (1810), it was held that a corporation could not be sued in a justice's court, the provisions of the statute both as to the first process and the execution preventing such a suit. *Coxsackie Dutch Church v. Adams*, 5 John. 347. Since, however, a corporation may appear by attorney, it was held in a little later case (1811) that a corporation may bring an action in a justice's court, although it could not be made a defendant in such a court. *Hotchkiss v. Trustees*, 7 Johns. (N. Y.) 356.

As a Natural Person.—"There seems

at law or in equity.⁹ Moreover, a corporation is a "person" within the meaning of a statute giving "persons" the right to sue in certain matters.¹⁰

to be nothing in the character of a corporation to prevent its suing or being sued like a natural person. It is, in legal contemplation, a person, having existence, invested with rights, and subjected to liabilities; and very properly a party to proceedings in courts of law or equity, whenever those rights or liabilities are drawn in controversy." *Libbey v. Hodgdon*, 9 N. H. 394.

9. *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. 555, 7 Fed. Cas. No. 3,810.

In Equity.—The right to sue is not confined to natural persons. The power to sue and be sued in their corporate name is a power inseparably incident to every corporation, whether it be sole or aggregate. *Daniell's Ch. Pl. & Pr.* 20.

Bill by Corporation.—A corporation is a legal entity and may sue or be sued in any of the courts. When it is necessary to file a bill on behalf of a corporation, the corporate name is used the same as though it were an individual; and so, if the corporation is made a defendant. This rule obtains whether the corporation be public or private, for corporations may be made parties in chancery. *Van Zile, Eq. Pl. & Pr.*, §64.

10. *Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich*, 153 Mass. 42, 26 N. E. 239. And see, *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *Indiana v. Woram*, 6 Hill (N. Y.) 33.

When Deemed "Persons."—Corporations are to be deemed and considered "as persons" when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes. *Beaston v. Farmers' Bank*, 12 Pet. (U. S.) 102, 135, 9 L. ed. 1017. And see, *Mayor of Hereford v. Morton*, 15 L. T. N. S. 187.

Included Unless Evidence of Contrary Intention.—The term "person" is unquestionably sufficiently comprehensive to embrace corporations, and it must be held to embrace them, unless there is something in the law showing the legislative intention to restrict its application. Judge Cabell in *Stribbling*

v. Valley Bank, 5 Rand. (Va.) 132. And see, *State v. Portage City, etc., Co.*, 107 Wis. 441, 83 N. W. 697.

Evidence.—A statute providing that testimony shall be admitted as against certain "persons" applies to corporations. *La Farge v. Exchange Fire Ins. Co.*, 22 N. Y. 352.

Damages for Injuries.—A statute that provides that "persons" shall be liable for damages for injuries resulting in death, includes corporations. *Southwestern R. v. Paulk*, 24 Ga. 356.

Attachment.—Garnishment.—Corporations are likewise included in a statute providing that the property of "persons" may be attached or garnished. *Ala.*—*Planters', etc., Bank v. Andrews*, 8 Port. 404. *Conn.*—*Knox v. Protection Ins. Co.*, 9 Conn. 430. *Ill.*—*Mineral Point R. R. v. Keep*, 22 Ill. 3. *Wis.*—*Brauser v. New England, etc., Ins. Co.*, 21 Wis. 506.

Fourteenth Amendment.—Under the first section of the fourteenth amendment to the federal constitution, providing that "no state shall deny to any person within its jurisdiction the equal protection of the laws," a private corporation is included under the designation of "person." *Pembina, etc., Min. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. ed. 650; *San Mateo County v. Southern Pacific R. Co.*, 13 Fed. 722.

Citizens.—Relative to the jurisdiction of the federal courts, a domestic corporation when sued in a circuit court of the United States is indisputably presumed to be a citizen of the state of its original creation. *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. ed. 802. And see, *U. S.*—*Petri v. Commercial Nat. Bank*, 142 U. S. 644, 12 Sup. Ct. 325, 35 L. ed. 1134; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. ed. 768; *Kansas Pac. R. v. Atchinson, etc. R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. ed. 794; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20 L. ed. 354. *N. Y.*—*People v. Utica Ins. Co.*, 15 Johns. 358. *Wash.*—*Denny v. Schram*, 6 Wash. 134, 32 Pac. 1002. On the other hand, the members of a corporation created by a foreign state should

Right To Confess Judgment.—Incident to the right to sue, and the liability to be sued, is the right of a corporation to confess judgment.¹¹

May Refer to Arbitration.—The power to sue implies, also, a power to refer to arbitration.¹²

Compromise of Claims.—A corporation's capacity to sue likewise includes a power to compromise a claim.¹³

B. STATES.—A state is a legal being capable of transacting some kinds of business like a natural person, and such a being is a corporation.¹⁴ By virtue of its corporate capacity a sovereign state may sue in the courts of a state and of the United States,¹⁵ and when a

be regarded as citizens of such state. *National S. S. Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. ed. 87. Corporations are not "citizens," however, within the meaning of federal constitution providing that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." *U. S. Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. ed. 432; *McKinley v. Wheeler*, 130 U. S. 630, 9 Sup. Ct. 638, 32 L. ed. 1048; *Pembina Min. Co. v. Pennsylvania*, 125 U. S. 181, 3 Sup. Ct. 737, 31 L. ed. 650; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357. *Colo.*—*Thomas v. Chisholm*, 13 Colo. 105. *Ill.*—*Ducat v. City of Chicago*, 48 Ill. 172. *N. J.*—*Tatem v. Wright*, 23 N. J. L. 429.

11. *U. S.*—*White v. Crow*, 17 Fed. 98. *Ariz.*—*Keyser v. Shute*, 3 Ariz. 336, 29 Pac. 386. *Mo.*—*Chamberlin v. Mammoth Min. Co.*, 20 Mo. 96. And see *Black, Judgm. §59; Freeman, Judm. §545; Mor. Priv. Corp., §430.*

"Upon a confession of judgment by a corporation the court in which the action is pending must of necessity judge of the authority of any natural person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question." *White v. Crow*, 17 Fed. 98, 101.

12. *U. S.*—*Alexandria Canal Co. v. Swann*, 5 How. 83, 12 L. ed. 60. *Me.*—*Sawyer v. Winnegance Mill Co.*, 28 Me. 122. *Mass.*—*Morville v. American Tract Soc.*, 123 Mass. 129, 25 Am. Rep. 40. *Vt.*—*Day v. Essex Co. Bank*, 13 Vt. 97.

Municipal Corporations.—It is also held that a municipal corporation, in absence of any restrictive clause in its charter, may submit a disputed claim to arbitration. *Ill.*—*Shawneetown v. Baker*, 85 Ill. 563. *Ky.*—*Remington v. Harrison County Court*, 12 Bush 148. *Mass.*—*Buckland v. Conway*, 16 Mass. 396. *Wis.*—*Kane v. City of Fond du Lac*, 40 Wis. 495.

Equally Legal as an Action.—An arbitration of differences is just as legitimate a mode of settlement as by action. *District Tp. of Walnut v. Rankin*, 70 Iowa 65, 29 N. W. 806.

13. *Cal.*—*People v. San Francisco*, 27 Cal. 655. *Ill.*—*Agnew v. Brall*, 124 Ill. 312, 16 N. E. 230. *Ia.*—*Artz v. Chicago, etc. R. Co.*, 34 Iowa 153. *Me.*—*Baileyville v. Lowell*, 20 Me. 173. *Mass.*—*Prout v. Pittsfield Fire Dist.*, 154 Mass. 450, 28 N. E. 679; *Matthews v. Westborough*, 131 Mass. 521; *Cushing v. Stoughton*, 6 Cush. 389; *Drake v. Stoughton*, 6 Cush. 393. *Pa.*—*Smith v. Borough of Wilkinsburg*, 172 Pa. 121, 33 Atl. 171. *Tex.*—*City of San Antonio v. San Antonio St. R. Co.*, 22 Tex. Civ. App. 148, 54 S. W. 281.

14. *Indiana v. Woram*, 6 Hill (N. Y.) 33, 38; *People v. Assessors of Watertown*, 1 Hill (N. Y.) 620.

15. *U. S.*—*United States v. Louisiana*, 123 U. S. 32, 8 Sup. Ct. 17, 31 L. ed. 69; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. ed. 482. *Ind.*—*State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627. *Mass.*—*Healy v. Root*, 11 Pick. 389. *N. Y.*—*Indiana v. Woram*, 6 Hill 33.

A state cannot sue, however, in the Supreme Court of the United States upon a judgment recovered by the state in one of its own courts against a citizen or a corporation of another state for a pecuniary penalty for the violation of its municipal law, since

state becomes a suitor in the courts of a foreign state, it is treated as a private corporation.¹⁶ A state cannot, however, be sued in its own courts unless its consent has been expressly conferred either by the constitution or statutes;¹⁷ yet when a state becomes a stockholder in a corporation, as, for example, in a bank, it imparts none of its attributes of sovereignty to the institution. Although the state may become an exclusive stockholder, the corporation, as such, is liable to be sued.¹⁸

C. MUNICIPAL CORPORATIONS.—It is probable that the charters of most public or municipal corporations expressly provide that such corporations shall possess the right to sue and the liability to be sued, yet, as before, such general powers are incident to their corporate existence, and, as a rule, need not be expressly conferred.¹⁹

the federal supreme court has not original jurisdiction of such an action. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239.

Foreign Nation.—A foreign nation may sue in the courts of an American state. *Mexico v. Arrangois*, 11 How. Pr. (N. Y.) 1.

16. *Esley v. People*, 23 Kan. 510; *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740, 6 Am. St. Rep. 644. In this latter case, it was said by the court: Conceding "that this corporation (the plaintiff) and the commonwealth of Virginia are one and the same, and that it must be treated here as possessing all the attributes and immunities which belong to the sovereign commonwealth of Virginia, still, when Virginia seeks redress, and becomes a suitor in the courts of this state and beyond her territorial limits, she must lay aside her attributes and immunities of sovereignty, and assert her demands as private individuals or corporations assert theirs in those courts, subject to the same laws and limitations."

17. *Cal.*—*Davis v. State*, 121 Cal. 210, 53 Pac. 555. *Idaho.*—*Hollister v. State*, 9 Idaho 8, 71 Pac. 541. *Ill.* *People v. Sanitary Dist. of Chicago*, 210 Ill. 171, 71 N. E. 334. *Ind.*—*Shoemaker v. Board of Comrs.*, 36 Ind. 175. *Kan.*—*State v. Appleton*, 73 Kan. 160, 84 Pac. 753; *Asbell v. State*, 60 Kan. 51, 55 Pac. 338. *La.*—*Wright v. State Board*, 49 La. Ann. 1213, 22 So. 361. *Mich.*—*Aplin v. Van Tassel*, 73 Mich. 28, 40 N. W. 847; *Board of Suprs. v. Auditor General*, 68 Mich. 659, 36 N. W. 794.

State May Sue State.—The federal constitution provides that one state may sue another in the Supreme Court of the United States. *New Jersey v. New York*, 3 Pet. (U. S.) 461, 7 L. ed. 741.

A corporation created by the federal congress cannot sue a state. *Smith v. Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. ed. 1140.

United States.—The United States may also by statute waive their exemption from suit. *Carr v. United States*, 98 U. S. 433, 25 L. ed. 209.

18. *Briscoe v. Bank of Kentucky*, 11 Pet. (U. S.) 257, 9 L. ed. 709; *Bank of Kentucky v. Wister*, 2 Pet. (U. S.) 318, 7 L. ed. 437; *Bank of United States v. Planters' Bank*, 9 Wheat. (U. S.) 904, 6 L. ed. 244.

19. *Ala.*—*Wolfe v. State*, 79 Ala. 201. *Cal.*—*El Dorado County v. Meiss*, 100 Cal. 268, 34 Pac. 716. *Me.*—*Town of South Portland v. Town of Cape Elizabeth*, 92 Me. 328, 42 Atl. 503. *Mass.*—*Linehan v. Cambridge*, 109 Mass. 212. *Mich.*—*School Dist. No. 3 v. School Dist. No. 1*, 63 Mich. 51, 58, 29 N. W. 489. *N. Y.*—*Village of Carthage v. Frederick*, 122 N. Y. 268, 271, 25 N. E. 480. *Tex.*—*Palestine Water, etc. Co. v. City of Palestine*, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203. *Wis.* *Janesville v. Milwaukee, etc. R. Co.*, 7 Wis. 484.

Incidental Powers.—A municipal corporation possesses not only the powers specifically conferred upon it by its charter, but also such as are necessarily incident to those powers. *Village of Carthage v. Frederick*, 122 N. Y. 268, 271, 25 N. E. 480.

Judicial Notice of Capacity.—In ac-

D. QUASI-CORPORATIONS. — Bodies such as counties, towns, and school districts, to which the term, "quasi corporation" is applied, by reason of the limited number of their powers, and also for the purpose of distinguishing them from corporations aggregate and municipal corporations proper, such as cities and towns acting under charters or incorporating statutes,²⁰ may be enabled to sue and liable to be sued as corporations.²¹ In some jurisdictions, however, it is held that a county cannot be sued in absence of an express statute giving such authority,²² and a distinction is made between the capacity of a quasi-corporation to be sued in actions *ex contractu* and in actions *ex delicto*.²³

E. DE FACTO CORPORATION. — A *de facto* corporation may sue in its alleged corporate name until its legal existence is directly questioned in a proper suit instituted by the state.²⁴ The right to be a corporation

tions by public corporations it is not necessary to allege a legal capacity to sue, since courts will take judicial notice of such a capacity. *Janesville v. Milwaukee, etc. R. Co.*, 7 Wis. 484.

20. See *Kennedy v. Queens County*, 47 App. Div. 250, 62 N. Y. Supp. 276.

Quasi-Corporations. — Quasi-corporation is a phrase generally applied to a body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute general or special. *School Dist. v. St. Joseph Fire & Marine Ins. Co.*, 103 U. S. 707, 26 L. ed. 601. And see *Barnes v. Dist. of Columbia*, 91 U. S. 540, 552, 23 L. ed. 440; *Scates v. King*, 110 Ill. 456, 466.

21. U. S.—*Vincent v. County of Lincoln*, 30 Fed. 749. Minn.—*Village of Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931. Nev.—*Floral Springs W. Co. v. Rives*, 14 Nev. 431.

22. U. S.—*Dollar Savings Bank v. United States*, 19 Wall. 227, 239, 22 L. ed. 80; *United States v. Williams*, 5 McLean 133, 28 Fed. Cas. No. 16,721. Ala.—*Lowndes County v. Hunter*, 49 Ala. 507. Cal.—*Whittaker v. Tuolumne Co.*, 96 Cal. 100, 30 Pac. 1016; *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 Pac. 646; *Hastings v. San Francisco*, 18 Cal. 49. Conn.—*Ward v. Hartford County*, 12 Conn. 404. Miss.—*Joselyn v. Stone*, 28 Miss. 753. N. Y.—*People v. Herkimer*, 4 Cow. 345, 15 Am. Dec. 379. Ohio.—*Hamilton County v. Mighels*, 7 Ohio St. 109.

California.—Thus in California it is held, in the case of *Whittaker v. Tuolumne Co.*, 96 Cal. 100, 30 Pac. 1016, that "the State and its political sub-

divisions cannot be sued except as specially authorized by statute, and general language creating new remedies or prescribing procedure has never been held to authorize such actions."

Action By Distinguished From Action Against.—A quasi-corporation may sue without a statute expressly authorizing it, if the law of its creation imposes such duties and confers such privileges as require legal remedies for their enforcement and protection. A county cannot, however, be sued at law. *Ward v. County of Hartford*, 12 Conn. 404, 407.

Corporate Capacity Distinguished From Governmental Agency.—Where a county deals with another "in its corporate capacity and violates its obligation or duty, it may be sued the same as a natural person; but where the sovereign power of the state is exercised through a county organization, . . . a claim to compensation, created in the discharge of a duty in such a case, must be adjusted in the mode pointed out by law." *Pruden v. Grant County*, 12 Ore. 308, 7 Pac. 308.

23. See *infra*, III.

24. Cal.—*First Baptist Church v. Branham*, 90 Cal. 22, 27 Pac. 60. Ill.—*Hudson v. Green Hill Seminary Corp.*, 113 Ill. 618. N. Y.—*Remington Paper Co. v. O'Dougherty*, 65 N. Y. 570.

Attempt To Legally Organize.—Where a plaintiff had in good faith attempted to legally organize as a corporation and had long acted as such, and was at least a corporation *de facto*, it is all that is necessary to enable it to maintain an action against any

cannot be collaterally attacked.²⁵ The regular proceeding is *quo warranto*, or a statutory proceeding in the nature of *quo warranto*, instituted by the proper officers who act in the name of the state.²⁶

one, other than the state, who has contracted with the corporation or who has done it a wrong. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. ed. 784. See, also *U. S.—Bank of United States v. Dandridge*, 12 Wheat. 64, 72, 6 L. ed. 552; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 450, 7 L. ed. 189; *Chubb v. Upton*, 95 U. S. 685, 24 L. ed. 523. **Cal.**—*Stockton & Linden Co. v. Stockton & Copperopolis Railroad*, 45 Cal. 680. **Ill.**—*Cincinnati, etc., Railroad v. Danville & Vincennes Railroad*, 75 Ill. 113. **Mass.**—*Williamsburg Ins. Co. v. Frothingham*, 122 Mass. 391. **Vt.** *Searsburgh Turnpike Co. v. Cutler*, 6 Vt. 315.

Corporation Not Organized.—Under a statute providing that corporations created thereunder shall "when organized" be capable to sue and be sued, it must appear that the alleged corporation was in fact organized, since otherwise it will have no capacity to sue even though the articles of association have been subscribed. *Lawrie v. Silsby*, 76 Vt. 240, 56 Atl. 1106, 104 Am. St. Rep. 927.

Estoppel To Deny Incorporation.—"A *de facto* corporation, that by regularity of organization might be one *de jure* can sue and be sued. And a person who contracts with such corporation, while it is acting under its *de facto* organization, who contracts with it as an organized corporation, is estopped in a suit on such contract, to deny its *de facto* organization at the date of the contract; but this does not extend to the question of legal power to organize. Hence, if an organization is completed where there is no law, or an unconstitutional law, authorizing an organization as a corporation, the doctrine of estoppel does not apply." *Heaston v. Cincinnati, etc. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430. And see, *Harriman v. Southam*, 16 Ind. 190; *Brown v. Killian*, 11 Ind. 449.

25. **Ill.**—*Imperial Bldg. Co. v. Chicago Open Board of Trade*, 238 Ill. 100, 87 N. E. 167. **Ind.**—*Cravens v. Eagle, etc. Co.*, 120 Ind. 6, 21 N. E. 981; *Smelser v. Wayne, etc. Co.*, 82 Ind. 417. **Mass.**—*Butchers & Drovers*

Bank v. McDonald, 130 Mass. 264. **Utah.** *McCord, etc. Co. v. Glenn*, 6 Utah 139, 21 Pac. 500.

As said by Judge Cooley in *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 390: "Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence, where it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be, and the questions are only whether there has been exact regularity and strict compliance with the provisions of the law relating to corporations, it is plainly a dictate alike of justice and public policy, that in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, that such questions should not be suffered to be raised." See, also, *Snider Sons' Co. v. Troy*, 91 Ala. 224, 8 So. 658, 24 Am. St. Rep. 224; *Schloss v. Montgomery Trade Co.*, 87 Ala. 411, 6 So. 360, 13 Am. St. Rep. 51; *Central Agricultural, etc. Assn. v. Alabama Gold Life Ins. Co.*, 70 Ala. 120.

26. See, in general, the title "*Quo Warranto*." See, also, the following cases: **U. S.**—*La Moine Lumber & Trading Co. v. Kesterson*, 171 Fed. 980. **Ill.**—*Imperial Bldg. Co. v. Chicago Open Board of Trade*, 238 Ill. 100, 87 N. E. 167. **Wis.**—*State v. Minahan Bldg. Co.*, 141 Wis. 400, 123 N. W. 258.

Enjoining Tax.—An action to enjoin the collection of a tax on the ground that the corporation was never legally organized, is not a proceeding for the purpose of destroying the corporate existence of company. *Knight v. Flatrock & Waldron Turnpike Co.*, 45 Ind. 134.

Relator a "Private Party."—Under a statute providing that the state upon the relation of a "private party" may bring an action in the nature of a *quo warranto* proceeding, a quasi-public corporation is a private party. *State v. Minahan Bldg. Co.*, 141 Wis. 400, 123 N. W. 258.

In a suit by a corporation, the common law plea of *nul tiel* corporation raises only the issue of the existence of a corporation *de facto*.²⁷

F. UNORGANIZED CORPORATION. — In order, however, to have juristic capacity a corporation must be in fact organized.²⁸ A mere voluntary association cannot sue or be sued as a corporation,²⁹ and parties cannot assume a corporate character and sue as such without being entitled to it.³⁰ For example, a number of persons, not being incorporated, cannot enter into a contract as a corporation, and then sue in a corporate capacity.³¹

G. INSOLVENT CORPORATION. — The fact that a corporation is insolvent does not, of itself, deprive it of its power to bring and defend actions.³² Moreover, the appointment of a receiver does not terminate the corporation's existence and thus bar an action against it,³³ for although the property of a corporation is in the hands of a receiver, or of a trustee, the corporation may still be liable to be sued.³⁴ Actions by the corporation, however, should, regularly, be brought by the receiver in his own name as receiver.³⁵

H. DISSOLVED CORPORATIONS. — Strictly speaking, a corporation dies, *ipso facto*, at the time its charter expires,³⁶ and being dead it can

27. Ill.—Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. 167. Ind.—Heaston v. Cincinnati, etc. R. Co., 16 Ind. 275, 79 Am. Dec. 430. N. Y.—Bank of Toledo v. International Bank, 21 N. Y. 542. And see plea of *nul tiel* corporation, *infra*, VIII.

28. Lawrie v. Silsby, 76 Vt. 240, 56 Atl. 1106, 104 Am. St. Rep. 327.

Levying Assessments.—However, a company not legally organized can be enjoined from levying assessments. Newton County Draining Co. v. Nofsinger, 43 Ind. 566.

29. Pipe v. Bateman, 1 Iowa 369; Shear v. Overseers of Hillsdale, 13 Johns. (N. Y.) 496; Medical Inst. of Geneva College v. Patterson, 5 Denio (N. Y.) 618.

See the titles "Associations;" "Beneficial Associations."

30. Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151.

Demurrer Will Lie.—Where it sufficiently appears on a bill in equity that plaintiffs have assumed, without authority, a corporate character, a demurrer will hold. As was said by Lord Eldon in Lloyd v. Loaring, 6 Ves. 773, 31 Eng. Reprint 1302, in a suit filed by certain members of a lodge of free-masons, who claimed a "charter" and professed a corporate existence: The court will not permit persons who can sue only as partners, to sue in a cor-

porate character; and upon principles of policy, the courts do not sit to determine upon charters granted by persons who have not the prerogative to grant them. And see Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573, 596; 1 Story Eq. Pl. §497; Dan. Ch. Pl. & Pr., §24.

31. See Graves v. Colby, 9 Ad. & El. 356, 36 E. C. L. 162, 112 Eng. Reprint 1247.

32. No reason is perceived why an insolvent corporation may not be sued as well as an insolvent natural person. Mr. Justice Scott in City Ins. Co. v. Commercial Bank, 68 Ill. 348.

33. Ill.—City Ins. Co. v. Commercial Bank, 68 Ill. 348. Ia.—Weigen v. Council Bluffs Ins. Co., 104 Iowa 410, 73 N. W. 862. Ohio.—State v. Merchant, 37 Ohio St. 251.

34. Ill.—Grand Tower Mfg. & Transp. Co. v. Ullman, 89 Ill. 244. Ia.—Allen v. Central R. Co., 42 Iowa 683. Mo.—Heath v. Missouri, K. & T. R. Co., 83 Mo. 617. And see Steinhauer v. Colmar, 11 Colo. App. 494, 55 Pac. 291. See, in general, the title "Receivers."

35. Ueland v. Haugan, 70 Minn. 349, 73 N. W. 169.

36. The dissolution of a corporation by act of the legislature, deprives it of its corporate existence, and no legal judgment can be rendered against it. Merrill v. Suffolk Bank, 31 Me.

no longer sue or be sued.³⁷ No cause of action can arise in its favor after dissolution,³⁸ and it cannot bring an action or enforce any judgment unless some statute expressly authorizes it.³⁹

In many states, however, statutes provide that for a limited time after a corporation expires or is dissolved, suits may be brought by it or against it merely for the purpose of winding up its affairs.⁴⁰

57, 50 Am. Dec. 649; *Crease v. Babcock*, 23 Pick. (Mass.) 334, 34 Am. Dec. 61. To the same effect see the following cases: *U. S.*—*Pendleton v. Russell*, 144 U. S. 640, 13 Sup. Ct. 743, 36 L. ed. 574; *First Nat. Bank v. Colby*, 21 Wall. 609, 22 L. ed. 687; *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. ed. 945; *Greeley v. Smith*, 3 Story 657, 10 Fed. Cas. No. 5,748. *Ga.*—*Ferry v. Merchants*, etc. Bank, 66 Ga. 177. *Mass.*—*Folger v. Columbian Ins. Co.*, 99 Mass. 276. *Miss.*—*Coulter v. Robertson*, 24 Miss. 278; *Commercial Bank of Natchez v. Chambers*, 8 Smed. & M. 9. *N. Y.*—*Sturges v. Vanderbilt*, 73 N. Y. 384; *McCulloch v. Norwood*, 58 N. Y. 562. *N. C.*—*Dobson v. Simon-ton*, 86 N. C. 492. *Wis.*—*Combes v. Keyes*, 89 Wis. 297, 62 N. W. 89, 46 Am. St. Rep. 839, 27 L. R. A. 369.

37. The corporate right to sue, when not prolonged by statute for the purpose of winding up the affairs of the corporation, dies with the charter. There can be no suit by a dead person, whether natural or artificial. In this respect a dead corporation stands upon no better footing than a dead man. *Merritt v. Gate City Nat. Bank*, 100 Ga. 147, 27 S. E. 979. See, also: *Ga.*—*Carey v. Giles*, 10 Ga. 9. *La.*—*Bank of Louisiana v. Wilson*, 19 La. Ann. 1. *Me.*—*Rankin v. Sherwood*, 33 Me. 509. *Wis.*—*Combes v. Keyes*, 89 Wis. 297, 62 N. W. 89. And see cases in preceding note.

Pending Suits By a Corporation Abate on Dissolution.—*Ga.*—*Van Pelt v. Home Bldg. Assn.*, 87 Ga. 370, 13 S. E. 574. *Miss.*—*Torry v. Robertson*, 24 Miss. 192. *Tenn.*—*Ingraham v. Terry*, 11 Humph. 572.

Appeal.—Charter Expired.—A writ of error must be dismissed where, owing to the expiration of the charter of a defendant corporation there remains no party to be made defendant in error to a bill of exceptions filed by plaintiff. *Venable Bros. v. Southern Granite Co.*, 135 Ga. 508, 69 S. E. 822.

Ceasing To Do Business.—Dissolution of corporate existence will not, however, be implied from the facts that the corporation has become insolvent and has ceased to do business, and under a plea that since the contract sued on was made, the plaintiff has become unincorporate, evidence that it has ceased to do business is not admissible. *Butchers' & D. Bank v. Pulitzer*, 11 Mo. App. 594. See also, *Jones v. Spartanburg Herald Co.*, 44 S. C. 526, 22 S. E. 731. And see *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279.

38. *Kinney v. Reid Ice-Cream Co.*, 57 App. Div. 206, 68 N. Y. Supp. 325.

39. *MacRae v. Kansas City Piano Co.*, 69 Kan. 457, 77 Pac. 94.

Judgment Against Dissolved Corporation Invalid.—*U. S.*—*Pendleton v. Russell*, 144 U. S. 640, 12 Sup. Ct. 723, 36 L. ed. 574. *N. Y.*—*In re Directors*, etc. *Brewing Co.*, 24 App. Div. 223, 49 N. Y. Supp. 12. *Wis.*—*Combes v. Keyes*, 89 Wis. 297, 62 N. W. 89, 46 Am. St. Rep. 839.

40. *U. S.*—*Bradley Salt Co. v. Norfolk Imp.*, etc. Co., 101 Fed. 681, 41 C. C. A. 600. *Ala.*—*Tuskaloosa, etc. Assn. v. Green*, 48 Ala. 346. *Ark.*—*State v. Bank of Washington*, 18 Ark. 554. *Colo.*—*Steinhauer v. Colmar*, 11 Colo. App. 494, 55 Pac. 291. *Ill.*—*Singer & Talcott Stone Co. v. Hutchinson*, 176 Ill. 48, 51 N. E. 622. *Ky.*—*Economy B. & L. Assn. v. Paris Ice Mfg. Co.*, 113 Ky. 246, 68 S. W. 21. *Mass.*—*Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532. *Neb.*—*Schmidt & Bro. Co. v. Mahoney*, 60 Neb. 20, 82 N. W. 99; *Wehn v. Fall*, 55 Neb. 547, 76 N. W. 13, 70 Am. St. Rep. 397. *N. H.*—*Blake v. Portsmouth & C. R. Co.*, 39 N. H. 435. *N. Y.*—*Shayne v. Evening Post Pub. Co.*, 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777, holding that an action for libel may be reviewed against the trustees of a dissolved corporation. *N. C.*—*Heggie v. Building & Loan Assn.*, 107 N. C. 581, 12 S. E. 275. *S. C.*—*State v. Port*

This doctrine is of especial importance in the case of banking institutions.⁴¹

I. CONDITIONS PRECEDENT TO ACTIONS.—The state may prescribe the method by which a corporation may sue or be sued, and such method must be followed in order to confer jurisdiction upon the

Royal, etc. R. Co., 45 S. C. 413, 23 S. E. 363. **Va.**—Richmond Union Pass. R. Co. v. New York Seabeach R. Co., 95 Va. 386, 28 S. E. 573. **W. Va.**—Donnelly v. Hearndon, 41 W. Va. 519, 23 S. E. 646. **Wis.**—Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335.

Illustration of Statute.—The Delaware statute is a good illustration of such legislation. It provides as follows: "All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall, nevertheless, be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which said corporation shall have been established." Act of March 10, 1899, §36. Quoted in *Scott v. Stockholders' Oil Co.*, 142 Fed. 287.

Method of Dissolution Distinguished. Statutory provisions relating to the bringing of suits by or against dissolved corporations may apply to voluntary dissolution only, and may have no application to a dissolution caused by a repeal of the charter by the legislature. The language of the statute should be carefully observed. See *Board of Councilmen v. Deposit Bank*, 124 Fed. 18, 59 C. C. A. 538.

Suits by Receivers.—Under the statutes, the action may be brought by or against a receiver, trustees, or manager of the dissolved corporation, rather than by or against the corporation itself. **U. S.**—*Lafayette Co. v. Neely*, 21 Fed. 738. **Ala.**—*Nelson v. Hubbard*, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375. **Ga.**—*Houston v. Redwine*, 85 Ga. 130, 11 S. E. 662. **Kan.**—*Paola Town Co. v. Krutz*, 22 Kan. 725. **N. Y.**—*Central City Savings Bank v. Waller*, 66 N. Y. 424. **Ohio.**—*Miami Exporting Co. v. Gano*, 13 Ohio 269.

The statute may provide that the of-

ficers and directors of the dissolved corporation shall be made trustees of the assets for the benefit of the creditors. See N. Y. Laws, for example, of 1890, ch. 563, §§19, 20; and, also, statutes of other states.

Service on Dissolved Corporation.—The statutes providing for the continuance of actions after the dissolution of a corporation also provides for service in such cases, specifying the officers on whom service may be made. The same general rules governing service apply as in the case of existing corporations. See, also, **Ky.**—*Economy B. & L. Assn. v. Paris Ice Mfg. Co.*, 113 Ky. 246, 68 S. W. 21. **Mich.**—*Merrill v. Montgomery*, 25 Mich. 73. **Mo.**—*Ford v. Kansas City & I. S. L. R. Co.*, 52 Mo. App. 439. **N. J.**—*Hould v. John P. Squire & Co.*, 79 Atl. 282. **Ohio.**—*Warner v. Callender*, 20 Ohio St. 190. **Va.**—*Richmond, etc., R. Co. v. New York, etc., R. Co.*, 95 Va. 386, 28 S. E. 573. **Wash.**—*Stanton v. Gilpin*, 38 Wash. 191, 80 Pac. 290.

Not Confined to Suits in State of Origin.—Where a state law provides for the continuance of the life of a domestic corporation for the purpose of bringing and defending suits, such a corporation may sue or be sued anywhere, since the statute applies to all suits by or against them, wheresoever brought or defended. Consequently, a suit pending against such a corporation in another state will not be abated on the ground that the corporation is dissolved. *Scott v. Stockholders' Oil Co.*, 142 Fed. 287. See, however, *Rogers v. Adriatic Fire Ins. Co.*, 148 N. Y. 34, 42 N. E. 515, holding that a foreign corporation may be dissolved and dead in the domicile of its origin, and yet alive in a foreign state by force of statute there providing for its continuance for the purpose of winding up its affairs, and that a judgment, although valid in the state where rendered, would be of no validity in the original domicile of the corporation.

41. See the title "*Banks and Banking*," Vol. IV.

court over the defendant corporation.⁴² The state may also establish conditions precedent to actions, by providing, for example, that certain statutory requirements shall be complied with before a corporation can bring or defend a suit.⁴³ Such conditions are illustrated by requiring corporations to file a copy of their articles of incorporation,⁴⁴ or to pay certain fees or a bonus tax.⁴⁵

42. Thus, where the statutes prescribe a mode for the commencement of an action against corporations, as, for example, the venue of the action, and the service of process, such mode must be pursued. *Holgate v. Oregon Pac. R. Co.*, 16 Ore. 123, 17 Pac. 859.

Whether Demand Necessary.—Whether or not a demand should be made by a corporation before bringing an action, is governed by the same principles that apply to natural persons under similar circumstances. See *East N. Y., etc., R. Co. v. Elmore*, 5 Hun (N. Y.) 214. That an action upon injury to person or property lies against a corporation without first filing with the corporation a claim for damages, see *Georgia R. R. & Banking Co. v. Monroe*, 49 Ga. 373.

43. *San Diego Gas Co. v. Frame*, 148 Cal. 252, 82 Pac. 1049.

Filing Reports.—Where as a condition precedent to actions, a statute provided that every bank "doing business" should file regular reports of its financial condition with the bank commissioner, and a bank was being liquidated but had not filed its reports, a suit on a promissory note was not a "doing business" within the meaning of the statute. *Wilson v. First State Bank of Jetmore*, 77 Kan. 539, 95 Pac. 404.

44. *San Diego Gas Co. v. Frame*, 148 Cal. 252, 82 Pac. 1049. See, also, *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080.

Filing of Articles Waived.—In an action to quiet title the plaintiff corporation failed to file their articles of incorporation as required by statute before the action was brought and the trial was postponed to allow the articles to be filed. It was held that the disability having been removed before the close of the case, the plaintiff was properly allowed to show its capacity to maintain the action. *Riverdale Min. Co. v. Wicks*, 14 Cal. App. 526, 112 Pac. 896.

Objection Must Be Pleaded.—Such a

defense, however, will be waived unless affirmatively pleaded. *Ward Land & Stock Co. v. Mapes*, 147 Cal. 747, 82 Pac. 426; *Labory v. Orphan Asylum*, 97 Cal. 270, 32 Pac. 231.

Action for Work and Labor.—Where the civil code requires a corporation to file its articles of incorporation before defending or maintaining an action concerning its property, an action for work and labor against the corporation does not come within the requirements. *Weeks v. Garibaldi South Gold-Min. Co.*, 73 Cal. 599, 15 Pac. 302.

Action To Foreclose Mortgage.—It has been held in California that a provision of the civil code requiring every corporation to file in the office of the county clerk, in every county in which the corporation holds any property, a copy of its articles of incorporation, as a condition precedent to the bringing or the defending of any action relating to such property, does not apply to an action for the foreclosure of a mortgage. *Savings & Loan Soc. v. McKoon*, 120 Cal. 177, 52 Pac. 305.

45. *Maryland Tube & Iron Works v. West End Imp. Co.*, 87 Md. 207, 39 Atl. 620, 39 L. R. A. 810; *J. T. Stark Grain Co. v. Harry Bros. Co.* (Tex. Civ. App.), 122 S. W. 947.

Annual License Fees may be required to be paid before a corporation can maintain an action. *North Star Trading Co. v. Alaska-Yukon Pacific Exposition* (Wash.), 115 Pac. 855.

Evidence on Appeal.—The receipts showing payment of the annual license fee cannot be introduced as evidence on appeal, where such evidence was not introduced below. *North Star Trading Co. v. Alaska-Yukon Pacific Exposition* (Wash.), 115 Pac. 855. See, *contra*, *Ohio Colorado M. & M. Co. v. Elder*, 47 Colo. 63, 99 Pac. 42.

Must Be Paid Before Action Brought. A plaintiff corporation cannot pay its bonus tax after suit commenced, and thus acquire the right to continue the action. *Maryland Tube & Iron Works v. West End Imp. Co.*, 87 Md. 207, 39

A foreign corporation, outside of interstate commerce, can do business within a state only by and with the consent of the state, and the state may prescribe such terms and conditions for the transacting of business, and for the bringing of actions, as it may deem proper.⁴⁶

II. ACTIONS BY CORPORATIONS. — A. ACTIONS MUST BE AUTHORIZED BY PROPER OFFICERS. — A corporation can obtain redress for a wrong committed against it, only through the action of its regular officers; and, if these are either unwilling or unable to act, the corporation as an entity has no means of obtaining a remedy.⁴⁷

As a general rule, if the corporation does not deem it wise to bring an action, an individual member, merely because he is a member and dissatisfied with the decision of the corporation, has no authority to bring the action in the name of the corporation.⁴⁸ There are times,

Atl. 620, 39 L. R. A. 810. See, however, *Rollins v. Fearnley*, 45 Colo. 319, 101 Pac. 345, where it is held that if the annual state license tax is paid by a defendant corporation prior to the hearing, it is in time.

Objection by Demurrer or Answer.

In Washington it is held, although by a divided court, that a failure to pay the license fee last due affects, under the statute, only the corporation's capacity to sue, and that a defendant who fails to object either by demurrer or answer to such want of capacity, waives his right to do so. *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031.

46. See, in general, *infra*, XX.

47. Colo. — *Arkansas River Land, etc., Co. v. Farmers L. & T. Co.*, 13 Colo. 587, 22 Pac. 954. Conn. — *Allen v. Curtis*, 26 Conn. 458. Ga. — *Blackman v. Central R. R., etc., Co.*, 58 Ga. 189. W. Va. — *Park v. Petroleum Co.*, 25 W. Va. 108.

48. *Bronson v. La Crosse & M. R. Co.*, 2 Wall. (U. S.) 283, 17 L. ed. 725; *Green v. Compton*, 41 Misc. 21, 83 N. Y. Supp. 538. See, also, cases in preceding note.

Stockholders Represented by Corporation. — It is a well settled rule that a corporation represents the stockholders in all matters within the scope of its corporate powers transacted in good faith by the officers of the corporation. Among these powers are those of bringing and defending actions in regard to the rights and obligations of the corporation. Moreover, in bringing and defending suits, the corporation binds the stockholders as fully as in the making of contracts. Cal. — *Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac.

776. Ill. — *Singer v. Hutchinson*, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133. Ore. — *Nickum v. Burckhardt*, 30 Ore. 464, 48 Pac. 474, 47 Pac. 788, 60 Am. St. Rep. 822. See, also, *Bissit v. Kentucky River Nav. Co.*, 15 Fed. 353, where the cases are collected in a note.

Stockholders Cannot Sue. — Except in special cases, "stockholders cannot plead or defend the corporation. That the action is groundless and collusive, and that, from motives of fraud or favor on the part of the officers, the corporation fails or refuses to defend, will make no difference." *Bleckley, J., in Blackman v. Central R. R., etc., Co.*, 58 Ga. 189.

Part of Contract of Membership. — A corporation, both at common law and under the statute, acts by and through its trustees and agents, and cannot act otherwise. It is a part of the contract of subscription of a shareholder that the affairs of the corporation shall be governed and controlled by its directors or trustees, or other duly authorized agents. *Arkansas River Land, etc., Co. v. Farmers' L. & T. Co.*, 13 Colo. 587, 22 Pac. 954.

Presumption That Directors Are Acting for Corporate Interests. — "The general rule is that the stockholders have no right to maintain or defend actions for or against the corporation. This duty the law devolves upon the directors as the trustees and agents of the corporation." Where no fraud or collusion is charged, every presumption should be indulged that the directors are acting for the best interests of the corporation. *Gantt, J., in Meyer v. Bristol Hotel Co.*, 163 Mo. 59, 63 S. W. 96.

however, where, if through negligence or mismanagement of directors or other corporate officers, the corporate interests are threatened with injury, and the corporation as such refuses or neglects to sue, an individual stockholder may bring suit,⁴⁹ but in case of breach of contract or injury from a tort, where the corporation refuses or fails to institute an action individual stockholders cannot, thereupon, prosecute the action, since the corporation is the only proper party to complain.⁵⁰

The directors, or the proper corporate officials, alone can sanction the bringing of a suit,⁵¹ and in order that a corporation may be authorized to sue, the consent of a majority of the directors is usually necessary.⁵²

It will be presumed, however, that a suit brought in the name of

49. As said by Vice-Chancellor Wigram, in *Foss v. Harbottle*, 2 Hare 461, 492, 67 Eng. Reprint 189: "If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that . . . the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue."

May Be Made Defendant When. A court of equity, "in its discretion, will permit a stockholder to become a party defendant, for the purpose of protecting his own interests against unfounded or illegal claims against the company; and he will also be permitted to appear on behalf of other stockholders who may desire to join him in the defense. But this defense is independent of the company and of its directors, and the stockholder becomes a real and substantial party to the extent of his own interests and of those who may join him, and against whom any proceeding, order, or decree of the court in the cause is binding, and may be enforced. It is true, the remedy is an extreme one, and should be admitted by the court with hesitation and caution; but it grows out of the necessity of the case and for the sake of justice, and may be the only remedy to prevent a flagrant wrong." *Bronson v. La Crosse & M. R. Co.*, 2 Wall. (U. S.) 283 (302), 17 L. ed. 725. See, in general, *infra*, XVIII, E.

50. U. S.—*Samuel v. Holladay*, 1

Woolw. C. C. 400, 21 Fed. Cas. No. 12,288. Ind.—*Smith v. Parker*, 148 Ind. 127, 45 N. E. 770. Eng.—*Foss v. Harbottle*, 2 Hare 461, 67 Eng. Reprint 189.

One Person Sole Owner.—Although one has become the sole owner of the stock of a corporation, this fact does not entitle him to sue in his own name upon a debt due to the corporation. *Randall v. Dudley*, 111 Mich. 437, 69 N. E. 729.

51. U. S.—*Eagle Iron Co. v. Colyar*, 156 Fed. 954, 87 C. C. A. 388. Colo. *Arkansas River Land, etc., Co. v. Farmers' Loan & Trust Co.*, 13 Colo. 587, 22 Pac. 954. N. Y.—*Hudson River, etc., R. Co. v. Hay*, 14 Abb. Pr. (N. S.) 191.

52. *Dart v. Houston*, 22 Ga. 508.

Directors Control Litigation.—The directors represent the corporation in all litigation. Consequently, where the directors of a corporation have ordered an appeal to be prosecuted from a decree, the supreme court of the United States will refuse to dismiss the appeal upon the motion of strangers to the decree, although such persons since the decree was rendered have become the owners of a majority of the stock. *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463, 25 L. ed. 438.

Subsequent Ratification.—"The authorization to bring an action by the president of a corporation, subsequently ratified by the board of directors, is sufficient, although such ratification takes place after the commencement of the suit, and after the authority of counsel has been challenged." *Massachusetts Const. Co. v. Kidd*, 142 Fed. 285. And see, *School District v. Richardson*, 23 Pick. (Mass.) 62.

the corporation was authorized by it,⁵³ and where, for example, an action is brought by a city in its corporate name by the proper officials, the presumption exists that such action is authorized until the contrary appears.⁵⁴

B. CORPORATION MAY SUE ITS OWN MEMBERS.—The rule that a person cannot be both plaintiff and defendant in the same action does not apply to a suit by a corporation against its own members, and a corporation may sue, or be sued by, the individual members comprising the artificial personality of the corporate body.⁵⁵

C. ACTIONS IN GENERAL.—As a general rule, a corporation may, in the enforcement of its legal rights, resort to the same remedies that a natural person may avail himself of under like circumstances.⁵⁶

53. *Smythe v. Scott*, 124 Ind. 183, 24 N. E. 685; *Bangor, etc. R. R. v. Smith*, 47 Me. 34; *Lime Rock Bank v. Macomber*, 29 Me. 564.

54. *Ft. Covington v. U. S. & C. R. Co.*, 8 App. Div. 223, 40 N. Y. Supp. 313, *affirmed*, 156 N. Y. 702, 51 N. E. 1094.

55. **Ill.**—*Merrick v. Peru Coal Co.*, 61 Ill. 472. **Mass.**—*Gray v. Portland Bank*, 3 Mass. 364. **Miss.**—*Connell v. Woodward*, 5 How. 665. **Ore.**—*Budd v. Multnomah St. R. Co.*, 12 Ore. 271, 7 Pac. 99, 53 Am. Rep. 355.

Actions on Subscription to Stock. Thus, a corporation may sue its members for due and unpaid subscriptions to stock. **Ala.**—*Planters', etc., Packet Co. v. Webb*, 144 Ala. 666, 39 So. 562; *Selma & T. R. R. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344. **Conn.**—*Russell v. Easterbrook*, 71 Conn. 50, 40 Atl. 905; *Mann v. Cooke*, 20 Conn. 178. **Mass.**—*Taunton, etc., Turnpike Corp. v. Whiting*, 10 Mass. 321, 6 Am. Dec. 124. **N. Y.**—*Herkimer, etc., Co. v. Small*, 21 Wend. 273. **Wash.**—*Puget Sound & C. R. Co. v. Ouellette*, 7 Wash. 265, 34 Pac. 929.

Actions To Recover Dividends.—On the other hand, a stockholder may sue the corporation for the dividends declared and due upon his shares. **Conn.**—*Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542. **Ill.**—*Cook County Brick Co. v. Kaehler*, 83 Ill. App. 448. **Ia.**—*Redhead v. Iowa Nat. Bank*, 127 Iowa 572, 103 N. W. 796. **Mass.**—*French v. Fuller*, 40 Mass. 108. And see, in general, *infra*, XVIII, C.

56. **U. S.**—*Marion County v. McIntyre*, 10 Fed. 543; *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. 555, 7 Fed. Cas. No. 3,810. **Ala.**—*Gaston v. States*, 88

Ala. 459, 7 So. 340. **Mont.**—*Johnson v. Butte & Superior Copper Co.*, 41 Mont. 158, 108 Pac. 1057.

May Invoke Both Legal and Equitable Remedies.—"The rule is well settled that, notwithstanding a corporation may have been created for the transaction of certain business, which is specified in the articles of incorporation, it may invoke any legal or equitable remedy which would be available to an individual under similar circumstances." Therefore, although a corporation was created to manufacture lumber and erect buildings it may take an assignment of a judgment and sue thereon. *Capital Lumb. Co. v. Learned*, 36 Ore. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

Like Cases as Natural Persons.—The constitution of Alabama provides that "All corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons." In construing this provision, the supreme court of Alabama has said: "'In like cases as natural persons' must mean that where the cases are alike, the cause of action the same description of contract or tort, there must be no discrimination between corporations and natural persons, in the matter of prosecuting or defending suits. A tort which will support an action for one, will support it for the other, and a defense available to one, is available to the other. *Mayor v. Stonewall Ins. Co.*, 53 Ala. 570; *Green v. State*, 73 Ala. 26. The sum of these provisions is that no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes." *Smith v. Louisville & N. R. Co.*, 75 Ala. 449; *Home Protection of*

Actions Ex Contractu. — A corporation may bring an action at law upon a contract.⁵⁷ The former common law rule that a corporation cannot sue on a contract not under seal,⁵⁸ is obsolete, and, in general, corporations may sue upon all contracts, express or implied, which fall within the scope of their powers,⁵⁹ to the same extent, and by the use of the same remedies, as natural persons may.

North Alabama *v.* Richards, 74 Ala. 466.

57. *Ala.*—Beene *v.* Cahawba & M. R. Co., 3 Ala. 660. *Ill.*—Leigh *v.* American Brake Beam Co., 205 Ill. 147, 68 N. E. 713. *Md.*—Gordon *v.* Baltimore, 5 Gill. 231; McKim *v.* Odom, 3 Bland, Ch. 407. *Ohio.*—M. E. Church *v.* Wood, 5 Ohio 283. *Eng.*—London Gas Light, etc., Co. *v.* Nicholls, 2 Car. & P. 365, 12 E. C. L. 174.

Contracts Ultra Vires.—By the strict common law rule, a corporation cannot sue on an *ultra vires* contract. Dicey, p. 278. The English courts, moreover, hold that such contracts are illegal and void, and absolutely unenforceable by action, regardless whether the contract be fully executed or merely executory. Ashbury R. Co. *v.* Riche, L. R. 7 H. L. 653; East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775, 73 E. C. L. 775.

The American courts, however, as a rule, distinguish between executed and executory contracts of an *ultra vires* character, holding, generally, that no relief upon such ground can be granted with respect to fully executed contracts. This is the federal court rule, and also the rule in a majority of the state courts. See the following cases: *U. S.*—California Nat. Bank *v.* Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. ed. 198, reversing the supreme court of California; Nat. Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443; Thomas *v.* West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Peru Plow, etc., Co. *v.* Harker, 144 Fed. 673, 75 C. C. A. 475; Old Colony Trust Co. *v.* Wichita, 123 Fed. 762. *Ala.*—Long *v.* Georgia Pac. R. Co., 91 Ala. 513, 8 So. 706, 24 Am. St. Rep. 931; Craddock *v.* American, etc., M. Co., 88 Ala. 281, 7 So. 196. *Ill.*—Hough *v.* Cook County Land Co., 73 Ill. 23. *Mich.*—Day *v.* Spiral Springs B. Co., 57 Mich. 146, 23 N. W. 628, 53 Am. Rep. 352. *Ohio.*—Railway Co. *v.* Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412.

58. In accordance with the notion

that corporations aggregate could express their assent only by their common seals, the ancient doctrine of the common law was that they could bind themselves only by deed. *Ang. & Ames Corp.*, §228. See, also, Dicey's Rules on Parties, Rule 26. See, also, East London Water Works Co. *v.* Bailey, 4 Bing. 283, 13 E. C. L. 435, where Best, C. J., held that a corporation could not maintain an action in assumpsit, where it was brought upon an executory contract.

59. "It is indeed now, as it has ever been, perfectly well established, that corporations, whether public or private, may commence and prosecute all actions, upon all promises and obligations, implied as well as expressed, made to them, which fall within the scope of their design, and the authority conferred upon them." *Ang. & Ames Corp.*, §370.

Corporations may maintain all such actions as are necessary to assert their rights when invaded, or to give them a recompense for any injury that can be done to them. *Kyd Corp.*, §185.

A Sovereign State.—In all cases of contract with the United States, they must have a right to enforce the performance of such contract, or to recover damages for their violation, by actions in their own name, unless a different mode of suit be prescribed by law. *Dugan v. United States*, 3 Wheat. (U. S.) 172, 4 L. ed. 362.

May Sue on Parol Contracts.—For some of the earlier cases discussing the question whether a corporation aggregate could maintain an action upon a parol contract, and holding that it could, see *Church v. Imperial Gas Light & C. Co.*, 6 Adol. & El. 846, 33 E. C. L. 230, 112 Eng. Reprint 324; *Beverley v. Lincoln Gas Light Co.*, 6 Ad. & El. 829, 33 E. C. L. 222, 112 Eng. Reprint 318; *Mayor of Stafford v. Till*, 4 Bing. 75, 13 E. C. L. 347; *Southwark Bridge Co. v. Sills*, 2 C. & P. 371, 12 E. C. L. 178; *London Gaslight, etc. Co. v. Nich-*

Actions Ex Delicto.—Corporations may also sue in tort for injuries inflicted upon them.⁶⁰

D. SPECIFIC ACTIONS.—1. **Assumpsit.**—Under the common law forms of actions, a corporation may be plaintiff in an action of assumpsit.⁶¹ Thus, a corporation may sue for the use and occupation of land upon a tenant's implied promise to pay.⁶²

It has also been held that assumpsit will lie for money had and received, paid out by a corporation in connection with even an *ultra vires* contract, when such money belongs in equity to the corporation;⁶³ and the two corporations may join in an action of assumpsit to recover money due them jointly.⁶⁴

Assumpsit will not lie, however, on an implied promise, where a special remedy has been provided by statute.⁶⁵ A statutory remedy, however, of forfeiture and sale of stock, on failure of a subscribing

olls, 2 Car. & P. 365, 12 E. C. L. 174; Dean v. Pierce, 1 Camp. 466.

60. Conn.—Tilden v. Metcalf, 2 Day 259. N. J.—Trenton Mut. L. & F. Ins. Co. v. Perrine, 23 N. J. L. 402, 57 Am. Dec. 400. Pa.—Mather v. Trinity Church, 3 Serg. & R. 509, 8 Am. Dec. 663. S. C.—Greenville & C. R. Co. v. Partlow, 14 Rich. L. 237.

No Action for a Purely Personal Tort.—The intention of the law is to secure to corporations "all the rights and remedies of natural persons, so far as their purely artificial nature will permit. In the nature of things, however, a corporation, a fictitious being, cannot bring an action *ex delicto* for a purely personal tort, nor be awarded purely personal damages. In its own capacity it cannot be seduced or falsely imprisoned, nor can it sue for breach of promise of marriage, nor for personal injury. Damages for anguish of soul or pain of body it cannot recover." Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 N. W. 926.

61. Ala.—Gayle v. Cahawba & M. R. Co., 8 Ala. 586; Beene v. Cahawba & M. R. Co., 3 Ala. 660. Ill.—Leigh v. American Brake Beam Co., 205 Ill. 147, 68 N. E. 713. N. M.—Meyer & Sons Co. v. Black, 4 N. M. 190, 16 Pac. 620. Ohio.—Methodist Episcopal Church v. Wood, 5 Ohio 283. Tenn. Stokes v. Lebanon & Sparta Turnp. Co., 6 Humph. 241. Eng.—Mayor of Stafford v. Till, 4 Bing. 75, 13 E. C. L. 347; London Gas Light, etc. Co. v. Nicholls, 2 C. & P. 365, 12 E. C. L. 174.

See the title "Assumpsit."

Executory or Executed Contract.—It was at one time held that a corporation could not sue in assumpsit upon an executory contract. East London Water Works v. Bailey, 4 Bing. 283, 13 E. C. L. 435. It was afterwards held, however, that it made no difference, as to the right to bring the action, whether the contract was executed or executory, or whether the promise was express or implied. Beverly v. The Lincoln Gas Light Co., 6 Ad. & El. 829, 33 E. C. L. 222, 112 Eng. Reprint 318; Mayor of Ludlow v. Charlton, 6 M. & W. 315, 822.

Ultra Vires No Defense, When.—In an action in assumpsit for goods sold and delivered brought by a corporation, it is no defense that the plaintiff corporation did not have corporate authority to purchase originally the goods so sold to defendant. Rutland R. Co. v. Proctor, 29 Vt. 93.

62. Mayor of Stafford v. Till, 4 Bing. 75, 13 E. C. L. 347.

Not Even a De Facto Existence. However, where an alleged corporation did not have even a *de facto* existence, it could not maintain an action for rent against a tenant. Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. 167.

63. Leigh v. American Brake Beam Co., 205 Ill. 147, 68 N. E. 713.

64. New York & Sharon Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412.

65. Kidder v. Boom Co., 24 Pa. 193.

stockholder to pay for the same, may be but cumulative,⁶⁶ and, in such case, does not preclude the bringing of an action of assumpsit by the corporation to recover the subscription due.⁶⁷

It is held in some of the early cases, however, that in view of the statutory remedy of forfeiture assumpsit will not lie for stock assessments unless there was an express promise to pay the same;⁶⁸ although other cases recognize that a subscription for stock imposes a personal obligation, and hold that assumpsit lies to recover unpaid installments, although there be no express promise to pay.⁶⁹

2. **Debt.**—A corporation may, in a proper case, sue in debt⁷⁰ and, likewise, on the statutory forms of debt known as book-account.⁷¹

3. **Covenant.**—A corporation may also sue in covenant.⁷²

4. **Trespass.**—A corporation may sue in trespass *quare clausum*.⁷³

5. **Libel.**—A corporation may sue in an action of libel for defamation of its trade or business.⁷⁴

6. **Replevin.**—A corporation may maintain replevin.⁷⁵

7. **Trover.**—An action in trover may, likewise, be brought by a corporation.⁷⁶

8. **Real Actions.**—All real and possessory actions applicable to

66. **Conn.**—*Mann v. Cooke*, 20 Conn. 178. **Md.**—*Hughes v. Antietam Mfg. Co.*, 34 Md. 316. **N. Y.**—*Ogdensburgh, etc., R. Co. v. Frost*, 21 Barb. 541.

67. *Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 70; *Instone v. Frankfort Bridge Co.*, 2 Bibb (Ky.) 576, 5 Am. Dec. 638.

68. **Me.**—*Bangor House v. Hinckley*, 12 Me. 388. **Mass.**—*Franklin Glass Co. v. White*, 14 Mass. 286; *Andover Turnpike v. Gould*, 6 Mass. 40. **N. H.**—*Franklin Glass Co. v. Alexander*, 2 N. H. 380, 9 Am. Dec. 92.

69. *Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 70; *Rensselaer & W. Plank-Road Co. v. Wetsel*, 21 Barb. (N. Y.) 56; *Harlaem Canal Co. v. Spear*, 2 Hall (N. Y.) 510.

70. **Conn.**—*City of New Haven v. Fair Haven, etc., R. Co.*, 38 Conn. 422, **Me.**—*National Exchange Bank v. Abell*, 63 Me. 346. **Eng.**—*The Dean & Chapter of Rochester v. Pierce*, 1 Campb. 466.

See the title "**Debt.**"

71. *Vermont Mut. Ins. Co. v. Cummings*, 11 Vt. 503.

72. *I Kyd, Corp.* 137. *Angell & Ames, Corp.*, §370. See the title "**Covenant.**"

73. *Second Cong. Society v. Waring*, 24 Pick. (Mass.) 304; *Greenville & C. R. Co. v. Partlow*, 14 Rich. L. (S. C.) 237. See the title "**Trespass.**"

74. **Ill.**—*Hahnemannian Life Ins. Co. v. Beebe*, 48 Ill. 87. **N. J.**—*Trenton Mut. Life & Fire Ins. Co. v. Perrine*, 23 N. J. L. 402, 57 Am. Dec. 400. **N. Y.**—*Knickerbocker Life Ins. Co. v. Ecclesine*, 2 Jones & S. 76, 42 How. Pr. 201, 11 Abb. Pr. (N. S.) 385. **Pa.**—*Temperance Mut. Ben. Assn. v. Schweinhart*, 3 Pa. Co. Ct. 353. **Eng.**—*Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87, 28 L. J. Ex. 201.

See the title "**Libel and Slander.**"

75. **Colo.**—*Stovell v. Alert Gold Min. Co.*, 38 Colo. 80, 87 Pac. 1071. **Ind.**—*Smith v. Little*, 67 Ind. 549. **N. Y.**—*American Typefounders Co. v. Conner*, 6 Misc. 391, 26 N. Y. Supp. 742. **Ore.**—See *Capital Lumbering Co. v. Learned*, 36 Ore. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

See the title "**Replevin.**"

Records and Seal of a Corporation.

The secretary of a corporation being the custodian of the records and seal could undoubtedly maintain a suit of replevin to recover their possession, yet the property being the property of the corporation, the corporation itself may maintain an action to recover it. *Stovell v. Alert Gold Min. Co.*, 38 Colo. 80, 87 Pac. 1071.

76. *Portsmouth Livery Co. v. Watson*, 10 Mass. 91. See the title "**Trover and Conversion.**"

the legal rights of a corporation may be brought by it.⁷⁷ Thus, a corporation may be entitled to a writ of right,⁷⁸ and it may sue in an action of ejectment.⁷⁹ The statutory action of trespass to try title may also be invoked by a corporation.⁸⁰

9. Equitable Remedies.—As in the case of remedies at law, a corporation may avail itself of the remedies offered in courts of equity. For example, it may file a bill for an injunction to protect its franchises or other property.⁸¹ It may also obtain a discovery.⁸² A corporation in a proper case may, likewise, file a bill of interpleader;⁸³ enforce specific performance;⁸⁴ or file a bill to set aside a deed as fraudulent.⁸⁵

77. *Angell & Ames, Corp.*, 10th ed., §370; *Chit. Pl.* 102; *Com. Dig.*, tit. Franchise; *Gospel Society v. Wheeler*, 3 Gall. 105, 22 Fed. Cas. No. 13,156. See various specific titles.

78. *I Kyd*, 185. *Inhabitants of Rehoboth v. The Catholic Cong. Church*, 23 Pick. (Mass.) 139.

Writ of Entry.—A corporation may maintain a writ of entry. *Rehoboth v. Hunt*, 1 Pick. (Mass.) 224.

79. *Brown v. State*, 5 Colo. 493; *University of North Carolina v. Johnston*, 2 N. C. 375.

Municipal Corporations.—A state, or a city, may maintain ejectment against one in unlawful possession of its lands. *Gaston v. State*, 88 Ala. 459, 7 So. 340; *City of Chicago v. Wright*, 69 Ill. 318; *Esley v. People*, 23 Kan. 510.

Action of Unlawful Detainer.—A corporation has a right to recover possession of its lands and buildings in an action of unlawful detainer, such property being withheld from it under, and by virtue of, an *ultra vires* agreement. *Mallory v. Hanauer Oil Works*, 86 Tenn. 598, 3 S. W. 396, 20 Am. & Eng. C. C. 478.

Writ of Entry.—It has been held, however, that two corporations, that is, two towns, cannot join in a writ of entry to recover lands they hold in common. *Rehoboth v. Hunt*, 1 Pick. (Mass.) 224.

80. *Eskridge v. Louisville T. Co.*, 29 Tex. Civ. App. 571, 69 S. W. 987.

81. **U. S.**—*Osborn v. United States Bank*, 22 U. S. 738, 6 L. ed. 204. **Ala.** *Birmingham, etc. R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465, 58 Am. Rep. 615. **Mass.**—*Central Bridge Corp. v. City of Lowell*, 4 Gray 474; *Boston*

& L. R. Corp. v. Salem & L. R. Co., 2 Gray 1; *Boston Water Power Co. v. Boston & W. R. Corp.*, 16 Pick. 512. **N. Y.**—*Newburgh & C. Turnpike Road Co. v. Miller*, 5 Johns. Ch. 101, 9 Am. Dec. 274.

See the various specific titles.

Abatement of Nuisance.—A corporation may abate a nuisance by injunction. *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 13 Sup. Ct. 822, 37 L. ed. 686.

De Facto Corporation.—A *de facto* corporation may obtain an injunction where its property rights require such protection from a court of equity. *Williams v. Citizens St. R.*, 130 Ind. 71, 29 N. E. 408, 30 Am. St. Rep. 201, 15 L. R. A. 64.

82. *Union Bank v. McDonough*, 5 La. 63.

83. *Salisbury Mills v. Townsend*, 109 Mass. 115.

84. *Odessa Tramway Co. v. Mendel*, L. R. 8 Ch. D. 235.

Act of Parliament.—The English Companies Act of 1907 (7 Edw. VII, c. 50), §16 expressly provides that specific performance may be decreed in favor of a corporation against a subscriber for its bonds.

Ultra Vires Contract.—Where, however, the making of a contract is *ultra vires*, owing to the fact that the corporation has no power to make such a contract, the federal courts will not regard the corporation's equitable interest in the property an execution of the contract, and will not permit the corporation to maintain specific performance. *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. ed. 513.

85. *Joseph Schlitz Brew. Co. v. Ester*, 86 Hun 22, 33 N. Y. Supp. 143.

A body corporate cannot, however, maintain a suit for equitable relief except as the representative of the stockholders.⁸⁶

10. **Mechanics' Lien.**—A corporation may file a mechanics' lien.⁸⁷

11. **In Admiralty.**—A corporation may maintain a suit for salvage.⁸⁸

III. ACTIONS AGAINST CORPORATIONS.—A. **AS AGAINST NATURAL PERSONS.**—Although the legislature may prescribe what remedies may be had against a corporation,⁸⁹ yet, as to corporations generally, the same remedies exist against them as against natural persons.⁹⁰ They may be sued either at law or in equity by their creditors;⁹¹ and even their own members,⁹² or directors,⁹³ may bring actions against them.

86. *Arkansas River Land, Town & Canal Co. v. Farmers Loan & Trust Co.*, 13 Colo. 587, 22 Pac. 954.

87. *Neuchatel Asphalte Co. v. New York*, 155 N. Y. 373, 49 N. E. 1043; *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151; *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073.

88. *The Camanche*, 8 Wall. (U. S.) 448, 19 L. ed. 397. See the title "Admiralty."

89. *In re Manufacturers' Nat. Bank*, 5 Diss. 499, 16 Fed. Cas. No. 9,051; *Aurora & Laighery Turnpike Co. v. Hothouse*, 7 Ind. 59.

90. *Bank of Columbia v. Patterson*, 7 Cranch (U. S.) 299, 3 L. ed. 351; *Angell & Ames, Corp.*, 10th ed., §379.

91. *U. S.—Hollins v. Brierfield Coal & I. Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113. *Mich.—Edwards v. Michigan Tontine Inv. Co.*, 132 Mich. 1, 92 N. W. 491. *N. Y.—Cole v. Millerton Iron Co.*, 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615.

Enjoining Corporation.—The creditors of a corporation may obtain an injunction to prevent a waste of the corporate assets. Thus, the transfer of the business and property to another company may be enjoined. *Lothrop v. Stedman*, 42 Conn. 583; *Foster v. Borax Co.*, 80 L. T. (N. S.) 461.

Remedies of Creditors in General.—As a general rule, the rights and remedies of the creditors of a corporation against it are the same, both at law and in equity, as the rights and remedies of the creditors of a natural person are against him. They may sue the corporation at common law, and recover a judgment against it, and may enforce the judgment by

execution against the corporate assets. Like creditors of a natural person, also, they may come into a court of equity and reach and subject equitable assets of the corporation to the satisfaction of their claims." *Clark on Corporations*, §214.

92. A member of a corporation who is a creditor, has the same right as any other creditor to secure the payment of his demands, by attachment or levy on the property of the corporation. In this respect, the cases of incorporated companies are entirely dissimilar to those of ordinary partnerships, or unincorporated joint-stock companies. *Angell & Ames, Corp.*, 10th ed., §390; *Waring v. Catawba Co.*, 2 Bay (S. C.) 109; *Culbertson v. Washash Nav. Co.*, 4 McLean 544, 6 Fed. Cas. No. 3,464.

Action To Collect Dividend.—Upon the legal declaration of a dividend, a shareholder may enforce his claim for such dividend as he is entitled to. *Jackson's Admr. v. Newark Plank-Road Co.*, 31 N. J. L. 277; *King v. Patterson, etc. R. Co.*, 29 N. J. L. 82.

See, also, in general, the following cases: *U. S.—Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Weir v. Ray State Gas Co. of Delaware*, 91 Fed. 940. *N. Y.—Schwab v. Potter Co.*, 194 N. Y. 409, 87 N. E. 670. *Pa.—Manderson v. Commercial Bank*, 28 Pa. 379. *Va.—Baltimore R. Co. v. Wheeling*, 13 Gratt. 40. *Wash.—Hampton v. Buchanan*, 51 Wash. 155, 93 Pac. 374. *Wis.—Northern Trust Co. v. Snyder*, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

93. **Actions by Directors.**—Unless a director is prohibited by law from dealing with his corporation, an action

B. ACTIONS EX CONTRACTU.—Corporations are, in general, liable to suit upon all breaches of contract within their contractual powers to make.⁹⁴

Ultra Vires Contracts.—The liability of corporations to actions upon *ultra vires* contracts belongs properly to the substantive law, rather than to the law of procedure, yet a brief reference to the prevailing rules is pertinent in this connection.

Common Law Rule.—At common law, it is said that a corporation cannot be sued on a contract *ultra vires*.⁹⁵

English Rule.—The English doctrine, likewise, is, that *ultra vires* contracts are illegal and void, of no effect, and unenforceable, regardless of the fact whether such contracts have been executed or not.⁹⁶

Federal Courts.—The federal courts, however, distinguish between executed and executory *ultra vires* contracts, holding, that so far as executed contracts of that character are concerned, the courts will leave the parties where they are, that is, such contracts when executed will not be disturbed, but will be treated as valid.⁹⁷ Contracts, however, which remain even in part executory cannot be enforced by either party.⁹⁸

by a director against the corporation may be maintained in a proper case. See **U. S.**—Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328. **Ill.** Harts v. Brown, 77 Ill. 226. **Kan.** Manley v. Mayer, 68 Kan. 377, 75 Pac. 550. **Ky.**—McMurty v. Masonic Temple Co., 86 Ky. 206, 5 S. W. 570. **N. J.**—Marr v. Marr, 73 N. J. Eq. 643, 70 Atl. 375; Stratton v. Allen, 13 N. J. Eq. 229. **N. Y.**—Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314, 13 Am. St. Rep. 595; New York, etc. Co. v. Schuyler, 34 N. Y. 30, 89.

Claims Against Corporation.—The fact that one is a director or an officer of a corporation does not preclude him from maintaining an action against the corporation in the prosecution of a meritorious claim. Forest Glen Brick & Tile Co. v. Gade, 55 Ill. App. 181.

Salary or Compensation.—An official of a corporation may sue the corporation to recover salary or compensation for his services. **U. S.**—Davis v. Memphis City R. Co., 22 Fed. 883. **Cal.** Barstow v. City R. Co., 42 Cal. 465. **Ga.**—Etowah Gold-Min. Co. v. Exter, 91 Ga. 171, 16 S. E. 991.

94. **U. S.**—Chesapeake & O. Canal Co. v. Knapp, 9 Pet. 541, 9 L. ed. 222; Bank of Columbia v. Patterson, 7 Cranch 299, 3 L. ed. 351. **Cal.**—Hunt v. City of San Francisco, 11 Cal. 250. **Ill.**—Illinois Cent. R. Co. v. Thomp-

son, 116 Ill. 159, 5 N. E. 117. **Mass.** Hayden v. Middlesex T. Co., 10 Mass. 397; Smith v. Congregational Meeting-house, 8 Pick. 178. **Eng.**—Rex v. Bank of England, 1 Doug. 524, 99 Eng. Reprint 334.

95. 1 Blk. Com., 483; 2 Kent Com., 291, 292; Angell & Ames, Corp., §256; Dicey on Parties, p. 278, Rule 27; Root v. Wallace, 4 McLean 8, 20 Fed. Cas. No. 12,039; Pennsylvania Co. v. Dandridge, 8 Gill & J. (Md.) 248.

96. East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 775, 73 E. C. L. 775; Ashbury R. Co. v. Riche, L. R. 7 H. L. 653.

97. California Nat. Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. ed. 198; National Bank v. Whitney, 103 U. S. 99, 26 L. ed. 443; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Peru Plow, etc. Co. v. Harker, 144 Fed. 673, 75 C. C. A. 475; Old Colony Trust Co. v. Wichita, 123 Fed. 762; Central Trust Co. v. Western, etc. R. Co., 89 Fed. 24.

98. De La Vergne R. M. Co. v. German Sav. Inst., 175 U. S. 40, 20 Sup. Ct. 20, 44 L. ed. 65; McCormick v. Market Nat. Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. ed. 817; Central Transp. Co. v. Pullman, etc. Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Pearce v. Mad-

The federal supreme court, however, in order to avoid the inequity of permitting one to retain a benefit under an unenforceable *ultra vires* contract, holds that while, in such a case there can be no recovery upon the contract, yet the person who has parted with his property in reliance upon its performance by the other party may recover upon *quasi contract* the reasonable value of such property.⁹⁹

The State Courts.—The state decisions are far from harmonious, yet so far as private corporations are concerned it is held in a majority of the state courts, that where the contract has been executed by one side, an action may be maintained, and if the corporation is disposed to rely upon the plea of *ultra vires*, the alleged doctrine of estoppel will apply.¹

C. ACTIONS EX DELICTO.—Despite some early doubts, it is now well settled that a corporation may be charged in actions *ex delicto* as well as *ex contractu*, and redress, under the common law forms of action, may be had against it by an action of trespass, trover, or case, as may be best suited to the nature of the circumstances.²

ison, etc. R. Co., 21 How. (U. S.) 441, 16 L. ed. 184; *In re Waterloo Organ Co.*, 134 Fed. 341, 67 C. C. A. 255.

99. This result was reached after some doubts, however, as indicated by the earlier cases. The party recovering must have performed either in whole or in part his portion of the agreement. See *Pullman Palace Car Co. v. Central Transp. Co.*, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. ed. 108; *Richmond Guano Co. v. Farmers' Cotton Co.*, 126 Fed. 712, 61 C. C. A. 630; *Emmerling v. First Nat. Bank*, 97 Fed. 739, 38 C. C. A. 399.

May recover in equity. See *Edwards v. Michigan Tontine Inv. Co.*, 132 Mich. 1, 92 N. W. 491.

1. **Ark.**—*Arkadelphia Lumb. Co. v. Posey*, 74 Ark. 377, 85 S. W. 1127. **Cal.**—*Kelly v. Ning Yung Benev. Assn.*, 2 Cal. App. 460, 84 Pac. 321. **Colo.**—*Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771. **Kan.**—*Arkansas Valley, etc. Co. v. Lincoln*, 56 Kan. 145, 42 Pac. 706; *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 23 Pac. 569. **Mich.**—*Dewey v. Toledo, etc. R. Co.*, 91 Mich. 351, 51 N. W. 1063. **N. Y.**—*Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664. **Pa.**—*Boyd v. American Carbon Black Co.*, 182 Pa. 206, 37 Atl. 937. **Wis.**—*McElroy v. Minnesota Percheron Horse Co.*, 96 Wis. 317, 71 N. W. 652.

Following the Federal Rule.—Other state courts, however, are in accord with the federal rule, holding that

suits to enforce an executory *ultra vires* contract may always be defended on the ground of their invalidity, even where the contract is executed on one side, but remains unperformed upon the other. **Ala.**—*Long v. Georgia Pac. R. Co.*, 91 Ala. 519, 8 So. 706, 24 Am. St. Rep. 931; *Memphis, etc. R. Co. v. Grayson*, 88 Ala. 572, 7 So. 122. **Cal.**—*Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543. **Conn.**—*Terry v. Eagle Lock Co.*, 47 Conn. 141. **Ill.**—*Nat. Home Bldg. Assn. v. Home Sav. Bank*, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245. **Ia.**—*Willett v. Farmers' Sav. Bank*, 107 Iowa 69, 77 N. W. 519. **Md.**—*Western Md. R. Co. v. Blue Ridge Hotel Co.*, 102 Md. 307, 62 Atl. 351, 111 Am. St. Rep. 362. **Tenn.**—*Miller v. American Ins. Co.*, 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765.

2. **Bac. Abr. Corp.**, E, 2, 5; **Com. Dig. tit. Franchises**, F, 19; **I Kyd Corp.**, 225. See also various specific titles.

The difficulty felt in earlier times was one purely of process; not that a corporation was metaphysically incapable of doing wrong, but that it was not physically amenable to *capias* or *exigent*. See notes to *Mand v. Monmouthshire Canal Co.*, 4 M. & G. 452, 43 E. C. L. 237, collected by Serjeant Manning. Pollock on Torts, 53, 2nd ed. See also Lord Ellenborough's review of the early decisions in *Yarborough v. The Bank of England*, 16 East.

Quasi-Corporations. — In the case of quasi-corporations, however, a distinction is made between actions in contract and actions in tort, in that such corporations are suable upon contract but are not suable in tort for neglect of corporate duty unless a right of action is given by the statute.³

6, 104 Eng. Reprint 991, decided in 1812.

Wrongs Committed by Servants. Corporations are responsible for every wrong committed by their servants in the line of their employment. *U. S.* Salt Lake City *v.* Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. ed. 176; *Orleans v. Platt*, 99 U. S. 676, 25 L. ed. 404; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008. *Mass.*—*Riddle v. Proprietors of Lakes & Canals*, 7 Mass. 169. *Mo.* *Johnson v. St. Louis Dispatch Co.*, 2 Mo. App. 570. *Neb.*—*Miller v. Burlington & C. R.*, 8 Neb. 219. *N. Y.*—*New York, etc. R. Co. v. Schuyler*, 34 N. Y. 49. *Wis.*—*Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657.

Responsible for All Torts.—"The views of the old lawyers, regarding the real nature, power, and responsibilities of corporations, to a great extent, are exploded in modern times, and it is believed, that now, these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically, and consistently with their respective charters. . . . And now it seems to be generally admitted, that they are civilly responsible, in their corporate capacities, for all torts which work injury to others, whether acts of omission or commission; for negligence merely, and for direct violence." Church, C. J., in *Goodspeed v. East Haddam Bank*, 22 Conn. 530, decided in 1853.

Corporations May Be Sued in Tort. *U. S.*—*Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. ed. 1146; *Phil. W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73; *Bank of Columbia v. Patterson*, 7 Cranch 299, 3 L. ed. 351. *Conn.*—*Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Hooker v. New Haven & N. Canal Co.*, 14 Conn. 146. *Ill.*—*St. Louis, etc. R. Co. v. Dalby*, 19 Ill. 352. *Ind.* *American Exp. Co. v. Patterson*, 73 Ind. 430. *Md.*—*Carter v. Howe Machine Co.*, 51 Md. 290; *Union Bank of Md. v. Ridgely*, 1 Har. & G. 324;

McKim v. Odom, 3 Bland 407. *Mass.* *Foster v. Essex Bank*, 17 Mass. 479. *Mo.*—*Sherman v. Commercial Printing Co.*, 29 Mo. App. 31. *N. Y.*—*Beach v. Fulton Bank*, 7 Cow. 485; *New York v. Bailey*, 2 Denio 433. *Pa.*—*Chestnut Hill T. Co. v. Rutter*, 4 Serg. & R. 6, reviewing the ancient authorities. *S. C.*—*Main v. North Eastern R. Co.*, 12 Rich. L. 82, 75 Am. Dec. 725. *Eng.* *Yarborough v. The Bank of England*, 16 East 6, 104 Eng. Reprint 991.

3. "Towns and other political divisions, as counties, hundreds, etc., which are established without an express charter of incorporation, are denominated *quasi-corporations*." In the same class are included overseers of the poor, supervisors of a county and of a town, and commissioners of roads, in some states. School Districts are also included in this class. *Angell & Ames, Corp.*, 10th ed., §§23, 24; *Inhabitants of 4th School Dist. v. Wood*, 13 Mass. 192.

Actions in Contract.—Where the officers of quasi-corporations contract a debt, and afterwards go out of office, they cannot be sued as "late overseers," etc., but the action must be against their successors. *I Kyd, on Corp.*, 29, 30, 31; *Jackson v. Hartwell*, 8 Johns. (N. Y.) 422.

Tort Action Only By Statute.—In the leading case of *Hill v. City of Boston*, 122 Mass. 344, decided in 1877, Chief Justice Gray (later of the federal supreme court), in a masterly review of the authorities, said: "Although the English books contain numerous cases of indictments or informations for neglect to repair highways and bridges, no instance has been referred to, in the frequent discussions of the subject in England and in this country, in which an English court has sustained a private action against a public or municipal corporation or *quasi* corporation for such neglect, except under a statute expressly or by necessary implication giving such a remedy. . . . The result of the review of the American cases

D. SPECIFIC ACTIONS.—1. **Assumpsit.**—By the ancient rule, assumpsit could not be brought *against* a corporation by reason of the doctrine that a corporation could not contract by parol but only by deed under its corporate seal.⁴ An exception, however, was made

may be summed up as follows: There is no case in which the neglect of a duty, imposed by general law upon all cities and towns alike, has been held to sustain an action by a person injured thereby against a city, when it would not against a town. The only decisions of the state courts, in which the mere grant by the legislature of a city charter . . . has been held sufficient to render the city liable to a private action for neglect in their performance, when a town would not be so liable, are in New York since 1850, and in Illinois. The cases in the Supreme Court of the United States, in which private actions have been sustained against a city for neglect of a duty imposed upon it by law, are of two classes: 1st. Those which arose under the peculiar terms of special charters, in the District of Columbia, . . . or in a territory of the United States. . . . 2nd. Those which arose in New York or in Illinois," in which the court consistently with established rule, followed the decisions of those states. Upon this general proposition, see *Conn.*—Chidsey v. Canton, 17 Conn. 475. *Me.*—Reed v. Belfast, 20 Me. 246. *Mass.*—Bigelow v. Randolph, 14 Gray 541. *N. M.*—Eastman v. Meredith, 36 N. H. 284. *N. Y.*—Markey v. County of Queens, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46. *Ohio.*—Hamilton County v. Mighels, 7 Ohio St. 109. *E. I.*—Taylor v. Peckham, 8 R. I. 349. *S. D.*—Bailey v. Laurence County, 5 S. D. 393, 59 N. W. 219, 49 Am. St. Rep. 881. *Vt.*—State v. Burlington, 36 Vt. 521. *Eng.*—Russell v. County of Devon, 2 T. R. 667, 100 Eng. Reprint 359.

Tort Liability of Municipal Corporations.—In distinction from *quasi*-corporations, municipal corporations proper, are held liable in tort in some jurisdictions although no statute confers the right of action. See Thayer v. Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157. Other cases, however, hold that they can be sued in tort only where the right of action is given by statute. See Choze v. Eureka, 78 Cal. 588, 12 Am. St. Rep. 113. Many of

the cases turn, however, upon the nature of the transaction, whether the municipality was performing a governmental or a private function, holding that no tort liability arises in the former case (see Bartlett v. City of Columbus, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795, note); while, in the latter case, the municipal corporation is liable the same as a private person. See Stock v. Boston, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430.

Charitable Corporations.—The cases are not in harmony as to the liability of charitable corporations. In case of institutions incorporated for carrying on the work of public charities, the rule is that such corporations cannot be sued for the torts of their agents. Fire Insurance Patrol v. Boyd, 120 Pa. 624, 15 Alt. 553, and cases therein cited. When, however, the corporation is a private charity, it is held, in some jurisdictions, that it may be sued in tort as any other private corporation. Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675. Other cases hold that the trust funds of such corporations are not to be diverted from the charitable uses specified by their donors, and, therefore, cannot be used in the payment of tort judgments. Downes v. Harper Hospital, 101 Mich. 555, 60 N. W. 42, 45 Am. St. Rep. 427.

4. Breckbill v. Lancaster Turnp. Co., 3 Dall. 496, 1 L. ed. 694. This case, decided as late as 1799, held that since a corporation could contract only by deed under its corporate seal, an action against it of *indebitatus assumpsit*, upon an implied promise, could not be maintained. See, also, Frankfort Bank v. Anderson, 3 A. K. Marsh (Ky.) 1; Marine Ins. Co. v. Young, 1 Cranch (U. S.) 332, 2 L. ed. 126.

See the title "**Assumpsit.**"

Doctrine Obsolete.—The ancient doctrine that it is the fixing of the seal, and that only, which makes one joint assent of the members composing the corporation, is now repudiated. This "technical doctrine," says Judge Story, "that a corporation could not contract except under its seal, or in other words,

in the case of promissory notes,⁵ and bills of exchange,⁶ when a corporation was authorized by statute to execute the same. As already stated, however, this ancient doctrine has long since been abrogated, and the rule well established that corporations may act by parol and may be sued even on an implied contract.⁷

2. Debt. — Book-Account. — A corporation may be sued in the statutory form of debt known as book-account.⁸

could not make a promise, . . . must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in its name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation." The Bank of Columbia v. Patterson, 7 Cranch 299, 3 L. ed. 351.

In the case of Muscatine Water Co. v. Muscatine Lumb. Co., 85 Iowa 112, 52 N. W. 108, 39 Am. St. Rep. 284, decided in 1892, it was contended that, under the Iowa statute, providing that "the use of private seals in written contracts, except the seals of corporations, is abolished," the use of seals by corporations was governed by the rules of the common law, and that such seals must be affixed to all contracts not covering the ordinary, everyday functions of the corporation. The court held, however, that such was not the law, and that the doctrine is well settled "that corporations of all kinds may be bound by contracts not under their seals." In other words, "a corporation may make a contract without the use of a seal in all cases in which this may be done by an individual." See, also, Merrick v. Burlington & W. Plank Road Co., 11 Iowa 74; Morawetz, Corp., I, §338. A seal may, of course, be required by some statutes to give validity to a contract or conveyance. See Garrett v. Belmont Land Co., 94 Tenn. 459, 29 S. W. 726. See also, Taylor on Prov. Corp., §248.

5. Slark v. Highgate Archway Co., 5 Taunt. 792, 1 E. C. L. 268; Murray v. East India Co., 5 B. & Ald. 196, 5 East 239, 7 E. C. L. 66, 106 Eng. Reprint 1167. And see Chit. Pl. 102.

6. Where the power of a trading or other corporation to draw and accept bills is recognized by statute, assumpsit lies against it; although, in England, an action of debt is generally the only remedy against a corporation.

Chit. Cont. 86; Angell & Ames, Corp., 10th ed., §379.

7. See *supra*, II, and the following cases: U. S.—Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326, 5 L. ed. 100; Bank of Columbia v. Patterson, 7 Cranch 299, 3 L. ed. 351; Davis v. Georgetown Bridge Co., 1 Cranch 147, 7 Fed. Cas. No. 3,637. Ill.—Seagraves v. Alton, 13 Ill. 366. Mass.—Inhabitants of Second Precinct in Rehoboth v. Catholic Cong. Church & Soc., 23 Pick. 139; Hayden v. Middlesex T. Co., 10 Mass. 397; Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156. N. J. Antipoeda Baptist Church v. Mulford, 8 N. J. L. 182. N. Y.—Danforth v. Schoharie & D. Turnpike Road, 12 Johns. 227. Pa.—Chestnut Hill T. Co. v. Rutter, 4 Serg. & R. 7. Vt.—Stone v. Congregational Soc., 14 Vt. 86; Vermont Mut. Ins. Co. v. Cummings, 11 Vt. 503.

Assumpsit Upon Express or Implied Promise.—In the case of The Bank of Columbia v. Patterson, 7 Cranch 299, 3 L. ed. 351, decided in 1813, counsel contended that the liability of a corporation to be sued in assumpsit depended upon an express promise, but Mr. Justice Story, speaking for the court, refused to recognize any distinction between express and implied promises, holding that "wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are *express* promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise *implied* promises, for the enforcement of which an action may well lie."

8. Hunneman v. Fire Dist., 37 Vt. 40; Vermont Mut. Fire Ins. Co. v. Cummings, 11 Vt. 503.

Action To Enforce Payment of Dividend.—A stockholder may enforce his claim for a declared dividend by an action either in debt or assumpsit. Jackson's Admr. v. Newark Plank Road

3. **Covenant.**—Where an action at common law against a corporation is founded upon a sealed instrument, the form of the action must be debt or covenant. Assumpsit cannot be maintained.⁹

4. **Trespass.**—It was formerly held that a corporation could not be sued in trespass,¹⁰ but at the present time a corporation's liability to such action is everywhere recognized.¹¹ Thus, a corporation may be sued for assault and battery,¹² since a corporation is liable for

Co., 31 N. J. L. 277; *King v. Patterson*, etc. R. Co., 29 N. J. L. 82. See the titles "Account and Accounting;" "Debt."

9. *Randel v. Chesapeake & D. Canal*, 1 Har. (Del.) 233; *Porter v. Androscoggin & Kennebec R. Co.*, 37 Me. 349. See the title "Covenant."

Private Seal.—The private seal of a committee is not, however, the corporate seal, and an action on covenant cannot be maintained against a corporation upon an instrument sealed only with the seal of such committee. *Mitchell v. St. Andrew's Bay Land Co.*, 4 Fla. 200.

Corporate Seal Must Be Proved.—An action of covenant against a corporation will lie only on a written instrument sealed with its common seal; and such seal does not prove itself, but must be proved by some person having knowledge of it. If the corporation has no seal, it may adopt a seal for the occasion, but that must be proved to be their seal. *Farmers' & Mechanics' Turnp. Co. v. McCullough*, 25 Pa. 303.

10. The technical reason was that since *capias* was the proper process in trespass, the corporation could not be proceeded against, but that the members or servants doing the wrong must be sued individually. Bro. Corp. 43; 1 Kyd, 223; Ang. & Ames, 10th ed., §385.

See the title "Trespass."

Trespass Vi Et Armis.—Blackstone also wrote that a corporation can neither maintain, nor be made a defendant to, an action of battery, or such like personal injuries, for a corporation can neither beat, nor be beaten. Blk. Com. I, 476.

Held Not Suable.—In *Orr v. Bank of the United States*, 1 Ohio 36, it was expressly held that a corporation could not be sued in an action of assault and battery, and that it could not be

joined in such an action with other defendants.

11. Fla.—*Edwards v. Union Bank of Florida*, 1 Fla. 158. Ill.—*Chicago R. Co. v. Fell*, 22 Ill. 333. Ind.—*Crawfordsville & W. R. Co. v. Wright*, 5 Ind. 252. Mass.—*Inhabitants of Second Precinct v. Catholic Cong. Church & Soc.*, 23 Pick. 139; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168. N. Y.—*Hay v. Cohoes Co.*, 3 Barb. 42. Pa.—*M'Cready v. Guardians of the Poor*, 9 Serg. & R. 94, 11 Am. Dec. 667. S. C.—*White v. City Council of Charleston*, 2 Hill 571. Eng. *Maund v. Monmouthshire Canal Co.*, 4 M. & G. 452, 43 E. C. L. 237; *Yarborough v. Bank of England*, 16 East 6, 104 Eng. Reprint 991; *Duncan v. Surrey Canal*, 3 Stark. 50, 14 E. C. L. 159.

Trespass and Trover.—Mr. Justice Patterson, in the court of Queen's Bench, said, in connection with an indictment against a corporation, that since the case of *Yarborough v. The Bank of England*, both trover and trespass are maintainable against corporations. (*Regina v. Birmingham R. Co.*, 3 Q. B. 223, 43 E. C. L. 708.) It was not till the year 1842, however, that the question was squarely decided in England. The case of *Maund v. Monmouthshire Canal Co.* (4 M. & G. 452, 43 E. C. L. 237) was brought in trespass, based upon the fact that an agent of the company had broken and entered locks on a canal, and had carried away barges and coal, the same being seized, as alleged, for tolls due the company. It was held that since it had been decided that trover would lie against a corporation, trespass would also, since there was no distinction to be made between the two actions. See *Angell & Ames, Corp.*, 10th ed., §386.

12. U. S.—*Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. ed. 1146. Ill.—*St. Louis, etc. R. Co. v. Dalby*, 19 Ill. 352. Mass.—*Mon-*

assault and battery committed by its agent in connection with the performance of the business of the corporation.¹³

A corporation may likewise be sued for false imprisonment,¹⁴ as also for trespass *quare clausum fregit*.¹⁵

5. **Case.**—A corporation is liable in case.¹⁶ It may be sued for the publication of a libel,¹⁷ and for negligence, trespass on the case, and not trespass *vi et armis*, is the proper action.¹⁸ Likewise, an action for malicious prosecution may be brought against a corporation,¹⁹ and

ument Bank v. Globe Works, 101 Mass. 57. **N. J.**—Brokaw v. New Jersey Co., 32 N. J. L. 328.

See the title "Assault and Battery."

13. Ramsden v. Boston & A. R. Co., 104 Mass. 117. And see cases in preceding note.

14. **Ala.**—Owsley v. Montgomery, etc., R. Co., 37 Ala. 560. **Ind.**—American Express Co. v. Patterson, 73 Ind. 430. **Kan.**—Wheeler v. Boyce, 36 Kan. 350, 13 Pac. 609. **Mass.**—Krulvitz v. Eastern R. Co., 140 Mass. 573, 5 N. E. 500. **N. Y.**—Lynch v. Metropolitan Elevated R. Co., 90 N. Y. 77, 43 Am. Rep. 141.

See the title "False Imprisonment."

15. **Del.**—Whitman's Exr. v. Wilmington R. Co., 2 Har. 514. **Fla.**—Edwards v. Union Bank of Florida, 1 Fla. 158. **S. C.**—Main v. Northeastern R. Co., 12 Rich. L. 82, 75 Am. Dec. 725.

See the title "Trespass."

16. **Ala.**—Nabring v. Bank of Mobile, 58 Ala. 204. **Ill.**—Protection Life Ins. Co. v. Osgood, 93 Ill. 69; Harlem v. Emmert, 41 Ill. 319; Conger v. Chicago R. Co., 15 Ill. 366. **N. Y.**—New York v. Bailey, 2 Denio 433. **Pa.**—North American Building Assn. v. Sutton, 35 Pa. 463; Chestnut Hill Turnp. Co. v. Rutter, 4 Serg. & R. 6; Presbyterian Cong. v. Carlisle Bank, 5 Pa. 345. **Eng.**—Denton v. Great Northern R. Co., 5 Ellis & B. 860, 85 E. C. L. 860; Mayor of Lynn v. Turner, Cowp. 86, 98 Eng. Reprint 980; Bank of Ireland v. Evan's Trustees, 5 H. L. Cas. 389, 10 Eng. Reprint 950.

See the title "Case (the Action of Trespass on the)."

17. It is also held in some cases that the malice of the agent may be imputed to the corporation. **Cal.**—Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48. **Conn.**—Merrills v. Tariff Mfg. Co., 10 Conn. 384. **Ga.**—Howe Machine Co. v. Sowder, 58 Ga. 64. **Ill.**—Aetna Life Ins. Co. v. Paul, 37 Ill. App. 439.

La.—Vinas v. Merchants, etc., Ins. Co., 27 La. Ann. 367. **Me.**—Goddard v. Grand Trunk R., 57 Me. 202. **Mass.**—Fogg v. Boston, etc., R., 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583. **Mich.**—Randall v. Evening News Assn., 97 Mich. 136, 56 N. W. 361; Bacon v. Michigan Cent. R. Co., 55 Mich. 224. **Minn.**—Hewitt v. Pioneer Press Co., 23 Minn. 178. **Mo.**—Johnson v. St. Louis Dispatch Co., 65 Mo. 539. **N. J.**—Evening Journal Assn. v. McDermott, 44 N. J. L. 430. **N. Y.**—Samuels v. Evening Mail Assn., 75 N. Y. 604. **N. C.**—Hussey v. Norfolk, etc., R., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312. **Tex.**—Missouri Pac. R. v. Richmond, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280.

Whether Liable for Slander.—The writer has been unable to find any decision holding that a corporation may be sued for slander. There is a *dictum* to the effect that a corporation is not liable in such an action unless the corporation expressly ordered the words to be uttered. See Behre v. Nat. Cash Reg. Co., 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320. On the other hand, there are *dicta* to the effect that a corporation may be held liable for slander just as reasonably as for libel. See Palmeri v. Manhattan R. Co., 133 N. Y. 261, 30 N. E. 1001; Hussey v. Norfolk, etc., R., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312.

Malice of Stockholder.—In an action for libel against a corporation, evidence showing the malice of a stockholder against the plaintiff several years before the publication is immaterial and inadmissible, where such stockholder had nothing to do with the publication. Randall v. Evening News Assn., 97 Mich. 136, 56 N. W. 361.

18. Illinois Central R. Co. v. Reedy, 17 Ill. 580.

19. **U. S.**—Denver, etc. R. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286,

also an action for deceit where the corporation profits from the fraud of its agents,²⁰ because while it is true, strictly speaking, that a corporation cannot be guilty of fraud, yet through the acts of its agents it may be liable.²¹ An action for conspiracy has also been held maintainable against a corporation.²²

6. **Trover.**—Trover may lie against a corporation.²³

7. **Replevin.**—At an early date it was said that a corporation aggregate cannot distrain in their own persons, therefore no replevin lies against them by the name of their corporation.²⁴ When, however, property is unlawfully detained by corporate sanction there can be no doubt as to the right of a remedy for its specific recovery.²⁵

8. **Ejectment.**—The action of ejectment lies against a corporation.²⁶

9. **Quare Impedit.**—It has also been held that the old action of *quare impedit* might be brought against a corporation.²⁷

10. **Specific Performance.**—A suit for specific performance may

30 L. ed. 1146. **Conn.**—Goodspeed v. East Haddam Bank, 22 Conn. 530. **Miss.**—Williams v. Planter's Ins. Co., 57 Miss. 759. **Mo.**—Woodward v. St. Louis, etc. R. Co., 85 Mo. 142. **N. J.**—Vance v. Erie R. Co., 32 N. J. L. 334. **N. Y.**—Morton v. Metropolitan Ins. Co., 103 N. Y. 645. **N. C.**—Hussey v. Norfolk, etc. Ry., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312. **Eng.**—Cornford v. Carlton Bank, 1 Q. B. 22, 68 L. J. Q. B. 1020.

See the title "**Malicious Prosecution.**"

20. **U. S.**—Zabriskie v. Cleveland, etc. R. Co., 23 How. 381, 16 L. ed. 604. **Ga.**—Planters' Rice Mill Co. v. Olmstead, 78 Ga. 586, 3 S. E. 647. **Mass.**—White v. Sawyer, 16 Gray 586. **Neb.**—Fitzgerald v. Fitzgerald Co., 41 Neb. 374, 59 N. W. 838. **Pa.**—Erie City Iron Works v. Barber, 106 Pa. 125.

See the title "**Fraud.**"

21. **Ranger v. Great Western R. Co.**, 5 H. L. Cas. 72, 87, 10 Eng. Reprint 824. And see Washington Gas Light Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. ed. 543.

22. **Ala.**—Jordan v. Alabama, etc. R. Co., 74 Ala. 85. **Kan.**—Western News Co. v. Wilmarth, 33 Kan. 510, 6 Pac. 786. **Mass.**—Krulovitz v. Eastern R. Co., 140 Mass. 573, 5 N. E. 500. **N. Y.**—Buffalo, etc. Co. v. Standard Oil Co., 106 N. Y. 669, 12 N. E. 825.

See the title "**Conspiracy.**"

23. **Me.**—Brown v. South Kennebec

Ag. Soc., 47 Me. 275. **Md.**—Baltimore v. Norman, 4 Md. 352. **Mass.**—Inhabitants of Second Precinct v. Catholic Cong. Church & Soc., 23 Pick. 139; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168. **N. Y.**—Beach v. Fulton Bank, 7 Cow. 485; Fishkill Sav. Inst. v. Bostwick, 19 Hun 354. **Eng.**—Giles v. Taff Vale R. Co., 2 El. & Bl. 822, 831, 75 E. C. L. 822; Smith v. Birmingham, etc. Co., 1 A. & E. 526, 28 E. C. L. 140; Yarborough v. Bank of England, 16 East 6, 104 Eng. Reprint 991; Duncan v. Surrey Canal, 3 Stark, 50, 14 E. C. L. 159.

See the title "**Trover and Conversion.**"

24. **Brownl.** 175. See the title "**Replevin.**"

25. **Certificate of Stock May Be Recovered by Replevin.**—**Ind.**—Opperman v. Citizens Bank, 85 N. E. 991. **La.**—People's Brewing Co. v. Boebinger, 40 La. Ann. 277, 4 So. 82. **N. Y.**—Thompson v. St. Nicholas Nat. Bank, 113 N. Y. 325, 21 N. E. 57.

Detinue.—The common law action of detinue may be maintained, it has been held, for the recovery of a certificate of stock. Williams v. Archer, 5 C. B. 318, 57 E. C. L. 318; Williams v. Peel River, etc. Co., 55 L. T. (Eng.) 689.

26. **I Kyd.** 187; Lucas v. Johnson, 8 Barb. (N. Y.) 244; Dater v. Troy Turnp. Co., 2 Hill (N. Y.) 629. See Den v. Fen, 10 N. J. L. 237. And see the title "**Ejectment.**"

27. **Rutter v. Bishop of Hereford,**

be maintained against a corporation, as, for example, where the corporation may be compelled to issue to a subscriber the stock, bonds, or debentures which it had contracted to issue,²⁸ or to compel the transfer of shares of bank stock.²⁹

11. Bill of Discovery.—Under the chancery practice when discovery is desired from a corporation, the officers or agents of the corporation, who may have custody of papers or knowledge of facts, are joined as parties to a bill of discovery in order to elicit from them the evidence desired in cases where relief is sought against the corporation.³⁰ The making of the officers and agents of a corporation

etc., *Barnes' C. P.* 350, 94 Eng. Reprint 949.

28. Tex.—*Texas Western R. Co. v. Gentry*, 69 Tex. 625, 8 S. W. 98. **Wis.** *Bailey v. Champlain, etc. Co.*, 77 Wis. 453, 46 N. W. 539. **Eng.**—*In re Strand Music Hall Co.*, 3 De G. J. & S. 147, 46 Eng. Reprint 594. And see *Western U. Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. ed. 1047; *Duncuft v. Albrecht*, 12 Sim. 189, 59 Eng. Reprint 1104. *Compare Ross v. Union Pac. R. Co.*, 4 Woolw. 26, 20 Fed. Cas. No. 12,080.

See the title "**Specific Performance.**"

Statutory Duty.—A railway corporation may be compelled by specific performance to perform a statutory duty, such as building a bridge over a highway. *Montclair v. New York & G. L. R. Co.*, 45 N. J. Eq. 436, 18 Atl. 242.

Stock Carrying Controlling Voice. Under a contract to deliver corporate stock, when such stock has no ascertainable market value, and carries with it a controlling voice in the management, a plaintiff is entitled to a decree for specific performance. *Rumsey v. New York & P. R. Co.*, 203 Pa. 579, 53 Atl. 495; *Goodwin, etc. Co.'s Appeal*, 117 Pa. 514, 12 Atl. 736, 2 Am. St. Rep. 696.

29. *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Middlebrook v. The Merchants' Bank*, 41 Barb. (N. Y.) 481; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348.

Legal Remedy Must Be Inadequate. As a rule, courts of equity will not entertain jurisdiction for a specific performance on the sale of stock, since compensation in damages will furnish a complete and satisfactory remedy. The rule is, however, subject to exceptions, and where the case is such that the legal remedy is incapable of giving adequate compensation, courts of

equity will feel themselves bound to decree a specific performance. *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365; *Phillips v. Berger*, 2 Barb. (N. Y.) 608; *Story's Eq. Jur.*, §717.

30. U. S.—*Consolidated Brake-Shoe Co. v. Chicago, etc. R. Co.*, 69 Fed. 412; *Continental Nat. Bank v. Heilman*, 66 Fed. 184; *Doyle v. San Diego, L. & Tr. Co.*, 43 Fed. 349. **Ala.**—*Walker v. Hallett*, 1 Ala. 379. **Mass.**—*Post-r. Toledo, etc. R. Co.*, 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86; *Wright v. Dame*, 1 Met. 237. **N. Y.**—*Shumaker v. Doubleday, Page & Co.*, 116 App. Div. 302, 101 N. Y. Supp. 587; *Many v. Beekman Iron Co.*, 9 Paige 188; *Vermilyea v. Fulton Bank*, 1 Paige 37. **W. Va.**—*Munson v. German-American Fire Ins. Co.*, 55 W. Va. 423, 47 S. E. 160. **Eng.**—*Wadeer v. East India Co.*, 29 Beav. 300, 54 Eng. Reprint 642; *Gibbons v. Waterloo Bridge Co.*, 1 C. P. Coop. 385, 47 Eng. Reprint 909; *Wych v. Meal*, 3 P. Wms. 310, 24 Eng. Reprint 1078; *Anon.*, 1 Vern. 117, 23 Eng. Reprint 355; *United States v. Wagner*, L. R. 2 Ch. 582, 587.

See the title "**Discovery.**"

Whether Mandamus Lies.—Ordinarily the extraordinary remedy of mandamus will not be sustained to compel the transfer of stock, the ordinary legal remedy being adequate. **Cal.** *Kimball v. Union Water Co.*, 44 Cal. 173. **N. Y.**—*Shipley v. Mechanics' Bank*, 10 Johns. 484. **Ohio.**—*Freon v. Carriage Co.*, 42 Ohio St. 30, 51 Am. Rep. 794. Mandamus may be invoked, however, if the ordinary remedy is inadequate. **Cal.**—*People v. Crockett*, 9 Cal. 113. **Ill.**—*People v. Goss & Phillips Mfg. Co.*, 99 Ill. 355. **Wis.**—*In re Klaus*, 67 Wis. 401, 29 N. W. 582.

Equity Rules.—Under the equity rules of the federal supreme court, an officer of a defendant corporation who

parties to such a bill, contrary to the general rule that mere witnesses cannot be made parties, is permitted for the purpose of obtaining an answer under oath;³¹ owing to the fact that a corporation cannot be sworn but answers merely under its common seal, unaccompanied by an oath.³² It accordingly follows that however false its answer may be, the corporation can never be convicted of perjury.³³

Discovery, however, from an officer of a corporation cannot be compelled relative to facts learned by him before or after his official connection with the corporation.³⁴

In the federal courts, when an answer under oath is waived, and relief is sought only from the corporation, the officers of the corporation cannot be made parties to a suit against it, and if made parties demurrer will lie.³⁵

Decreasing Importance.—Bills of discovery are, however, of much less importance than formerly, owing to the prevalence of modern statutes permitting the examination of witnesses in open court, or making other provisions for the taking of testimony.³⁶

is not individually a party to the suit, cannot be required to make discovery. *Kirby v. Lake Shore, etc. R. Co.*, 14 Fed. 261. The bill, however, may be amended by making them parties. *French v. First Nat. Bank*, 7 Ben. 488, 9 Fed. Cas. No. 5,099.

31. **U. S.**—*O'Brien v. Champlain Const. Co.*, 107 Fed. 338. **Mass.**—*Post v. Toledo, etc. R. Co.*, 144 Mass. 341, 11 N. E. 540. **N. J.**—*Howell v. Arkmore*, 9 N. J. Eq. 82. **N. Y.**—*Many v. Beekman Iron Co.*, 9 Paige 188. **Pa.**—*Bovaird v. Seyfang*, 200 Pa. 261, 49 Atl. 958. **Tenn.**—*Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 599. **Va.**—*Roanoke St. R. Co. v. Hicks*, 96 Va. 510, 32 S. E. 295.

Corporation Bound To Answer.—"A corporation aggregate is bound to answer a bill of discovery the same as a natural person, except that it puts its answer under its corporate seal, while a natural person makes answer under oath. While it is the usual practice to join the clerk or other principal officer of a corporation aggregate as a party to the suit in a bill for discovery, such joinder is not necessary," since it is the corporation's duty, "if required to do so by the bill, to put in a full, true, and complete answer. . . . Nor is it a sufficient reason for the corporation to refuse to answer a cross-bill for discovery that the officers and employes of the corporation are made competent witnesses for either party by the Federal stat-

utes." *Indianapolis Gas Co. v. City of Indianapolis*, 90 Fed. 196.

32. **Story, Eq. Pl.**, §235; *Union Bank of Georgetown v. Geary*, 5 Pet. (U. S.) 93, 8 L. ed. 60; *Smith v. St. Louis M. Ins. Co.*, 2 Tenn. Ch. 599.

33. **Story, Eq. Pl.**, §235.

34. *McComb v. Chicago, etc. R. R. Co.*, 7 Fed. 426.

A former officer, however, may be required to give discovery of matters learned while he was in office. *Fulton Bank v. Sharon Canal Co.*, 1 Paige (N. Y.) 219.

35. *Matthews & W. Mfg. Co. v. Trenton L. Co.*, 73 Fed. 212; *Colonial & U. S. Mtg. Co., Ltd. v. Hutchinson Mtg. Co.*, 44 Fed. 219.

36. See U. S. Rev. Sts., §724, and similar statutes in the several states. A like statute has also been enacted in England, Stat. 14 & 15 Vict., 99, §6. See, also, U. S. Rev. Sts., §858, 862.

Suits in Equity.—Although section 724 of the federal statutes, cited above, does not apply to suits in equity, yet parties to suits in equity are, by other federal statutes, competent witnesses in the courts of the United States, and may be examined at the instance of their adversary. *Bischoffsheim v. Brown*, 29 Fed. 341.

Judicature Act.—Under the English Judicature Act, the officers of a corporation cannot be made defendants for the mere purpose of discovery. *Wilson v. Church*, L. R. 9 Ch. Div. 552.

12. Quo Warranto.—The state through its proper officers may inquire into the validity of a corporation's alleged existence by means of the remedy of *quo warranto*, or proceedings in the nature of *quo warranto*.³⁷ A corporation, however, cannot be sued as such, and brought into court, and the action maintained against it on the ground that it is not a corporation, since by making the corporation a party it is admitted that it has an existence.³⁸ The proceedings, in such cases, must be against the individuals who usurp the franchise.³⁹

13. Scire Facias.—At common law, both *scire facias* and an information in the nature of *quo warranto* are appropriate remedies to enforce the dissolution of a corporation for a cause of forfeiture.⁴⁰

Officers, Agents, Etc., Are Not Parties.—A statute, however, making "parties" to an action competent witnesses, does not apply to the officers, directors, and stockholders of a corporation where the corporation is a party to the record, since the corporation is distinct from its agents and members. And a statute providing for proceedings at law in place of a discovery in equity against "parties," does not include the examination, after issue joined and before trial, of the officers and agents of a corporation merely because the corporation is a party. *Apperson v. Mutual Benefit Life Ins. Co.*, 38 N. J. L. 272; *Hinds v. Canandaigua*, etc. R. R., 10 How. Pr. (N. Y.) 487.

Statute Does Not Abolish Discovery. "While bills of discovery in aid of the prosecution or defense of actions at law have practically fallen into disuse, owing to the simpler methods provided by statute for obtaining the same facts which might have been originally obtained by such cross-bills, still it seems to be certain that courts of equity have not been deprived of their original and inherent jurisdiction to entertain bills of discovery by reason of such statutory provisions. . . . These statutes have provided a cumulative remedy for obtaining evidence of facts" which previously could be obtained only by bills of discovery. However, such bills "in aid of the prosecution or defense in an action at law will be of very rare occurrence for the reason that the statutes provide a simpler, cheaper, and more expeditious method of obtaining the facts." *Indianapolis Gas Co. v. Indianapolis*, 90 Fed. 196.

37. See the title "*Quo Warranto*."

38. *People v. Stanford*, 77 Cal. 360, 19 Pac. 693, 18 Pac. 693.

Usurpation of Privileges.—If the proceedings are based upon the charge that the corporation is usurping privileges and powers not belonging to it, the corporation is the only proper party defendant. *Ind.*—*Mud Creek Draining Co. v. State*, 43 Ind. 236. *N. Y.*—*People v. Ransselaer Co.*, 15 Wend. 113. *Ohio.*—*State v. Coke Co.*, 18 Ohio St. 262.

39. *State v. Ford County*, 12 Kan. 441; *Attorney General ex rel. Nelson v. McArthur*, 38 Mich. 204.

40. *Green v. St. Albans Trust Co.*, 57 Vt. 340.

Writ of Scire Facias.—"The writ of *scire facias* was formerly used by the government as a mode to ascertain and enforce the forfeiture of a corporate charter, in cases where there was a legally existing body, capable of acting, but who had abused its power. It would not lie in cases of mere *de facto* corporations." 2 Kent, Comm. 313. Quoted in *People v. Dashaway Assn.*, 84 Cal. 114, 24 Pac. 277.

Writ of Quo Warranto.—The writ of *quo warranto* was a writ which issued to bring the defendant before the court to show by what authority he claimed an office or franchise, and was applicable alike to cases where the defendant never had a right, or where, having a right or franchise, he had forfeited it by neglect or abuse. 3 Blk. Comm., 262, 263.

Information in Nature of Quo Warranto.—Corporations are creatures of the law, and when they fail to perform duties which they were incorporated to perform, and in which the public have an interest, or do acts which are not authorized, or are forbidden them to do, the state may forfeit their franchises and dissolve them by an information in the nature of a

The action, for this purpose, is properly brought against the corporation in its corporate name where, as a corporation, it has usurped franchises not granted to it.⁴¹

14. Statutory Action.—In many jurisdictions, at the present time, the writ of *scire facias*, and the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto* have been expressly abolished by statute, and the remedies formerly obtainable in these forms may be obtained by civil actions under the various codes.⁴²

15. Attachment and Garnishment.—Corporations, like natural persons, are subject to the laws regulating proceedings in attachment and garnishment.⁴³

16. Indictment.—A corporation may be guilty of a crime, and consequently may be indicted and made a defendant in a criminal prosecution.⁴⁴

IV. JURISDICTION OF ACTIONS.—A. STATE OF DOMICIL. Actions by and against corporations may be brought in the state in which they are created.⁴⁵ This is but axiomatic, since, as previously

quo warranto. Cal.—People v. Dashaway Assn., 84 Cal. 114, 24 Pac. 277; People v. Pittsburgh Co., 53 Cal. 694. Ill.—Golden Rule v. People, 118 Ill. 492, 9 N. E. 342. N. Y.—People v. Utica Ins. Co., 15 Johns. 358.

41. Mud Creek Draining Co. v. State, 43 Ind. 236; People v. Bank of Niagara, 6 Cow. (N. Y.) 196; People v. Rensselaer R. Co., 15 Wend. (N. Y.) 113; People v. Trustees, 5 Wend. (N. Y.) 211.

Petition in Proceedings for Ouster. For a form of petition in ouster proceedings by *quo warranto* for abuse of corporate powers, see State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279.

42. See People v. Dashaway Assn., 84 Cal. 114, 24 Pac. 277; People v. Bleecker St. & F. F. R. Co., 67 Misc. 577, 124 N. Y. Supp. 782, *affirmed*, 140 App. Div. 611, 125 N. Y. Supp. 1045.

Repeal by Implication.—A statutory remedy for *quo warranto* may also, by implication, supersede the common law. See Green v. St. Albans Trust Co., 57 Vt. 340.

Court of Equity.—A court of equity, however, has no inherent jurisdiction to decree the forfeiture of the franchises of a corporation. Mass.—Folger v. Columbian Ins. Co., 99 Mass. 274. N. J.—Doremus v. Dutch Reformed Church, 3 N. J. Eq. 332. N. Y.—Kincaid v. Dwinelle, 59 N. Y. 548. Tenn.

State v. Merchants' Ins., etc. Co., 8 Humph. 252.

43. See the titles "**Attachment;**" "**Garnishment,**" and *infra*.

44. Suburban Electric Co. v. Com., 21 Ky. L. Rep. 1556, 55 S. W. 684.

45. Baltimore & O. R. Co. v. Gallahue's Admr., 12 Gratt. (Va.) 655, 65 Am. Dec. 254.

Cannot Contract as to Jurisdiction. A provision endorsed on the certificates of stock issued by a corporation that any action brought by its stockholders against it shall be brought in a certain county in the state of its domicile, is void. Savage v. Peoples B. & L. Assn., 45 W. Va. 275, 31 S. E. 991.

Venue.—Actions must be brought, however, in the proper county of the state. Emmons v. Lexington & Carter County Min. Co., 112 Ky. 91, 65 S. W. 593.

State a Stockholder.—The mere fact that the state is a stockholder in a corporation will not give the Federal Supreme Court original jurisdiction of its suits. United States Bank v. Planters' Bank, 9 Wheat. (U. S.) 904, 6 L. ed. 244.

In What Courts.—The statutes sometimes provide that corporations may sue and be sued in all courts of the state. Yet, even in absence of such a provision, corporations, like natural persons, may, as a rule, sue and be sued in all the various courts of the

stated, there is an express or inherent power in corporations to sue and to be sued.⁴⁶

B. FOREIGN STATE.—1. **Actions by Corporations.**—Unless some statute prevents, a corporation may, by the comity of states, bring suit, also, in a foreign state.⁴⁷

A citizen of the United States has the constitutional right to maintain actions in the courts of the several states,⁴⁸ but a corporation is not a "citizen" as that word is understood in the federal constitution.⁴⁹ In fact, a corporation has no positive right to exercise its fran-

state, under the statutory regulations governing the subject-matter of suits and the amount involved. See *Arroyo Ditch & Water Co. v. Superior Court*, 92 Cal. 47, 28 Pac. 54.

Thus, a justice of the peace may have jurisdiction of an action against a corporation. *Ark.*—*Woodruff v. Griffith*, 5 Ark. 354. *Mich.*—*Gallagher v. American Exp. Co.*, 56 Mich. 13, 22 N. W. 96. *Mo.*—*Grannahan v. Hannibal & St. J. R. Co.*, 30 Mo. 546. *N. J.*—*Wheeler & Wilson Mfg. Co. v. Carty*, 53 N. J. L. 336, 21 Atl. 851. And even the United States may maintain an action in a justice of the peace court. *McNamee v. United States*, 11 Ark. 148. A justice of the peace may, however, have no jurisdiction, under the statute, over a foreign corporation, owing to the requirements of service of process. *Hartford Fire Ins. Co. v. Owen*, 30 Mich. 441. And see *City of Jersey City v. Horton*, 38 N. J. L. 88.

Stockholder's Liability.—The jurisdiction of actions to enforce the liability of a stockholder in a corporation, may depend upon the amount involved. See *Hyman v. Coleman*, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178.

Municipal Corporations.—The statutes generally specify what courts shall or shall not have jurisdiction of actions brought by or against municipal corporations, since, the right to sue or be sued, in connection with such corporations, is largely a matter of statutory provision. See, in general, *U. S.*—*Smith v. Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. ed. 1140. *Ark.*—*Griffith v. County of Sebastian*, 49 Ark. 24, 3 S. W. 886. *Mich.*—*City of Eaton Rapids v. Houtt*, 63 Mich. 371, 29 N. W. 860. *Va.*—*Baker v. Briggs*, 99 Va. 360, 38 S. E. 277.

Common Carrier; Breach of Contract.—A contract of carriage made by a common carrier in the state of its

domicil may be sued on in the state of its incorporation, although the injury complained of occurred in another state. *Alabama, etc. R. Co. v. Thomas*, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119.

Constitutional Right.—Where the state constitution provides that all corporations shall have the right to sue and be sued in all courts in like cases as natural persons, a provision in a charter restricting such right, by providing that certain suits shall be taken only to a certain court, is void. *Story v. New York El. R.*, 3 Abb. N. C. (N. Y.) 478.

46. *Supra*, I.

47. See *infra*, XX.

48. *Const. of United States*, Art. IV, §2; *Ward v. Maryland*, 12 Wall. (U. S.) 418, 20 L. ed. 449.

49. *U. S.*—*Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. ed. 432; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. ed. 297; *Baltimore, etc., R. v. Koontz*, 104 U. S. 11, 26 L. ed. 643; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Bank of U. S. v. Deveaux*, 5 Cranch 61, 3 L. ed. 38. *Del.*—*Cadwell v. Armour*, 1 Penne. 545, 43 Atl. 517. *Ill.*—*Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 529. *La.*—*State v. Fosdick*, 21 La. Ann. 434. *Mich.*—*Hartford Ins. Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474. *Mo.*—*Daggs v. Orient Ins. Co.*, 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227.

U. S. Const., Art. IV, §22: "Privileges and Immunities" Clause.—Corporations, in the states of their creation, are not entitled to the privileges, or "rights" of the citizens of such states. They cannot vote at elections. They are ineligible to any public office. They are artificial beings, endowed only with such powers and priv-

chises beyond the territorial limits of the state in which it was brought into being;⁵⁰ and it is only by comity, not a matter of right but of grace, that a corporation of one state may enjoy the privileges of citizens of other states.⁵¹ The same comity, however, that is extended to alien individuals may also be extended to foreign and alien corporations,⁵² and although in some early cases it has been objected that a corporation could not maintain a suit in a foreign court,⁵³ yet it is well settled, that subject to the nature of the suit, and the requirements of the statutes of the forum, corporations may, by comity, sue in foreign jurisdictions.⁵⁴

2. Actions Against Corporations.—It was at one time held that only in the courts of what we may call its native state could a corporation be sued, since, for the purpose of serving process, it could not be "found" outside of such state.⁵⁵

At the present time it is, however, well established that a corporation may be sued in the courts of a foreign jurisdiction.⁵⁶ While a

ileges and rights as their creator thought fit to bestow upon them. They have not the power of locomotion, and are not fit subjects of the constitutional clause on which this case turns. *Breese, C. J., in Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 529.

Diversity of Citizenship.—In, so far, however, as "diversity of citizenship," in connection with corporations, affects the jurisdiction of the federal courts, corporations are citizens within the meaning of the clause of the Constitution which extends the judicial power to those courts to controversies between citizens of different states. *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227, 15 L. ed. 896; *Louisville C. & C. R. Co. v. Letson*, 2 How. (U. S.) 497, 11 L. ed. 353; *Western Union Tel. Co. v. Dickinson*, 40 Ind. 444, 13 Am. Rep. 295.

50. *Com. v. Milton*, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522.

51. **U. S.**—*Manchester Fire Ins. Co. v. Herriott*, 91 Fed. 711. **Ind.**—*State v. Insurance Co. of North America*, 115 Ind. 257, 17 N. E. 574. **Kan.** *State v. Topeka Water Co.*, 61 Kan. 547, 60 Pac. 337. **Mass.**—*National Tel. Mfg. Co. v. DuBois*, 165 Mass. 117, 42 N. E. 510, 52 Am. St. Rep. 503. **N. J.**—*Erie R. Co. v. State*, 31 N. J. L. 531, 86 Am. Dec. 226. **Tenn.** *State v. Cumberland Tel. & Tel. Co.*, 114 Tenn. 194, 86 S. W. 390. **Wis.** *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940.

52. *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 10 L. ed. 274.

53. *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370. And see *Henriques v. Dutch West Indies Co.*, 2 Ld. Raym. 1532, 92 Eng. Reprint 494, 1 Str. 612, 93 Eng. Reprint 733.

54. See *infra*, XX.

55. **U. S.**—*Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 5 McLean 444, 18 Fed. Cas. No. 10,321; *Myers v. Dorr*, 13 Blatchf. 22, 17 Fed. Cas. No. 9,988. **Conn.**—*Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301. **Mass.** *Peckham v. North Parish in Haverhill*, 16 Pick. 274. **N. J.**—*Moulin v. Trenton, etc. Ins. Co.*, 24 N. J. L. 222. **N. Y.**—*McQueen v. Middletown Mfg. Co.*, 16 Johns. 5. **Ore.**—*Aldrich v. Anchor Coal, etc. Co.*, 24 Ore. 32, 32 Pac. 756, 41 Am. St. Rep. 831.

56. The inconvenience and often manifest injustice of exempting a corporation from being sued in a state other than in which it was created has caused the rule in modern times to be very much relaxed, and it is now generally held that where a corporation created in one jurisdiction is permitted, either by express enactment or by acquiescence, to do business in another, it is to be deemed a resident, and subject to the jurisdiction of the courts of the latter in all matters founded upon contracts made or causes of action arising there, and service may be made upon it in the same manner as a domestic corporation where the law does not provide

corporation cannot change its domicile at will like a natural person,⁸⁷ yet, as was said by Mr. Chief Justice Waite, "it may for the purpose of securing business, consent to be 'found' away from home, for the purposes of suits as to matters growing out of its transactions."⁸⁸

A corporation may, however, confine its business strictly to one state and thus be exempt from suits in other states.⁸⁹

3. Jurisdiction Affected by Nature of Suit.—The nature of the suit and the relief sought may affect the question of jurisdiction. For example, the courts are not agreed as to the local or transitory character of suits to enforce the individual liability of stockholders. Some courts hold that this liability is purely statutory, and not enforceable outside the domicile of the corporation.⁹⁰ The great weight of authority holds, however, the liability to be contractual, and, consequently, enforceable in the courts of other states.⁹¹ Moreover, suits involving

otherwise. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222; *Miller v. Eastern Oregon Min. Co.*, 45 Fed. 345; *Aldrich v. Anchor Coal, etc. Co.*, 24 Ore. 32, 32 Pac. 756, 41 Am. St. Rep. 831. See, in general, *infra*, XX.

57. *Germania Fire Ins. Co. v. Francis*, 11 Wall. (U. S.) 210, 216, 20 L. ed. 77.

58. *Ex parte Schollenberger*, 96 U. S. 369, 378, 24 L. ed. 853.

59. *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 5 McLean 444, 18 Fed. Cas. No. 10,321; *Moulin v. Trenton, etc. Ins. Co.*, 24 N. J. L. 222.

No Way of Serving Process.—Where a foreign corporation is not engaged in business in the state, and has neither an agency nor property therein, there is no way of reaching it with process. The official character of officers and agents does not accompany such persons beyond the jurisdiction in which the corporation was created. *U. S.*—*Clews v. Woodstock Iron Co.*, 44 Fed. 31. *Ill.*—*Midland, etc. R. Co. v. McDermid*, 91 Ill. 170. *Mass.*—*Peckham v. Haverhill Parish*, 16 Pick. 274. *Mich.*—*Newell v. Great Western R. Co.*, 19 Mich. 336. *Mo.*—*Latimer v. Union Pac. R. Co.*, 43 Mo. 105, 97 Am. Dec. 378. *Ore.*—*Aldrich v. Anchor Coal, etc. Co.*, 24 Ore. 32, 32 Pac. 756, 41 Am. St. Rep. 831. *Pa.*—*Phillips v. Burlington Library Co.*, 141 Pa. 462, 21 Atl. 640, 23 Am. St. Rep. 304.

60. *Cal.*—*Russell v. Pacific R. Co.*, 113 Cal. 258, 45 Pac. 323. *Md.*—*First Nat. Bank v. Price*, 33 Md. 487, 3 Am. Rep. 204. *Mass.*—*Post v. Toledo, etc.*

R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86; *Erickson v. Nesmith*, 4 Allen 233. *N. H.*—*Crippen v. Laighton*, 69 N. H. 540, 44 Atl. 538, 46 L. R. A. 467; *Rice v. Merrimack Hosiery Co.*, 56 N. H. 114. *W. Va.*—*Nimick v. Mingo Iron-Work Co.*, 25 W. Va. 184.

Special Remedy Provided.—Where, however, a special remedy has been provided by a foreign state, such remedy, it is held, must be applied within the jurisdiction of the domicile of the corporation and is not by any principle of comity enforceable abroad. *Tuttle v. Nat. Bank of the Republic*, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750; *Fowler v. Lamson*, 146 Ill. 472, 34 N. E. 932; *National Bank v. Dillingham*, 147 N. Y. 603, 42 N. W. 338; *Christensen v. Eno*, 106 N. Y. 97, 12 N. E. 648. And see *Middleton Nat. Bank v. Toledo, etc. R. Co.*, 197 U. S. 394, 25 Sup. Ct. 462, 49 L. ed. 803.

Jurisdiction Declined When.—Where, however, a foreign law is a penal statute, or it offends the policy of the state of the forum, or is repugnant to justice or good morals, or is calculated to injure the state or its citizens; or where the court has not jurisdiction of parties who must be brought in to enable it to give a satisfactory remedy, or if, under the local procedure, a substantial remedy cannot be given, the foreign court is at liberty to decline jurisdiction. *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207.

61. *U. S.*—*Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; *Flash v. Conn.*, 109 U. S. 371, 3 Sup. Ct. 283, 27 L. ed. 966; *Fidelity, etc. Deposit Co. v. Mechanics*

the interpretation of the charter and by-laws of a corporation, the regularity and sufficiency of its proceedings, and the laws of the state in which the corporation was created, ordinarily belong properly and exclusively to the courts of its domicile.⁶² And since a corporation sues in another state not by right but by favor, if it is apparent, in a suit in equity, that complete justice cannot be done in the foreign court, or that the amount involved is small, or that the defendant will be subjected to great and unnecessary inconvenience, all of which would be avoided without special hardship to the plaintiff if suit is brought against the defendant in his own state, the foreign court may properly refuse to take jurisdiction.⁶³

Especially, in suits brought by stockholders, the courts will decline to take jurisdiction where a more complete remedy may be obtained in the state in which the corporation resides.⁶⁴ If in any case, the court's decree could not be enforced, the foreign court will refuse to entertain jurisdiction.⁶⁵

4. Statutes May Limit Remedies.—The statutes may restrict suits brought in a foreign jurisdiction, as, for example, providing that the cause of action must arise within the state, or that the contract sued on must have been one to be performed there.⁶⁶

Sav. Bank, 97 Fed. 297, 38 C. C. A. 193, 56 L. R. A. 228; *Rhodes v. United States Nat. Bank*, 66 Fed. 512, 13 C. C. A. 612; *Dexter v. Edmands*, 89 Fed. 467; *Cuykendall v. Miles*, 10 Fed. 342. Conn.—*Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621. Del.—*Love v. Pusey & Jones Co.*, 3 Penne. 577, 52 Atl. 542. Fla.—*Flash v. Conn.*, 16 Fla. 428, 26 Am. Rep. 721. Ill.—*Bell v. Farwell*, 176 Ill. 489, 52 N. E. 346, 68 Am. St. Rep. 194, 42 L. R. A. 804. Ia.—*Latimer v. Citizens' State Bank*, 102 Iowa 162, 71 N. W. 225. Ky.—*Williams' Exr. v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29. Me.—*Childs v. Cleaves*, 95 Me. 498, 50 Atl. 714. Mich.—*Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105. Minn.—*Straw & Ellsworth Mfg. Co. v. L. D. Kilbourne, etc. Co.*, 80 Minn. 125, 83 N. W. 36. Mo.—*Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Bagley v. Tyler*, 43 Mo. App. 195. N. Y.—*Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; *Marshall v. Sherman*, 84 Hun 186, 32 N. Y. Supp. 193; *Savings Assn. of St. Louis v. O'Brien*, 51 Hun 45, 3 N. Y. Supp. 764. Ohio.—*Kulp v. Fleming*, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611. Ore.—*Alldrich v. Anchor Coal, etc. Co.*, 24 Ore. 32, 32 Pac. 756, 41 Am. St. Rep. 831. 62. *Moore v. Silver Val. Min. Co.*, 104 N. C. 534, 10 S. E. 679.

63. *National Tel. Mfg. Co. v. DuBois*, 165 Mass. 117, 42 N. E. 510, 52 Am. St. Rep. 503; *Bank of North America v. Rindge*, 154 Mass. 203, 27 N. E. 1015, 26 Am. St. Rep. 240; *Post v. Toledo, etc. R. Co.*, 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86.

64. N. J.—*Polhemus v. Holland T. Co.*, 59 N. J. Eq. 93, 45 Atl. 534. N. Y.—*Hallenborg v. Greene*, 66 App. Div. 590, 73 N. Y. Supp. 403. Pa.—*Mad-den v. Penn, etc. Co.*, 199 Pa. 454, 49 Atl. 296.

65. Mass.—*Williston v. Michigan, etc. R.*, 13 Allen 400. N. J.—*Gregory v. N. Y., etc. R. R.*, 40 N. J. Eq. 38. Vt.—*Bellows Falls Bank v. Rutland, etc. R.*, 28 Vt. 470.

66. Thus the statutes of New York permit a resident of that state to sue a foreign corporation for any cause of action, but a non-resident may bring a suit against a foreign corporation only when the cause of action arose within the state. See N. Y. Code of Civ. Proc., §§1779, 1780. See also, *Jacobs v. Mexican Sugar Refining Co.*, 104 App. Div. 242, 93 N. Y. Supp. 776. See further, as to other states, the following cases: Mich.—*Grand Trunk R. Co. v. Hosmer*, 106 Mich. 248, 64 N. W. 17. N. C.—*Bryan v. Western U. T. Co.*, 133 N. C. 603, 45 S. E. 938; *Howard v. Mutual Reserve, etc. Assn.*, 125 N. C. 49, 34 S. E. 199,

5. Citizenship and Jurisdiction.—As already said, a corporation is not a "citizen" as that word is understood in the federal constitution,⁶⁷ yet in questions of jurisdiction the term has, at times, an important application to corporations.⁶⁸ For example, it is held that although a corporation may do business in other states by permission of their laws, nevertheless its citizenship can be only in the state in which it was chartered.⁶⁹ By doing business away from their legal residence, corporations do not change their citizenship, but simply extend the field of their operations,⁷⁰ consequently, for the purpose of determining the question of jurisdiction of the federal courts on the ground of diverse citizenship, a corporation is conclusively presumed to be a citizen of the state in which it was created;⁷¹ and a suit by or

45 L. R. A. 853. *Vt.*—*Osborne v. Shawmut Ins. Co.*, 51 *Vt.* 278; *Sawyer v. North Am. Life Ins. Co.*, 46 *Vt.* 697.

67. *Supra*, pp. 548, 549.

68. **Judiciary Acts.**—The word "citizen" when used in the Judiciary Acts has always been construed to include corporations. *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964. Thus, a corporation organized under the laws of a state is a citizen of the United States within the meaning of that term as used in the act of March 3, 1831, ch. 538, concerning claims arising from Indian depredations. *United States v. Northwestern Exp. Co.*, 164 U. S. 836, 17 Sup. Ct. 206, 41 L. ed. 599. As to "diversity of citizenship," see *infra*.

69. *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. ed. 768; *Peale v. Marian Coal Co.*, 172 Fed. 639; *Imperial Colliery Co. v. Chesapeake & O. R. Co.*, 171 Fed. 589.

Under the Act of March 3, 1887, c. 373, §1, as corrected by the act of Aug. 13, 1888, c. 866, "a corporation incorporated in one state only cannot be compelled to answer, in a circuit court of the United States held in another state, in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different state." *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. 935; *United States v. S. P. Shotton Co.*, 110 Fed. 1.

70. *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. ed. 768; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 537, 3 Sup. Ct. 363, 27 L. ed. 1020; *St. Clair v. Cox*, 106 U. S. 350, 356, 1 Sup. Ct. 354, 27 L. ed. 222; *Baltimore R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Paul v. Vir-*

ginia, 8 Wall. (U. S.) 168, 19 L. ed. 357.

71. *In re Keasbey, etc. Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. ed. 402; *Martin v. Baltimore, etc. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311; *Galveston, etc. R. Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. ed. 248; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. ed. 768; *Goodlett v. Louisville & N. R. Co.*, 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. ed. 230; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65, 20 L. ed. 354; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Ohio, etc. R. Co. v. Wheeler*, 1 Black. (U. S.) 236, 17 L. ed. 130; *Freeman v. American Surety Co.*, 116 Fed. 548; *Platt v. Massachusetts Real-Estate Co.*, 103 Fed. 705; *United States v. Southern Pac. R. Co.*, 49 Fed. 297, 302.

Incorporated Also in Another State. Although a corporation is afterwards also incorporated in another state, yet for the purposes of federal jurisdiction it remains a citizen of the state in which it was created. *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. ed. 1081. *Compare*, *Memphis, etc. R. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. ed. 518; also *Nashua, etc. R. Corp. v. Boston, etc. R. Corp.*, 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. ed. 363. And see *Goodwin v. Boston & M. R. R.*, 127 Fed. 986.

Municipal Corporation.—A municipal corporation, for the purposes of federal jurisdiction, is a citizen of the state which created it. *Cowles v. Mercer County*, 7 Wall. (U. S.) 121, 19 L. ed. 86; *Ysleta v. Canda*, 67 Fed. 6.

against a corporation in its corporate name, must be conclusively presumed to be a suit by or against citizens of the state which created the corporate body.⁷²

C. SUITS UNDER LAWS OF UNITED STATES.—Independently of diversity of citizenship, civil suits arising under the laws of the United States, the amount involved being in excess of two thousand dollars, are, of course, within the jurisdiction of the federal courts either originally or by removal from the state court.⁷³

D. CORPORATIONS CHARTERED IN TWO OR MORE STATES.—When a corporation has been chartered by two or more states, and suit is brought against it in either of such states, it is regarded as a citizen of the state in which the action is brought, and it cannot, while in such state, be regarded as the citizen of any other state and claim removal on ground of such other citizenship.⁷⁴

Such a corporation may, however, be sued in either state, and process may be served upon it in either jurisdiction.⁷⁵

A license issued, however, to a foreign corporation to do business

72. *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. (U. S.) 270, 20 L. ed. 571; *Ohio & M. R. Co. v. Wheeler*, 1 Black. 286, 17 L. ed. 130; *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 232, 15 L. ed. 896; *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314, 14 L. ed. 953; *Louisville C. & C. R. Co. v. Letson*, 2 How. (U. S.) 497, 11 L. ed. 353; *Baltimore & O. R. Co. v. Gallahue's Admr.*, 12 Gratt. (Va.) 655, 65 Am. Dec. 254.

Presumption One of Law.—The presumption that a corporation is composed of citizens of the state which created it, is one of law, and is not to be defeated by allegations or evidence to the contrary. This presumption also accompanies a corporation when it does business in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state in which it was originally created. *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. ed. 802.

73. *Larabee v. Dolley*, 175 Fed. 365; *National Bank of Commerce v. Wade*, 84 Fed. 10 (action against director for violating federal banking law).

Corporations Created by Act of Congress.—See *infra*, IV, E.

74. U. S.—*Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Minot v. Philadelphia*, etc. R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888; *Lake Shore & M. S. R. Co. v. Eder*, 174 Fed. 944, 98 C. C. A.

556; *Winn v. Wabash R. Co.*, 118 Fed. 55. Pa.—*County of Allegheny v. Cleveland*, etc. R. R. Co., 51 Pa. 228. Va.—*Baltimore & O. R. Co. v. Gallahue's Admr.*, 12 Gratt. 655.

Consolidation of Corporations.—Where corporations, organized under the laws of different states, are consolidated under the laws of each of such states the consolidated company is a citizen of each of the states. U. S.—*Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Baldwin v. Chicago & N. W. R. Co.*, 86 Fed. 167. Ill.—*Quincy Bridge Co. v. Adams Co.*, 88 Ill. 615. N. Y.—*Sage v. Lake Shore*, etc. R. Co., 70 N. Y. 220. In any one of the states, the consolidated company will be considered as a citizen of such state, and a citizen of such state cannot maintain an action against the corporation in a federal court in such state, on the ground of diversity of citizenship. *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Baldwin v. Chicago & N. W. R. Co.*, 87 Fed. 167.

75. U. S.—*Baltimore & O. Co. v. Harris*, 12 Wall. 65, 83, 20 L. ed. 354. Ga.—*McTighe v. Macon Const. Co.*, 94 Ga. 306, 21 S. E. 701. N. C.—*Bernhardt v. Brown*, 119 N. C. 506, 26 S. E. 162, 36 L. R. A. 402. Tenn.—*Mississippi & T. R. Co. v. Ayres*, 16 Lea 725. Vt.—*Richardson v. Vermont*, etc. R. R. Co., 44 Vt. 613. Va.—*Baltimore & O. R. Co. v. Wightman's Admr.*, 29 Gratt. 431. And see cases cited in preceding note.

within a state does not make the corporation a citizen therein for federal jurisdictional purposes.⁷⁶

The statutes may, however, expressly provide that upon compliance with the requirements of the state, a foreign corporation shall immediately become a domestic corporation of the state, with power to sue and to be sued in its courts.⁷⁷ While such a provision will enable the state whose legislative grant has been thus accepted to treat the corporation as a domestic one, nevertheless, so far as the federal courts are concerned, the presumption of the corporation's citizenship in the state of its original creation will not be affected by such legislation.⁷⁸

E. CORPORATIONS CREATED BY CONGRESS.—While there is no provision in the federal constitution directly authorizing congress to create corporations, yet it has implied authority to do so whenever necessary and proper for carrying into effect its express powers;⁷⁹ and congress, said Chief Justice Marshall, has the power to extend the jurisdiction of the federal courts to all suits brought by or against any corporation chartered by a law of the United States.⁸⁰

76. **U. S.**—*Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148; *Germania Fire Ins. Co. v. Francis*, 11 Wall. 210, 20 L. ed. 77. **Pa.**—*In re Application of Peter Schoenhofen Brewing Co.*, 8 Pa. Super. 141, 42 W. N. C. 402. **W. Va.**—*Quesenberry v. People's Building, Loan & Savings Assn.*, 44 W. Va. 512, 30 S. E. 73.

77. *Layden v. Endowment Bank K. P.*, 128 N. C. 546, 39 S. E. 47.

78. *St. Louis & S. F. R. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. ed. 802; *St. L. & S. F. R. Co. v. Cross*, 171 Fed. 480; *Atlantic Coast Line R. Co. v. Dunning*, 166 Fed. 850, 93 C. C. A. 128. And see *Tierney v. Helvetia Swiss Fire Ins. Co.*, 163 Fed. 82.

Removal to Federal Court.—It was held, in North Carolina, that where the statutes expressly provide that upon the compliance with the state's requirements a foreign corporation shall become a domestic corporation, such a corporation originally organized under the laws of another state could not remove a cause into the federal court when expressly sued as a domestic corporation. *Debnam v. Southern Bell Tel. Co.*, 126 N. C. 831, 36 S. E. 269. But see *contra*, *Wilson v. Southern R. Co.* (S. C.), 36 S. E. 701; also *Rece v. Newport News & M. V. Co.*, 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572.

The federal supreme court has, however, overruled the decision of the North Carolina decision, holding that

a statute providing that upon compliance with the local regulations a foreign corporation shall become a domestic corporation, does not affect the character of the original corporation, and that it does not thereby become a citizen of North Carolina so far as to affect the jurisdiction of the federal courts upon a question of diverse citizenship. *Southern Railway Co. v. Allison*, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. ed. 1078, reversing *Allison v. Southern R. Co.*, 129 N. C. 336, 40 S. E. 91.

79. *Osborn v. Bank of United States*, 9 Wheat. 738, 860, 6 L. ed. 204, 233; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

80. *Osborn v. Bank of the United States*, 9 Wheat. (U. S.) 738, 6 L. ed. 204, construing the constitutional provision (Art. III), that congress has power to confer jurisdiction upon the federal courts over any suit "arising under the laws of the United States." See, also, *Pacific R. R. Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. (U. S.) 333, 20 L. ed. 840; *Bank of United States v. Planters' Bank*, 9 Wheat. (U. S.) 904, 6 L. ed. 244.

Right Must Be Expressly Given.—In the case of *The Bank of the United States v. Deveaux*, 5 Cranch 61, 3 L. ed. 38, Chief Justice Marshall held, however, that the fact that a corpora-

When such corporations are created by and organized under acts of congress, they are entitled to remove into the federal courts suits brought against them in the state courts, on the ground that such suits are suits "arising under the laws of the United States."⁸¹ Moreover, corporations chartered by congress for governmental purposes are to be regarded not as foreign but as domestic corporations in every state and territory of the Union in which they may lawfully exercise their powers.⁸² Such corporations are liable to be sued in the federal courts in any district wherein they may be found doing business, and having an agent or representative upon whom service of process can be made.⁸³

F. NATIONAL BANKS.—Under the former practice the federal courts had jurisdiction of suits by and against national banks, but by the provisions of the act of 1888, all national banking associations, for the purposes of all actions by or against them, are deemed citizens of the states in which they are respectively located. Consequently, the federal courts no longer have jurisdiction other than such as they would have in cases between individual citizens.⁸⁴

G. CORPORATIONS IN DISTRICT OF COLUMBIA.—A corporation created by congress for no governmental purpose, but merely a private corporation incorporated in the District of Columbia, has no right beyond that of county to operate in any of the states. It is a citizen only of the district in which it was created.⁸⁵ Moreover, an act of congress

tion is chartered by the federal government does not of itself enable such a corporation to sue in the courts of the United States. The right to sue in such courts must be expressly conferred. See, also, the citations in the preceding note.

81. *Butler v. National Home*, 144 U. S. 64, 12 Sup. Ct. 581, 36 L. ed. 346; *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319; *Supreme Lodge, K. of P. v. England*, 94 Fed. 369, 36 C. C. A. 298; *Supreme Lodge, K. of P. v. Hill*, 76 Fed. 468, 22 C. C. A. 280. See, also, *Supreme Lodge K. of P. v. Kalinski*, 163 U. S. 289, 16 Sup. Ct. 1047, 41 L. ed. 163; *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 6 L. ed. 204. And see Act of March 3, 1875, 18 St. at L. p. 470.

Under the federal statute (25 St. at L. 433, ch. 866; 1 Supp. Rev. St. p. 611), it is held that an averment that the plaintiff is a corporation organized under an act of congress, makes it a case "arising under the laws of the United States," and confers jurisdiction upon the federal court. *United States v. Freehold Land, etc. Co. v.*

Gallegos, 89 Fed. 769, 771, 32 C. C. A. 470.

82. *U. S.*—*Van Dresser v. Oregon R. & N. Co.*, 48 Fed. 202. *N. Y.*—*In re Cushing's Estate*, 40 Misc. 505, 82 N. Y. Supp. 795. *Compare Market Nat. Bank v. Pacific Nat. Bank*, 64 How. Pr. 1. *Pa.*—*Com. v. Texas, etc. R. Co.*, 98 Pa. 90. *Utah.*—*Losee v. McCarty*, 5 Utah 528, 17 Pac. 452, so holding in regard to the Union Pacific R. Co.

Railway Corporation.—Thus, a corporation organized under the laws of the United States, and engaged in the operation of a line of railway in two or more states, is held to be a citizen of each state in which its operations are carried on. *Mooney v. U. P. R. Co.*, 60 Iowa 346, 14 N. W. 343.

83. *In re Dunn*, 212 U. S. 374, 29 Sup. Ct. 299, 53 L. ed. 553; *Van Dresser v. Oregon R. & N. Co.*, 48 Fed. 202.

84. *Continental Nat. Bank v. Buford*, 191 U. S. 119, 24 Sup. Ct. 54, 48 L. ed. 119; *State Nat. Bank of Denison v. Eureka Springs Water Co.*, 174 Fed. 827. See Act of Aug. 13, 1888, 25 St. at L. p. 436. See, also title "Banks and Banking," Vol. IV.

85. *Layden v. Endowment Bank*,

creating a purely private corporation, is the act of that body as the local legislature of the District of Columbia, and such a corporation is held a foreign corporation in respect to other jurisdictions.⁸⁶

H. CONCURRENT JURISDICTION.—In cases where both state and federal courts might have original jurisdiction in matters involving the disposal of property, illustrated, for example, in the foreclosure of mortgages, and the appointment of receivers, the test of jurisdiction is not which action was first commenced, but which court first acquired jurisdiction over the property.⁸⁷ However, where a foreclosure suit is pending in a federal court, a state court has jurisdiction of a suit filed to test the legality of the mortgage,⁸⁸ and in a foreclosure proceeding where the property is located both in and outside of the state, the state court having jurisdiction over the corporation may in its decree direct a sale of the entire property in both states.⁸⁹

V. VENUE OF ACTIONS.—**A. SUITS BY CORPORATIONS.**—In suits by corporations the same rules prevail, in general, as in suits by natural persons as to the county in which the action should be brought.⁹⁰

B. SUITS AGAINST CORPORATIONS.—COMMON LAW.—Under the prevailing common law rules, corporations may be sued in the county where the corporate property is located, or where it transacts a substantial part of its business,⁹¹ or in the county in which the cause of action arises,⁹² the venue being regulated by the nature of the action, that is, whether the action be local or transitory.⁹³

K. of P., 128 N. C. 546, 39 S. E. 47.

86. *Ind.*—Daly v. The Nat. Life Ins. Co., 64 Ind. 1. *Miss.*—Williams v. Creswell, 51 Miss. 817. *N. C.*—Layden v. Endowment Rank, K. of P., 128 N. C. 546, 39 S. E. 47. *Tenn.*—Hadley v. Freedman's Sav., etc. Co., 2 Tenn. Ch. 122.

87. *U. S.*—Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. ed. 981; Baltimore, etc. R. Co. v. Wabash R. Co., 119 Fed. 678, 57 C. C. A. 322; Appleton, etc. Co. v. Central Trust, etc. Co., 93 Fed. 286, 34 C. C. A. 302; Holland, etc. Co. v. International, etc. Co., 85 Fed. 865, 29 C. C. A. 460; Wilmer v. Atlanta, etc. Railroad Co., 2 Woods 409, 30 Fed. Cas. No. 17,775; East Tenn., etc. R. Co. v. Atlanta & F. R. Co., 49 Fed. 608. *Ohio.*—State v. Marietta & C. R. Co., 35 Ohio St. 154. *Wis.*—Milwaukee, etc. R. Co. v. Milwaukee, etc. R. Co., 20 Wis. 165, 88 Am. Dec. 735.

Seizure Gives Jurisdiction.—As said by Mr. Justice Bradley, when on circuit, in an opinion rendered in the case of Wilmer v. Railroad Co., 2 Woods 409, 30 Fed. Cas. No. 17,775: "Service

of process gives jurisdiction over the person, seizure gives jurisdiction over the property; and until it is seized, no matter when the suit was commenced, the court does not have jurisdiction."

88. *Gay v. Brierfield, etc. Co.*, 94 Ala. 303, 11 So. 353, 33 Am. St. Rep. 132, 16 L. R. A. 564.

89. *McTighe v. Macon Const. Co.*, 94 Ga. 306, 21 S. E. 701.

90. *Holbrook v. The Peoria Bridge Co.*, 3 Ill. 32. And see *Taunton and South Boston Turnp. Corp. v. Whiting*, 9 Mass. 321. Process in favor of a corporation can be sent out of the county where the suit is commenced, only when it might be so sent in suits in favor of natural persons. *Holbrook v. The Peoria Bridge Co.*, 3 Ill. 32.

91. *Ga.*—Merritt v. Cotton States Life Ins. Co., 55 Ga. 103. *Ia.*—Richardson v. Burlington & M. R. R. Co., 8 Iowa 260. *Pa.*—Park Bros. & Co. v. Oil City Boiler Works, 204 Pa. 453, 54 Atl. 334.

92. *Vermont & M. R. Co. v. Orcutt*, 16 Gray (Mass.) 116.

93. In the case of *Vermont and Mass. R. Co.*, *supra*, it was held that

Theories as to Residence.—Some of the earlier cases, applying the doctrine of residence of the defendant to the question of the venue of suits against corporations, held that the residence of a corporation was anywhere in the state where its franchises were exercised.⁹⁴ Under this theory, a corporation might be sued, it was held, anywhere in the state of its creation.⁹⁵ On the other hand, some courts held that a

a local action against a corporation must be brought at common law, in the county in which the cause of action arose. The action being brought by the corporation for injuries to a culvert and part of its railroad track, it was held that the venue was in the county in which the realty was situated.

Condemnation Proceedings.—Proceedings by a railway corporation to condemn lands for its uses must be brought in the county where the land is located. *California S. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 394, 4 Pac. 344.

94. *Ga.*—*Empire State Ins. Co. v. Collins*, 54 Ga. 376. *Ia.*—*Richardson v. Burlington & M. R. R. Co.*, 8 Iowa 260. *Md.*—*Baltimore & Yorktown Turnp. Road v. Crowther*, 63 Md. 558, 1 Atl. 279. *Mass.*—*Taunton & South Boston Turnp. Co. v. Whiting*, 9 Mass. 321.

Resides Where Franchises Are Exercised.—In *Bristol v. The Chicago & Aurora R. Co.*, 15 Ill. 436, it is said: "The residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised." See, also, *Chicago, D. & V. R. Co. v. Bank of North America*, 82 Ill. 493, 496, where it is said that while the citizenship of a corporation would depend upon the place of the law of its creation, its residence might be in any state where it was, by comity, permitted to exercise its franchise.

Residence and Citizenship the Same. The Supreme Court of the United States, contrary to the view expressed in *Chicago, D. V. R. Co. v. Bank of North America*, *supra*, has said: "The statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, al-

though it may do business in other states whose laws permit it." Mr. Justice Gray, in *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. ed. 768, and cases there cited.

Residence of Railway Corporation. In the case of *Baltimore & Yorktown Turnp. Rd. v. Crowther*, 63 Md. 558, 1 Atl. 279, the court says: "In the absence of any express statutory regulation on the subject, we must fall back upon the general rule of law relating to the legal residence of a corporation. This is very clearly stated in *Boone, Corp.* §33, where it is said: 'The place of residence of a corporation is the place where its principal office is located, or where its principal operations are carried on. In legal contemplation, a railroad corporation resides in the counties through which its road passes, or in county or town upon the line of its road where its principal office and the center of its business operations are situated.'" As to statutes regulating the venue of actions against railroad companies, see *infra*, V, E.

Charter May Fix Residence.—In the case of *The Central Bank of Georgia v. Gibson*, 11 Ga. 453, Judge Nesbit remarked: "However plausible the idea may be, that a corporation, an intangible entity, deriving its existence and all its functions from the legislature, and possessing no natural personality, is ubiquitous within the limits of the state, in the absence of any designation of its locality by law, yet in this case it has no application, because the charter of the Central Bank fixes its locality."

95. *S. C.*—*Cromwell v. Charleston Ins. & Trust Co.*, 2 Rich. L. 512; *Glaize v. South Carolina R. Co.*, 1 Strob. 70. *Va.*—*Baltimore & O. R. Co. v. Gallahue's Admr.*, 12 Gratt. 655, 65 Am. Dec. 254. *W. Va.*—*Humphreys v. Newport News, etc., Co.*, 33 W. Va. 135, 10 S. E. 39.

Special Constructive Residence.—In the case of *the City of St. Louis v.*

corporation, as such, could have no residence, and that the residence of the members was, for the purposes of the jurisdiction and venue of suits, the residence of the corporation.⁹⁶

It is also held that a statute providing that an action shall be brought in the county in which the defendant resides, includes corporations,⁹⁷ and in connection with such statutes the "residence" of a corporation is generally held to be its principal place of business.⁹⁸

The residence, however, of the corporators or the stockholders is not the test of the residence of the corporation,⁹⁹ and the personal residence of the agent of the corporation is immaterial.¹

Wiggins Ferry Co., 40 Mo. 580, the supreme court of Missouri declared that there can be no doubt that, within the limits of the state which grants the charter, a corporation may have a special constructive residence, in more places than one, so as to be subjected to the local jurisdiction; that the legal residence of a corporation is not necessarily confined to the locality of its principal office or place of business; and that its place of residence may be wherever its corporate business is done. See also, *Slavens v. South Pac. R.*, 51 Mo. 308.

⁹⁶ *Bank of U. S. v. Deveaux*, 5 Cranch (U. S.) 61, 3 L. ed. 38; *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 202, 33 Am. Dec. 395. And see *California Southern R. Co. v. Southern Pac. R. Co.*, 65 Cal. 394, 4 Pac. 344, where it is held that there is no common law in that state which defines the place of residence of a corporation, and that, as a matter of law, the principal place of its business cannot be held, in absence of statute, to be the residence of a corporation.

⁹⁷ *Holgate v. Oregon Pac. R. Co.*, 16 Ore. 123, 17 Pac. 859. See, however, *Cline v. Bryson City Mfg. Co.*, 116 N. C. 837, 21 S. E. 791.

Constitutional Provision.—Likewise a clause in a state constitution requiring all civil cases to be tried in the county wherein the defendant resides. The *Central Bank of Georgia v. Gibson*, 11 Ga. 453.

⁹⁸ *U. S.*—*Louisville, N. A. & C. R. v. Louisville T. Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. ed. 1081. *Ark.*—*Clarke v. Bank of Mississippi*, 10 Ark. 516, 52 Am. Dec. 248. *Cal.*—*Cohn v. Central Pac. R. Co.*, 71 Cal. 488, 12 Pac. 498; *Bloom v. Michigan Salmon Min. Co.*, 11 Cal. App. 122, 104 Pac. 324. *Colo.*—*Woods Gold Mining Co. v. Roy-*

ston, 46 Colo. 191, 103 Pac. 291. *Fla.*—*Edwards v. Union Bank of Florida*, 1 Fla. 158. *Ga.*—*Central Bank of Georgia v. Gibson*, 11 Ga. 453. *N. J.*—*Thorn v. Central R. Co.*, 26 N. J. L. 121. *N. Y.*—*Rossie Iron Works v. Westbrook*, 59 Hun 345, 13 N. Y. Supp. 141; *Finch School v. Finch*, 129 N. Y. Supp. 1. *Ore.*—*Holgate v. Oregon Pac. R. Co.*, 16 Ore. 123, 17 Pac. 859. *S. D.*—*Mullen v. Northern Accident Ins. Co.*, 128 N. W. 483. *Utah.*—*Crookston v. Centennial Eureka Min. Co.*, 13 Utah 117, 44 Pac. 714. See, also *Rackley v. Rowland Lumb. Co.*, 153 N. C. 171, 69 S. E. 56.

Likewise, in absence of statute, "the prevailing rule," as said in the case of *Home Protection of North Alabama v. Richards & Sons*, 74 Ala. 466, "would seem to be that the residence of a corporation, for the purpose of laying the venue, would be the county of its principal office or place of transacting business, depending not upon the habitation of the members or stockholders, but on what has been aptly termed, 'the official exhibition of legal and local existence.'" See *Ang. & Ames Corp.*, §107; *Field on Corp.*, §517; 2 *Redf. Railw.* (5th ed.) 420, note 14; *Thorn v. Central R. Co.*, 26 N. J. L. 121.

Must Maintain Some Office at Home. Although a domestic corporation may be authorized to maintain an office at some point beyond the state, a corporation must still maintain a principal office in some county in the state which fixes its residence in such county for the purpose of suing and being sued. *Robertson v. Greenleaf Johnson Lumb. Co.*, 153 N. C. 120, 68 S. E. 1064.

⁹⁹ *Connecticut & P. Rivers R. Co. v. Cooper*, 30 Vt. 476, 73 Am. Dec. 319.

¹ *Security Mut. Life Ins. Co. v. Ress*, 76 Neb. 141, 106 N. W. 1037.

C. CONSTITUTIONAL AND STATUTORY PROVISIONS.—At the present time, the venue of actions against corporations is fixed, generally, either by constitutional or statutory provisions.²

The statute cannot, of course, diminish the constitutional right conferred,³ but in absence of constitutional limitations, the legislature may change the venue of action, although the charter of the corporation may provide where it may be sued, since such a provision is not a vested right.⁴

Such Provisions Exclusive.—Practically all jurisdictions, however, have statutory provisions regulating the venue of suits against corporations,⁵ and under such statutes corporations may be sued only in the places provided by law.⁶ Consequently where the statute provides

2. Consult the laws of the various states.

Constitutional Provisions.—The constitution of California, for example, provides that corporations may be sued in the county where the obligation or liability arises or the breach occurs, or in the county of the principal place of business. Const., Art. 12, §16. And see *Tingley v. Times-Mirror Co.*, 144 Cal. 205, 77 Pac. 918; *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926; *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856; *Chase v. South. Pac. Coast R. Co.*, 83 Cal. 468, 23 Pac. 532.

"Defendant" Includes Corporations. A clause in a state constitution requiring all civil cases to be tried in the county wherein the defendant resides, applies to corporations as well as to natural persons. The *Central Bank of Georgia v. Gibson*, 11 Ga. 453, 456. See, also, *Davis v. Central R. R. Co.*, 17 Ga. 323, 326, explaining the decision in the *Central Bank v. Gibson*.

3. See *Story v. New York El. R. Co.*, 3 Abb. N. C. (N. Y.) 478.

"Sue and Be Sued as Natural Persons."—A constitutional provision that "All corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons," has no reference, however, to the venue in civil actions, which belongs only to the remedy or form of procedure; and it does not inhibit the passage of a general law authorizing a corporation to be sued in any county in which it transacts business through its agents, though an individual citizen can be sued only in the county of his residence. *Nelms v. Edinburg American Land Mortg. Co.*,

92 Ala. 159, 161, 9 So. 141; *Home Protection of North Alabama v. Richards & Sons*, 74 Ala. 466; *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487.

4. *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238. And see *Howard v. Kentucky & L. Mut. Ins. Co.*, 13 B. Mon. (Ky.) 282.

Statute May Specially Provide.—The statute may make, however, a special provision to cover corporations whose charters designate the venue of actions against them. Thus, for example, the Kansas statute provides, after specifying where actions against domestic corporations may be brought, that "the provisions of this article shall not apply in the case of any corporation created by a law of this state or the territory of Kansas whose charter prescribes the place where alone a suit against such corporations may be brought." Gen. Sts., 1909, §5644.

5. Consult the various statutes.

May Be the Same as in Case of Natural Persons.—The local statute of a given state may, in so far as it regulates the place of trial in civil cases, make no distinction between defendants who are natural persons and those who are corporations. *Ivanusch v. Great Northern R. Co.* (S. D.), 128 N. W. 333.

6. Thus, as is said by the supreme court of Nebraska: "A domestic corporation may be sued only in the places provided by law, and the temporary presence of one or more of the officers of such corporation in another county does not authorize the corporation to be sued there. When the legislature provides the county in which a domestic corporation may be

in what counties a corporation may be sued, a judgment by default against a corporation in a county not covered by the statute is null and void.⁷

Illustrative Statutes.—There is considerable similarity in the statutes, yet many of them differ in various details, making it necessary to consult the particular requirements of the different jurisdictions. The prevailing rule governing the locality of suits against corporations is that a corporation must be sued in the county where it has its principal office or place of business,⁸ or in *any* county in which it maintains a place of business.⁹

Among other and different jurisdictions are also found, for example, such statutory provisions or court rulings as, "any county in which the corporation does business by agent;"¹⁰ "the county in

sued, such provision is exclusive." *Western Travelers' Acc. Assn. v. Taylor*, 62 Neb. 783, 87 N. W. 950. See also, *Security Mut. Life Ins. Co. v. Ress*, 76 Neb. 141, 106 N. W. 1037.

7. *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 760.

8. **Ark.**—*Spratley v. Louisville & A. R. Co.*, 77 Ark. 412, 95 S. W. 776; *Clarke v. Bank of Mississippi*, 10 Ark. 516, 52 Am. Dec. 238. **Cal.**—See *Tingley v. Times-Mirror Co.*, 144 Cal. 205, 77 Pac. 918; *Bloom v. Michigan Salmon Mining Co.*, 11 Cal. App. 122, 104 Pac. 324; *Krogh v. Pacific Gateway & Development Co.*, 11 Cal. App. 237, 104 Pac. 698. **Ga.**—*Aetna Ins. Co. v. Brigham*, 120 Ga. 925, 48 S. E. 348; *Dade Coal Co. v. Haslett*, 83 Ga. 549, 10 S. E. 435; *Wallace v. Southern Express Co.*, 7 Ga. App. 565, 67 S. E. 694. **Idaho.**—*Easley v. New Zealand Ins. Co.*, 4 Idaho 205, 38 Pac. 405. **Ia.** *Benesh v. Mill Owners Mut. F. Ins. Co.*, 103 Iowa 465, 72 N. W. 674. **Ore.** *Cunningham v. Klamath L. R. Co.*, 54 Ore. 13, 101 Pac. 213; *Holgate v. Oregon Pac. R. Co.*, 16 Ore. 123, 17 Pac. 859. **Utah.**—*Crookston v. Centennial Eureka Min. Co.*, 13 Utah 117, 44 Pac. 714. **W. Va.**—*Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580. **Wyo.** *Harrison v. Carbon Timber Co.*, 14 Wyo. 246, 83 Pac. 215.

Camp-Meeting Association.—The "place of business" of a camp-meeting association is where its religious meetings are held, not where its trustees may meet. *Perry v. Round Lake Camp-Meeting Assn.*, 22 Hun (N. Y.) 293.

Agent's Office as Place of Business. An agent's place of business is not

always the place of business of his principal, but if an agent carries on the business of his principal at his own place of business, and at no other place, then the place of business of the agent becomes the place of business of the principal. Consequently, where an insurance agent represents several companies in a given city, and transacts their business in an office maintained at his own expense, this office is the "place of doing business" of such companies as have no other place of business in such city. *Aetna Ins. Co. of Hartford v. Brigham*, 120 Ga. 925, 48 S. E. 348.

"Domicil" of the Corporation. Damages arising from nonfeasance or negligence must be sued for at the domicil of the company. *Devons v. Lee Logging Co.*, 121 La. 518, 46 So. 612.

9. **Ala.**—*International Cotton-Seed Oil Co. v. Wheelock*, 124 Ala. 367, 27 So. 517; *Montgomery Iron Works v. Eufaula Oil, etc. Co.*, 110 Ala. 395, 20 So. 300; *Home Protection of North Alabama v. Richards & Sons*, 74 Ala. 466. **Ind.**—*Indiana Ins. Co. v. Capehart*, 108 Ind. 270, 8 N. E. 285; *New Albany, etc. R. Co. v. Haskell*, 11 Ind. 301. **Ky.**—*Louisville & N. R. Co. v. Proctor*, 21 Ky. L. Rep. 447, 51 S. W. 591. **Mass.**—*Vermont & M. R. Co. v. Orcutt*, 16 Gray 116. **Wash.**—*MacMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 760.

Railway Corporations.—A special statutory provision of this character is often found with reference to railway corporations. See *post*.

10. **Ala.**—*Alabama Gt. Southern R. Co. v. Ambrose*, 163 Ala. 220, 50 So.

which it is situated;¹¹ the county where the obligation or liability arises or the breach occurs;¹² the county where the cause of action accrues;¹³ the county where the contract is made;¹⁴ the county where the contract was to be performed;¹⁵ the county where the office or

1030; International Cotton-Seed Oil Co. v. Wheelock, 124 Ala. 367, 27 So. 517. **Ind.**—Edwards v. Van Cleave (Ind. App.), 94 N. E. 596. **Mo.**—Slavens v. Southern Pac. R. Co., 51 Mo. 308.

Actions for Personal Injuries.—A statute may provide that all actions for personal injuries must be brought in the county where the injury occurred or in the county where the plaintiff resides, provided that such corporation does business by agent in the county of plaintiff's residence. Alabama Great Southern R. Co. v. Ambrose, 163 Ala. 220, 50 So. 1030.

Under the above provision, "it is not required . . . that the injury should have wholly occurred within the county in which suit is brought—partly therein is sufficient; nor is it necessary that plaintiff should have resided in the county at the time of the injury—at the time of bringing the suit is sufficient." Southern R. Co. v. Harrington, 166 Ala. 630, 52 So. 57.

11. Spratley v. Louisiana & A. R. Co., 77 Ark. 412, 95 S. W. 776.

12. Cal.—Tingley v. Times-Mirror Co., 144 Cal. 205, 77 Pac. 918. La. Labarre v. Burton-Swartz Cypress Co., 126 La. 982, 53 So. 113. **Mo.**—Barnett v. Colonial Hotel Bldg. Co., 137 Mo. App. 636, 119 S. W. 471. **Tex.** Galveston Shoe & Hat Co. v. Rowe, 49 Tex. Civ. App. 336, 109 S. W. 1101.

13. La.—Houston v. Vicksburg, S. & P. R. Co., 39 La. Ann. 796, 2 So. 562. **Mo.**—Julian v. Kansas City Star Co., 209 Mo. 35, 107 S. W. 496; Rippstein v. St. Louis Mnt. Life Ins. Co., 57 Mo. 86; Barnett v. Colonial Hotel Bldg. Co., 137 Mo. App. 636, 119 S. W. 471. **Neb.** Omaha, etc. R. Co. v. Brown, 29 Neb. 492, 46 N. W. 39. **Ore.**—Cunningham v. Klamath L. R. Co., 54 Ore. 13, 101 Pac. 213, 1099. **Tex.**—Merchants, etc. Oil Co. v. Seeligson (Tex. Civ. App.), 15 S. W. 712.

Where Part of Action Arose.—May be brought in the county where the cause of action or a part thereof arose. Floresville Oil & Mfg. Co. v. Texas Refining Co., 55 Tex. Civ. App. 78, 118 S. W. 194.

Venue in Libel Suit.—Where a stat-

ute provides that a corporation shall be sued in the county where the cause of action arose or in any county where the corporation shall have an agent transacting business, a person libeled by a corporation may commence his action in any county where said publication is made or in which the newspaper containing the libelous article is circulated. Cook v. Globe Printing Co. of St. Louis, 227 Mo. 471, 127 S. W. 332.

14. Ivey v. Kern County Land Co., 115 Cal. 196, 46 Pac. 926; Lewis v. South Pacific Coast R. Co., 66 Cal. 209, 5 Pac. 79.

15. Denver & N. O. Const. Co. v. Stout, 8 Colo. 61, 5 Pac. 627; City of Covington v. Limerick, 19 Ky. L. Rep. 330, 40 S. W. 254.

Service of Process May Be in Another County.—Under a statute providing that action may be brought in the county where the contract is to be performed, and where another statute provides that process may be served in any county upon the principal officer of the corporation, an action may be brought in the county where the contract was to be performed, although process was served in another county on the president of the corporation. Glasscock v. Louisville Tobacco Warehouse Co., 31 Ky. L. Rep. 702, 103 S. W. 319.

California.—The California constitution provides that a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases. Cook v. W. S. Ray Mfg. Co. (Cal.), 115 Pac. 313. The above constitutional provision is permissive in its effect; it is intended to give to a plaintiff the right to choose which of the counties he desires to prosecute his action in. Bond v. Karma-Ajax Consol. Mining Co. (Cal. App.), 115 Pac. 254.

agency is located;¹⁶ the county where the certificate of incorporation is recorded;¹⁷ any county where the corporation maintains an agency;¹⁸ and the county where the corporate officers are elected and the financial operations are conducted.¹⁹

D. DIFFERENT CLASSES OF CORPORATIONS.—The venue may, by legislative provision, be different for different classes of corporations. Thus, it is a provision of the statutes of many states that certain actions may be brought against railway corporations, or other common carriers, in any county of the state through which the road or line passes or in which the business is carried on;²⁰ and, in the federal courts, a railroad is an inhabitant of any district in which it operates its road.²¹ Also in the case of actions against insurance companies, there may be special statutory provisions,²² and actions against foreign corporations

16. *Indiana Insurance Co. v. Capehart*, 108 Ind. 270, 8 N. E. 285; *Louisville & N. R. Co. v. Proctor*, 21 Ky. L. Rep. 447, 51 S. W. 591.

17. *Henderson v. Maryland Home Fire Ins. Co.*, 90 Md. 47, 44 Atl. 1020.

18. *Dennis v. Atlantic Coast Line R. Co.*, 86 S. C. 258, 68 S. E. 465; *Mangum v. Lane City Rice Milling Co.* (Tex. Civ. App.), 95 S. W. 605; *Red River S. & W. R. Co. v. Blount*, 3 Tex. Civ. App. 282, 22 S. W. 930. And see *Home Protection of North Alabama v. Richards & Sons*, 74 Ala. 406.

19. *Dade Coal Co. v. Haslett*, 83 Ga. 549, 10 S. E. 435, holding that while a mining company, not located by the legislature in any particular county of the state, may carry on its mining operations in any county, yet it may choose to establish its principal place of business in some particular county. Having selected a certain place "for the purpose of electing its officers and for the purpose of conducting its financial operations," such place will be considered its principal place of business, and the corporation may be sued there.

20. **U. S.**—*East Tennessee etc. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. 608. **Fla.**—*South Florida R. Co. v. Weese*, 32 Fla. 212, 13 So. 436. **Ga.**—*Georgia R. Co. v. Oaks*, 52 Ga. 410; *Davis v. Central R. R. & B. Co.*, 17 Ga. 326. **Ill.**—*St. Louis etc. R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *Bristol v. Chicago & Aurora R. Co.*, 15 Ill. 436. **Ia.**—*Mooney v. Union Pac. R. Co.*, 60 Iowa 346, 14 N. W. 343; *Richardson v. Burlington, etc. R. Co.*, 8 Iowa 260. **Kan.**—*George R. Barse, etc. Co. v. Turner*, 56 Kan. 778, 44 Pac. 987. **Neb.**—*Omaha,*

etc. R. Co. v. Brown, 29 Neb. 492, 46 N. W. 39. **Wis.**—*Schoch v. Winona & St. P. R. Co.*, 55 Minn. 479, 57 N. W. 208.

Other Provisions.—The statutes may, of course, contain other provisions relative to the venue of actions against railroads. Thus, in North Carolina, a railroad corporation may be sued in the county where the cause of action arises or in the county in which the plaintiff resides. *Roberson v. Greenleaf Johnson Lumb. Co.*, 153 N. C. 120, 68 S. E. 1064.

21. *East Tennessee V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. 608; *United States v. Southern Pac. Co.*, 49 Fed. 297; *Locomotive Engine, etc. Co. v. Erie R. Co.*, 10 Blatchf. 292. And see *U. S. Rev. Sts.*, §739.

22. The various statutes should be consulted.

Massachusetts.—A non-resident may sue a domestic insurance company in any county of the state. *Boynnton v. Middlesex Mut. Ins. Co.*, 4 Metc. 212; *Allen v. Pacific Ins. Co.*, 21 Pick. 257.

In County of Principal Place of Business.—See *Ga. Civ. Code*, 1895, §2145; *Iowa Code*, §3499. But see *Equity Life Assn. v. Gammon*, 119 Ga. 271, 46 S. E. 100, holding that where the company had no place of business in the state, it might be sued in any county where found. And see *Teller v. Equitable Mut. Life Assn.*, 108 Iowa 17, 78 N. W. 674.

In Any County.—*Stone v. Travelers' Ins. Co.*, 78 Mo. 655, in case of a foreign insurance company.

County in Which Cause of Action Arose.—*Insurance Co. of North America v. McLimans*, 28 Neb. 653, 44 N.

are often distinguished as to venue from actions against domestic corporations.²³

E. VENUE DEPENDENT UPON NATURE OF ACTION.—1. Local Actions.—The nature of the action is also often an important question in determining its venue. Even as the common law recognizes the inherent difference between actions essentially local and actions that are transitory, so the statutes cannot logically depart from the same criterion. It is, therefore, the general rule that actions involving the title to lands must be brought in the county in which the land is situated.²⁴

W. 991. See also, Kan. Rev. St., 1909, §5646; Wis. Rev. St., §2619, subd. 5. See also, *Rippstein v. St. Louis Mut. L. Ins. Co.*, 57 Mo. 86, holding that cause of action on life policy accrues at place of death. To same effect, see *Bruil v. Northwestern Mut. Relief Assn.*, 72 Wis. 430, 39 N. W. 529. But see *Carson v. Phoenix Ins. Co. of Hartford*, 41 W. Va. 136, 23 S. E. 552, holding that action arises in county of residence of beneficiary.

In Any County Where an Agency Is Kept.—*Owen v. Howard Ins. Co.*, 87 Ky. 571, 10 S. W. 119; *Gaines v. Bankers' Alliance*, 113 Ga. 1138, 39 S. E. 502; *Atlanta Home Ins. Co. v. Tullis*, 99 Ga. 225, 25 S. E. 401.

23. See the various statutes.

Kansas.—Thus, in Kansas, actions, other than local actions, against a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, the defendant, or where said defendant may be found. Rev. Sts., 1909, §5646. In the case of domestic corporations, actions, other than local, may be brought in the county in which it is situated, or has its principal office or place of business, or in which any of its principal officers may reside, or may be summoned. Rev. Sts., 1909, §5644. And see *infra*, XX.

24. Local actions are such as require the venue to be laid in the county in which the cause of action arose. These embrace all actions in which the subject or thing sought to be recovered is in its nature local; such as real actions of waste, when brought to recover the place wasted, as well as the damages; and actions of ejectment. They are local because brought to recover the seizing or possession of lands, which are local subjects. *Ackerson v. Erie R. Co.*, 31 N.

J. L. 309; *McLeon v. Conn. & Pass. R. Co.*, 58 Vt. 727, 6 Atl. 648.

Trespass Upon Lands.—Thus, in the case of *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913, the defendant was sued in the federal circuit court for the southern district of Ohio, for an alleged trespass to lands situate in the state of West Virginia. The court, speaking by Mr. Justice Gray, said: "By the law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the state in which the land lies." See also U. S.—*Northern Indiana Railroad v. Michigan Central Railroad*, 15 How. 233, 242, 251, 14 L. ed. 674. **Ind.**—*Du Breuil v. Pennsylvania R. Co.*, 130 Ind. 137, 29 N. E. 909. **Mass.** *Allin v. Conn. River Co.*, 150 Mass. 560, 23 N. E. 581. **Eng.**—*British South Africa Co. v. Companhia de Mocambique*, L. R. 1893, App. Cas. 602.

Proceedings to Condemn Land.—Should be brought in county where land lies. *California Southern R. Co. v. Southern Pac. R. Co.*, 65 Cal. 394, 4 Pac. 344.

Action for Flooding Lands.—An action for flooding lands is local, and must be brought within the jurisdiction where the land lies. *Eachus v. Trustees of Illinois & Michigan Canal*, 17 Ill. 534.

Title to Land.—Where a decree determines, in effect, title to land, it cannot be entered except in an action commenced in a court where the land is situated. *Staacke v. Bell*, 125 Cal. 309, 57 Pac. 1012.

Effect of Statutes.—The statute may, of course, arbitrarily abolish all dis-

2. Personal Injury Cases.—In personal injury cases, it may be provided that a railroad may be sued in the county in which the injuries were received;²⁵ or in any county through or into which the road passes;²⁶ or in any county where the corporation has an office or agency.²⁷

3. Garnishment.—On the other hand, although a railroad, in some actions, may be sued in other counties than where its chief office is located, yet, in other proceedings, as for example, in garnishment, the venue may be confined to the latter county.²⁸

4. Deceit.—In further illustration, it is the rule in some jurisdictions that an action in deceit must be brought against a corporation in the county in which the false representation was made, although the office of the corporation is in another county.²⁹

tinctions between local and transitory actions. See *Eachus v. The Trustees of Illinois & Michigan Canal*, 17 Ill. 534, 537; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269. On the other hand, an action inherently transitory, such as injury to live stock, may be made, by statute, local. See *Indianapolis, etc. R. Co. v. Solomon*, 23 Ind. 534.

Transitory Actions.—On the other hand it is a frequent provision of the statutes that a transitory action may be brought, in case of a domestic corporation, either in the county where it has its principal office or place of business, or in the county where the cause of action arose. See *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213; *Winter v. Union Packing Co.*, 51 Ore. 97, 93 Pac. 930; *Bailey v. Malheur Irrigation Co.*, 36 Ore. 54, 57 Pac. 910; *Holgate v. Oregon P. R. Co.*, 16 Ore. 123, 17 Pac. 859.

Statute of Foreign State.—While actions relating to land are ordinarily local, yet actions *ex delicto* for injuries to the person are, by the common law, transitory in their nature, and the venue may be laid where the plaintiff or defendant resides at the time of instituting the action. When the right to recover depends upon a statute of the foreign state or country, the action is not less transitory than when the right of action is given by the common law. *Hanna v. Grand Trunk R. Co.*, 41 Ill. App. 116.

25. Ala.—Alabama Western R. Co. v. Wilson, 55 So. 932. **Cal.**—Jager v. California Bridge Co., 104 Cal. 542, 38

Pac. 413. **Ga.**—See *Gilbert v. Georgia R., etc. Co.*, 104 Ga. 412, 30 S. E. 673.

Principal Place of Business Elsewhere.—In California, a corporation may be sued in the county where the personal injury was received, although its principal place of business may be in another county. *Jager v. California Bridge Co.*, *supra*.

Georgia.—In Georgia, the action may be brought in county where the injury occurred providing the company has an agent in such county, otherwise in the county of the residence of the corporation. *South Carolina, etc. R. Co. v. Dietzen*, 101 Ga. 730, 29 S. E. 292.

26. Newberry v. Arkansas K. & C. R. Co., 52 Kan. 613, 35 Pac. 210.

Using Tracks of Another Company. Where a railroad company, incorporated under the laws of another state, has operating arrangements to run its passenger cars over the tracks of a corporation in this state, an action for injury to persons or property may be brought against the former company in any county of this state where it runs its trains and receives and lands its passengers. *Hannibal & St. J. R. Co. v. Kanaley*, 39 Kan. 1, 17 Pac. 324.

27. Fla.—*Southern Florida R. Co. v. Weese*, 32 Fla. 212, 13 So. 436. **Md.** *Baltimore & Yorktown Turnp. Road v. Crowther*, 63 Md. 558, 1 Atl. 279. **Tenn.**—*Toppins v. East Tenn., etc. R. Co.*, 5 Lea 600.

28. Clark v. Chapman, 45 Ga. 486. See the title "**Garnishment.**"

29. Western Cottage Piano & Organ Co. v. Griffin, 41 Tex. Civ. App. 76, 90 S. W. 884.

5. Passive or Active Breach of Contract.—In Louisiana, suits for damages caused by a passive breach of contract, in distinction from those caused by an active breach, can be brought only in the corporation's domicile.³⁰

F. CHANGE OF VENUE.—Under statutes providing for change of venue, a corporation may exercise the right the same as a natural person.³¹ Thus, where the statute prescribes the venue, a corporation sued in the wrong county may apply for a change to the proper county.³²

Where the corporation is sued on a breach of contract, the presumption is that the action is brought in the proper county, and the burden is upon the corporation to show the contrary.³³

Affidavit for Change.—The required affidavit for change of venue should be made by an officer of the corporation authorized to verify its proceedings.³⁴ The secretary of the corporation has been held a competent person,³⁵ while an affidavit made by its attorney has been held insufficient.³⁶

VI. STATUTES OF LIMITATIONS.—A. PROVISIONS AS TO "PERSONS."—Statutes limiting actions against "persons" apply to corporations as well as to natural persons,³⁷ and, in general, under such statutes, the same principles govern corporate bodies as individuals.³⁸

30. *Montgomery v. Louisiana Levee Co.*, 30 La. Ann. 607.

31. *Cal.*—*McDonald v. Cal. Timber Co.*, 151 Cal. 159, 90 Pac. 548; *Cohn v. Central Pac. R. Co.*, 71 Cal. 488, 12 Pac. 498. And see *Eddy v. Houghton*, 6 Cal. App. 85, 91 Pac. 397. *Ill.*—*Commercial Ins. Co. v. Mehlman*, 48 Ill. 313, 95 Am. Dec. 543; *First Nat. Bank v. Levinson*, 129 Ill. App. 173. *Mo.* *St. Louis, etc. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069. *S. D.*—*Ivanusch v. Great Northern Ry. Co.*, 128 N. W. 333. *Wis.*—*Wheeler & Wilson Mfg. Co. v. Lawson*, 57 Wis. 400, 15 N. W. 398.

See the title "Change of Venue," 4 Stand. Proc. 16.

Docketing the Transcript.—The transcript must be docketed, within the time prescribed by statute, in the county to which the transfer is made, or the order of change will be stricken out. *Cline v. Bryson City Mfg. Co.*, 116 N. C. 837, 21 S. E. 791.

Foreign Corporation.—Under a statute providing that if the defendant does not reside in the state, an action may be tried in any county which the plaintiff shall designate in his complaint, a foreign corporation is not a resident of any county in the state, and cannot, as a matter of right, change the venue from the county

designated in the complaint. *Ivanusch v. Great Northern Ry. Co.* (S. D.), 128 N. W. 333.

32. *Cohn v. Central Pac. R. Co.*, 71 Cal. 488, 12 Pac. 498; *Jenkins v. California Stage Co.*, 22 Cal. 537. But see *Cal.*—*Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 66 Pac. 856. *N. Y.*—*Speare v. Troy Laundry Mach. Co.*, 44 App. Div. 390, 60 N. Y. Supp. 1080. *S. C.*—*Hunter v. D. W. Alderman & Sons Co.*, 79 S. C. 555, 61 S. E. 202.

33. *Chase v. South Pac. Coast R. Co.*, 83 Cal. 468, 23 Pac. 532.

34. *Ill.*—*Commercial Ins. Co. v. Mehlman*, 48 Ill. 313, 95 Am. Dec. 543. *Mo.*—*St. Louis, etc. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069. *Wis.* *Western Bank of Scotland v. Tallman*, 15 Wis. 92.

35. *St. Louis, etc. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069.

36. *Western Bank of Scotland v. Tallman*, 15 Wis. 92.

37. *People v. Trinity Church*, 22 N. Y. 44. See generally the title "Limitation of Actions."

38. *U. S.*—*Bank of United States v. McKenzie*, 2 Brock. 293, 2 Fed. Cas. No. 927. *N. Y.*—*People v. Trinity Church*, 22 N. Y. 44; *Priest v. Hudson River R. Co.*, 40 How. Pr. 456, 10 Abb. Pr. (N. S.) 60; *Kane v. Blood-*

Provisions, however, suspending the operation of the statute during the absence from the state of parties liable to be sued, do not apply to corporations,³⁹ and a non-user of corporate powers does not amount to a "concealment" such as to suspend the running of the statute.⁴⁰

good, 7 John. Ch. 90, 11 Am. Dec. 417. **Tex.**—Aransas Pass Harbor Co. v. First Nat. Bank, 28 Tex. Civ. App. 372, 67 S. W. 906. **Vt.**—Lyman v. Norwich University, 28 Vt. 560. **Eng.**—Wych v. East India Co., 3 P. Wms. 309, 24 Eng. Reprint 1078; South Sea Co. v. Wymondsell, 3 P. Wms. 143, 24 Eng. Reprint 1004.

Lord Chancellor Talbot, nearly two hundred years ago, said, in *Wych v. East India Co.*, *supra*, that corporations, who are in no default, are entitled to take advantage of the benefit of the statute of limitations as well as private persons; since their witnesses may die, or their vouchers be lost.

Chancellor Kent, in the case of *Kane v. Bloodgood*, *supra*, says that "in suits by or against a corporation the statutes of limitations may be pleaded as in suits between private persons."

Municipal Corporations.—In the case of public corporations, it is the general rule that statutes of limitations apply to them, in matters of proprietary capacity, in the same way as they apply to individuals. **Ark.**—City of Helena v. Hornor, 58 Ark. 151, 23 S. W. 966. **Kan.**—City of Fort Scott v. Schulenberg, 22 Kan. 648. **Minn.**—St. Paul, etc., R. Co. v. City of Minneapolis, 45 Minn. 400, 48 N. W. 22. **N. Y.** *In re Opening of Fox St.*, 19 Misc. 571, 44 N. Y. Supp. 1087. **Ohio.**—Hartman v. Hunter, 56 Ohio St. 175, 46 N. E. 577. **Va.**—Johnson v. Black, 103 Va. 477, 49 S. E. 633, 106 Am. St. Rep. 890, 68 L. R. A. 264. **W. Va.**—Ralston v. Town of Weston, 46 W. Va. 544, 33 S. E. 326.

Sovereign States; Private Rights.—Where, likewise, a sovereign state seeks to enforce a mere private right, the statute of limitations may apply. **U. S.**—United States v. Beebe, 127 U. S. 344, 347, 8 Sup. Ct. 1083, 1088, 32 L. ed. 127. **Ala.**—Molton v. Henderson, 62 Ala. 426. **Ark.**—Calloway v. Cossart, 45 Ark. 81. **Ga.**—Moody v. Fleming, 4 Ga. 115, 118. **Ind.**—State v. Halter, 149 Ind. 292, 47 N. E. 665. **Ill.**—People v. Strauss, 97 Ill. App. 47. Thus, where the United States are mere-

ly formal parties to a suit, and the real remedy sought in their name is the enforcement of a private right for the benefit of a private party, a court of equity will not be restrained by any exemption designed for the rights of the United States alone. *Mr. Justice Lamar*, in *United States v. Beebe*, *supra*.

Governmental Functions: The United States.—The United States in asserting a public interest are not barred, however, by any statute of limitations. *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. ed. 121; *United States v. Devereux*, 90 Fed. 182, 32 C. C. A. 564.

A State.—Likewise, by general rule, unless the statute expressly provides the contrary, a statute of limitations does not apply to a state. **U. S.**—*Lindsey v. Miller*, 31 U. S. 666, 8 L. ed. 538. **Ala.**—*Miller v. State*, 38 Ala. 600. **Ind.**—*Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388. **Mo.**—*State v. City of Vandalia*, 119 Mo. App. 406, 94 S. W. 1009. **Tex.**—*Lawless v. Wright*, 39 Tex. Civ. App. 26, 86 S. W. 1039.

Cities; Counties, Etc.—Where, likewise, a municipal corporation is exercising purely governmental functions, in its sovereign capacity, the statute does not run against it, unless so expressly provided. **Ala.**—*Reed v. City of Birmingham*, 92 Ala. 339, 9 So. 161. **Ill.**—*Mecartney v. People*, 202 Ill. 51, 66 N. E. 873; *City of Alton v. Illinois Transp. Co.*, 12 Ill. 38, 52 Am. Dec. 479. **N. C.**—*City of Wilmington v. Cronley*, 122 N. C. 383, 30 S. E. 9.

39. *Faulkner v. Delaware Canal Co.*, 1 Denio (N. Y.) 441; *Olcott v. Tioga R. Co.*, 26 Barb. (N. Y.) 147.

40. "It may be doubted whether a corporation can ever be said to abscond or conceal itself, but certainly the mere failure to hold meetings, elect officers or exercise corporate powers, in short, the mere non-user of all the corporate franchises, is not a concealment," with- in the scope of the statute of limitations. *Brewer, J.*, in *City of Fort Scott v. Schulenberg*, 22 Kan. 648.

A foreign corporation, according to the general rule, cannot plead the statute.⁴¹

B. **LIABILITY ON STOCK SUBSCRIPTIONS.**—It is held with reference to stockholder's liability upon his subscription that the statute of limitations does not begin to run in his favor until a call by the corporation or an order by the court.⁴² Other cases hold, however, that if no demand is made within the statutory period of the limitation of actions, the right to enforce the payment may be lost.⁴³

A distinction has been made, however, in some cases, between the limitation of the corporation's right to sue and a creditor's right, it being held that although the corporation's right may be barred by the statute, nevertheless a creditor's right to sue is not barred by such mere lapse of time, because unpaid subscriptions will be regarded as a trust fund for the benefit of the creditors.⁴⁴

41. See *infra*, XX.

42. **U. S.**—*Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. ed. 790; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867, 34 L. ed. 262; *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. ed. 184; *Seovill v. Thayer*, 105 U. S. 143, 155, 26 L. ed. 968. **Ala.**—*Brockway v. Gadsden, etc.*, Land Co., 102 Ala. 620, 15 So. 431; *Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894. **Cal.**—*Union Savings Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441. **Ga.**—*Glenn v. Howard*, 81 Ga. 383, 8 S. E. 636. **Ill.**—*Great Western Tel. v. Gray*, 122 Ill. 630, 14 N. E. 214. **Kan.**—*West v. Topeka Sav. Bank*, 68 Kan. 524, 72 Pac. 252. **Ky.**—*Otter View Land Co. v. Bowling's Ex.*, 24 Ky. L. Rep. 1157, 70 S. W. 834. **Md.**—*Baltimore, etc., Turnp. Co. v. Barnes*, 6 Har. & J. 57. **Nev.**—*Fitzgerald v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994. **Nev.**—*Thompson v. Bank*, 19 Nev. 103, 7 Pac. 68. **N. J.**—*Grosse Isle Hotel Co. v. I'Anson's Exrs.*, 42 N. J. L. 10. **N. C.**—*Western R. Co. v. Avery*, 64 N. C. 491. **Pa.**—*Cook v. Carpenter*, 212 Pa. 165, 61 Atl. 799, 108 Am. St. Rep. 854. **Utah.**—*Crofoot v. Thatcher*, 19 Utah 212, 57 Pac. 171. **Va.**—*Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806.

The General Rule.—The general rule is that the statute of limitations begins to run from the time when each assessment becomes payable. *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920.

Statute Runs Only Against the Amount Called.—Although the statute of limitations may run against the amount called for at any particular

time, yet it does not run against the uncalled for remainder of the unpaid subscription. *Dorsheimer v. Glenn*, 51 Fed. 404; *Priest v. Glenn*, 51 Fed. 405.

43. Thus, in Iowa, it is held that the corporation has the right, upon a stock subscription, to commence the suit at any time, and that this power must be exercised, if at all, within a reasonable time, and that a party cannot by his inaction defeat the statute of limitations. See *Great Western Tel. Co. v. Purdy*, 83 Iowa 430, 50 N. W. 45, citing, *Hintrager v. Traut*, 69 Iowa 746, 27 N. W. 807; *First Nat. Bank v. Greene*, 64 Iowa 445, 17 N. W. 86, 20 N. W. 754; *Baker v. Johnson Co.*, 33 Iowa 151. And see, *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 So. 611; *Gilmore v. Cincinnati Bank*, 8 Ohio 62, 71.

Agreement To Pay at Stated Time. Where by the terms of the subscription, the amount is due at a time stated, the statute runs from such time without the necessity of a formal call. *Estell v. Knightstown, etc., Turnp. Co.*, 41 Ind. 174; *Williams v. Matthews*, 103 Va. 180, 48 S. E. 861.

Garnishment.—The statute may, moreover, provide for the remedy of garnishment whether the amount unpaid has been called in or not. See, *Russell v. Pac. R.*, 113 Cal. 258, 43 Pac. 323, referring to the Illinois statute.

44. **Authorities in Conflict.**—As said, however, in *Gold v. Paynter*, 101 Va. 714, 44 S. E. 920, the authorities are in conflict upon this question, some of them holding that the creditors of the corporation will be barred by the stat-

C. STOCKHOLDERS' STATUTORY LIABILITY.—Relative to the statutory liability of stockholders, it is held generally that the statutes of limitation apply.⁴⁵

utes from proceeding against the stockholders for unpaid subscriptions whenever the company itself would be barred; others holding that, as long as any part of the capital stock of a corporation remains unpaid in a stockholder's hands he is a trustee for the corporate creditors until their claims are satisfied, and that the statute of limitations does not run as to the creditors, except from the time of the dissolution of the corporation, or from the time the creditor's claim becomes due and payable or a judgment thereon has been recovered, or a call has been made by the court in a creditor's suit. See 2 *Thomp. Corp.*, §§2003, 2009, 2028; 3 *Thomp. Corp.*, §3779; 1 *Cook on Stockholders*, §195; *Beach on Private Corporations*; note to *Thompson v. Reno Savings Bank*, 3 *Am. St. Rep.* 827-829, and cases cited. And see, in general, *U. S.*—*Glenn v. Marbury*, 145 *U. S.* 499, 12 *Sup. Ct.* 914, 36 *L. ed.* 790; *Seovill v. Thayer*, 105 *U. S.* 143, 26 *L. ed.* 968. *Ia.*—*First Nat. Bank v. Greene*, 64 *Iowa* 445, 17 *N. W.* 86, 20 *N. W.* 754. *Md.*—*Glenn v. Williams*, 60 *Md.* 93. *Pa.*—*Swearing v. Dairy Co.*, 198 *Pa.* 68, 75, 47 *Atl.* 941, 53 *L. R. A.* 471.

Creditors Not Barred.—*Payne v. Bullard*, 23 *Miss.* 88; *Arthur v. Commercial R. & Bk.*, 9 *Smed. & M. (Miss.)* 394, 48 *Am. Dec.* 719. And see *Hatch v. Dana*, 101 *U. S.* 205, 214, 25 *L. ed.* 885.

Creditors Barred.—On the other hand, it is held that if the corporation is barred, an action by a creditor will be barred also. *Cal.*—*Stilphen v. Ware*, 45 *Cal.* 110. *Nev.*—*Thompson v. Reno Sav. Bank*, 19 *Nev.* 103, 7 *Pac.* 68, 3 *Am. St. Rep.* 797. *Pa.*—*Hamilton v. Clarion, etc.*, *R. R.*, 144 *Pa.* 34, 23 *Atl.* 53. *Ore.*—*Hawkins v. Donnerberg*, 40 *Ore.* 97, 66 *Pac.* 691.

Corporation Solvent; Trust Fund Doctrine Does Not Apply.—“When a corporation is solvent, the theory that its capital is a trust fund, upon which there is any lien for the payment of its debts, has, in fact, but a very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the cor-

poration to deal with its property is absolute, so long as it does not violate its charter or the law applicable to such corporation.” *McDonald v. Williams*, 174 *U. S.* 397, 401, 19 *Sup. Ct.* 743, 43 *L. ed.* 1022. See also, *Holins v. Brierfield Coal Co.*, 150 *U. S.* 371, 14 *Sup. Ct.* 127, 37 *L. ed.* 1113.

Exhausting Remedies Against Corporation.—In some jurisdictions, the statute does not begin to run till judgment has been obtained against the corporation, and there is a return of *nulla bona* upon the execution. *Ala.*—*Montgomery Iron Works v. Roman*, 147 *Ala.* 434, 41 *So.* 811. *Mont.*—*King v. Pony Gold Min. Co.*, 28 *Mont.* 74, 72 *Pac.* 309. *Neb.*—*Van Pelt v. Gardner*, 54 *Neb.* 701, 75 *N. W.* 874. *N. Y.*—*Christensen v. Colby*, 43 *Hun* 362. The last cited case holds that the well established rule is that a corporate creditor's suit to enforce the payment of unpaid subscriptions can be properly brought only after a judgment at law has been obtained against the corporation, and execution issued and regularly returned unsatisfied. Nothing short of that exhausts the remedy against the corporation.

Enforcing Delivery of Certificate of Shares.—Until the corporation denies a stockholder's right to his shares, he has no right of action to compel the execution and delivery of the proper certificate, and the statute of limitations does not commence to run against such an action until such a refusal to deliver the certificate has been made. *Wells v. Green Bay & Miss. Canal Co.*, 90 *Wis.* 442, 64 *N. W.* 69.

45. *U. S.*—*Carrol v. Green*, 92 *U. S.* 509, 23 *L. ed.* 738, barred after four years. *Cal.*—*Wells v. Black*, 117 *Cal.* 157, 48 *Pac.* 1090, action barred after three years. *Mass.*—*Com. v. Cochituate*, 3 *Allen* 42, barred after six years; *Baker v. Atlas Bank*, 9 *Met.* 182. *N. Y.*—*Corning v. McCullough*, 1 *N. Y.* 47, barred after six years. *S. C.*—*Parker v. Carolina Sav. Bank*, 53 *S. C.* 583, 31 *S. C.* 673, barred after six years.

National Banking Act.—Under the national banking act, the comptroller must make an assessment before action lies against the stockholder, but as to

Courts of equity have also recognized the statutory period.⁴⁶

In some jurisdictions, however, the statutes expressly provide that a stockholder's additional liability shall continue for a certain time after the corporation's suspension of business.⁴⁷

It is held in some cases that the statute begins to run in favor of the stockholder from the time the debt against the corporation is due.⁴⁸

D. **LACHES.**—The statutory period of limitation of actions is frequently recognized in equity as a bar to bringing a suit.⁴⁹

In suits based upon fraud, a reasonable time is allowed after the discovery of the fraud.⁵⁰

Laches are not, however, imputable to the state in suits to restrain corporations from the abuses of franchises or the usurpation of power.⁵¹

E. **RECEIVERS MAY PLEAD STATUTE.**—Under the doctrine that the receiver may avail himself of the defenses open to the corporation, a receiver of a railroad company may plead the statute of limitations to the same extent as the corporation may have done.⁵²

F. **CONSTITUTIONALITY OF STATUTES.**—Statutes limiting the time within which creditors may enforce their rights against corporations, although such statutes shorten the time on existing contracts, providing a reasonable time is given, impair no obligation of the contract and are valid.⁵³

VII. PARTIES.—A. **ACTIONS BY CORPORATIONS.**—1. **In Name of Corporation.**—Suits by corporations whether brought at law or in equity must be brought in the corporate name.⁵⁴

the time when the comptroller must make such assessment, the statute is silent. *Aldrich v. Yates*, 95 Fed. 78.

46. *Com. v. Cochituate Bank*, 3 Allen (Mass.) 42; *Baker v. Atlas Bank*, 9 Met. (Mass.) 182.

47. Consult the statutes. See, also, the title "**Banks and Banking.**"

48. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725.

When Debt Was Contracted.—In California, it is held that a stockholder's liability arises when the corporate debt was contracted. *Jones v. Goldtree Bros. Co.*, 142 Cal. 383, 77 Pac. 939. See, also, *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354.

Execution of Note.—Under the California rule, the statute runs, for example, from the time when a note was executed, rather than from the time it matured. *Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87.

49. **Stockholders' Suits.**—Thus, in a stockholder's suit, the statute may bar the right to sue. See *Montgomery v. Lahey*, 121 Ala. 131, 25 So. 1006; *Boyd v. Mutual, etc., Assn.*, 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171.

Unpaid Subscriptions.—In the case

of *Gilmore v. Bank of Cincinnati*, 8 Ohio 62, which was a suit in equity to enforce the payment of unpaid subscriptions, it was held that lapse of time would preclude creditors of insolvent banks from coming into equity to enforce rights which, if freshly pursued, would be available.

50. *U. S.—Pacific R. R. Co. v. Missouri Pac. R. Co.*, 111 U. S. 505, 4 Sup. Ct. 583, 28 L. ed. 493; *United States v. San Jacinto Tin Co.*, 23 Fed. 279. **Ill.**—*Stoddard v. Decatur Cracker Co.*, 184 Ill. 53, 56 N. E. 327. **Mass.** *Peabody v. Flint*, 6 Allen 52, 57. **E. I.** *Boston, etc., R. R. Co. v. New York, etc., R. R. Co.*, 13 R. I. 260.

51. *People v. Pullman Palace Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366.

52. *Bartlett v. Keim*, 50 N. J. L. 260, 13 Atl. 7.

53. *Gillilan v. Union Canal Co.*, 109 U. S. 401, 3 Sup. Ct. 304, 27 L. ed. 977 construing Pennsylvania statute. See also, *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365.

54. *U. S.—Bradley v. Richardson*, 2 Blatchf. 343, 3 Fed. Cas. No. 1,786.

Corporation Sole.—A corporation sole, having two capacities, a natural and a corporate, must always show in what capacity it sues, whether, for example, as bishop, parson, etc.⁵⁵

2. Incorporators and Officers.—Incorporators and officers of a corporation cannot merely as such sue in behalf of a corporation, since contracts made with officers and agents of the corporation, in the interest of the corporation, are suable by the corporation and not by such individuals.⁵⁶ Thus, a bank sues in its corporate name upon

Cal.—Curtiss v. Murry, 26 Cal. 633. Ill. Campbell v. Brunk, 25 Ill. 210. Ind. McBroom v. Lebanon, 31 Ind. 268. Ky. Lexington v. McConnell, 3 A. K. Marsh. 224. La.—Hill v. Tessier, 2 Mart. (N. S.) 539. Md.—Tartar v. Gibbs, 24 Md. 323. Mass.—Minot v. Curtis, 7 Mass. 443. Mo.—First Baptist Church v. Roberson, 71 Mo. 326; North St. Louis Christian Church v. McGowan, 62 Mo. 279. N. H.—Winnipiseogee Lake Co. v. Young, 40 N. H. 420, 428. N. C. Mauney v. High Shoals Mfg. Co., 39 N. C. 195. Ohio.—Milford, etc., Turnp. Co. v. Brush, 10 Ohio 111, 36 Am. Dec. 78; Wilson v. Trustees, No. 16, 8 Ohio 174. Pa.—Edinboro Academy v. Robinson, 37 Pa. 210, 78 Am. Dec. 421. Va.—Stewart v. Thornton, 75 Va. 215; Culpeper Agricultural & Mfg. Soc. v. Digges, 6 Rand. 165, 18 Am. Dec. 708; Porter v. Nekervis, 4 Rand. 359. W. Va.—Krell Piano Co. v. Kent, 39 W. Va. 294, 19 S. E. 409; Hechmer v. Gilligan, 28 W. Va. 750.

Voluntary Association Distinguished. In case of a voluntary association, the directors of such an unincorporated body may, where the members are numerous, maintain a bill in equity on behalf of themselves and the other members. Durburow v. Niehoff, 37 Ill. App. 403. In case, however, of a corporation, its rights and interests can be asserted and enforced by the corporation only. Like a natural person, it is recognized in law only by its name, and its corporate capacity is as distinct from the persons composing it as an incorporated city is from an inhabitant of the city. The same rule prevails in courts of equity as in courts of law. Curtiss v. Murry, 26 Cal. 633; Stewart v. Thornton, 75 Va. 215.

Name by Prescription.—A corporation may acquire a name by usage. Alexander v. Berney, 28 N. J. Eq. 90.

Name of Trustees.—It may sometimes appear that a suit is brought in the name of the trustees, owing to

the fact that the term "trustees" is a part of the corporate name. Ministerial, etc., Fund v. Parks, 10 Me. 441. And see 64, next following.

Corporate Name.—Misnomer.—As to the necessity of pleading the corporate name, and the effect of misnomer in connection therewith, see *infra*, VIII, B.

55. Bac. Abr., tit. Corp. E. 2. And see Archbishop v. Shipman, 79 Cal. 288, 21 Pac. 830 (a Roman Catholic Archbishop); Brunswick v. Dunning, 7 Mass. 445 (parson of a church); Weston v. Hunt, 2 Mass. 500 (parson of a church).

Plaintiff Sole Owner of Stock.—The fact, however, that one person becomes the sole owner of the entire stock of the corporation does not constitute him a corporation sole or entitle him to sue in his own name. The corporate name should still be used as a proper party plaintiff or defendant. Mass. England v. Dearborn, 141 Mass. 590, 6 N. E. 837. Mich.—Randall v. Dudley, 111 Mich. 437, 69 N. W. 729. Tenn. Insurance Co. v. Thornton, 97 Tenn. 1, 40 S. W. 136; Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706. Wis.—Button v. Hoffman, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131.

Kentucky, Maryland.—In Kentucky and Maryland, a contrary view as to the sole ownership of corporate stock is taken. In such a contingency the corporate entity is suspended. See Louisville Banking Co. v. Eisenman, 94 Ky. 83, 21 S. W. 531, 42 Am. St. Rep. 335, 19 L. R. A. 684; Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336.

56. U. S.—Donovan v. Dean, 1 Flip. 182, 7 Fed. Cas. No. 3,992. Ala.—Alston v. Heartman, 2 Ala. 699. Ill. Durburow v. Niehoff, 37 Ill. App. 403. Ind.—McBroom v. Lebanon, 31 Ind. 268; Herod v. Rodman, 16 Ind. 241. Me.—Garland v. Reynolds, 20 Me. 45; Warren Academy v. Starrett, 15 Me. 443. Mich.—Romeo v. Chapman, 2

commercial papers made payable to its cashier;⁵⁷ and a corporation sues upon an agreement to pay the directors money due to the corporation;⁵⁸ or upon a note, belonging to the corporation, but made payable to its treasurer as such.⁵⁹

Statutory Provision.—In some instances, however, the charter, or the statutes, may expressly provide that a corporation may sue in the name of its president, or other officer.⁶⁰

Corporation or Officer May Sue.—Some cases further hold that where a contract is made with an officer, as in case of a note, for example, either the corporation or the officer with whom the contract was made may sue.⁶¹

The rule, however, prevailing practically everywhere, at the present time, is that only the corporation may sue.⁶²

Titular Head of Corporation.—A corporation aggregate which has a titular head cannot sue or be sued without it, because without it the corporation name is incomplete.⁶³ Thus, where the corporation is chartered in the name of certain officers, as, for example, "The President and Officers of," etc.; or "The Trustees of," etc.; or "The Mayor and

Mich. 179. **Mo.**—North St. Louis Christian Church v. McGowan, 62 Mo. 279. **N. J.**—Nichols v. Williams, 22 N. J. Eq. 63. **N. Y.**—Habicht v. Pemberton, 4 Sandf. 657. **Vt.**—Bradley v. Richardson, 23 Vt. 720; Binney v. Plumley, 5 Vt. 500, 26 Am. Dec. 313.

An officer cannot bring the action, even though it seems necessary for the protection of the corporation. American Waterworks Co. v. Venner, 63 Hun 632, 18 N. Y. Supp. 379.

57. **U. S.**—Baldwin v. Bank of Newbury, 1 Wall. 234, 17 L. ed. 534; Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326, 5 L. ed. 100. **Ala.**—Alston v. Heartman, 2 Ala. 699. **Fla.**—Southern Life, etc., Co. v. Gray, 3 Fla. 262. **Kan.**—Pratt v. Topeka Bank, 12 Kan. 570. **Mass.**—Commercial Bank v. French, 21 Pick. 486, 32 Am. Dec. 280; Charitable Assn. v. Baldwin, 1 Metc. 359. **Mich.**—Garton v. Union City Nat. Bank, 34 Mich. 279. **N. Y.**—First Nat. Bank v. Hall, 44 N. Y. 395, 4 Am. Rep. 698. **Vt.**—Rutland & B. R. Co. v. Cole, 24 Vt. 33.

58. Thompson v. Marion & M. Gravel Road Co., 98 Ind. 449; Brittain v. Newland, 19 N. C. 363.

59. **Ala.**—Alston v. Heartman, 2 Ala. 699. **Me.**—Warren Academy v. Starrett, 15 Me. 443; Trustees of Ministerial & School Fund v. Parks, 10 Me. 441. **Vt.**—Rutland & B. R. Co. v. Cole,

24 Vt. 33; Whitelaw v. Cahoon, 1 D. Chip. 295.

60. Marsh v. Astoria Lodge No. 112, 27 Ill. 420.

Banking Associations.—It has been provided by statute in connection with banking associations, for example, that suits in behalf of such associations may be brought in the name of the president, or in the collective name of the association, at the pleasure of the party suing. See Delafield v. Kinney, 24 Wend. (N. Y.) 345. See, also, National Bank v. Nan Derwerker, 74 N. Y. 234; Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Leonardsville Bank v. Willard, 25 N. Y. 574; Cohn v. Borst, 36 Hun 562.

61. **View That Cashier or Corporation May Sue.**—Where a bill or note is made payable to A. B., cashier, without any other designation, there is authority for saying that an action may be maintained upon it, either by the person therein named as payee or by the bank of which he is cashier, if the paper was actually made and received on account of the bank. Baldwin v. Bank of Newbury, 1 Wall. (U. S.) 234, 242, 17 L. ed. 534; Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280.

62. See next preceding note 54.

63. Bac. Abr. tit. Corp. E. 2; Daugars v. Rivaz, 28 Beav. 233, 54 Eng. Reprint 355, 6 Jur. N. S. 854.

Aldermen of the City of," etc., such official titles are a part of the corporate name, and must be used in bringing or defending suits.⁶⁴ Yet it is not necessary to state the personal name of the head.⁶⁵

3. Stockholders.—In actions brought by or against corporations aggregate it is not necessary to name any of the individual members,⁶⁶ and a stockholder of a corporation cannot, as a party plaintiff, bring a suit in behalf of the corporation, since the corporation alone is authorized to sue.⁶⁷

In certain cases, however, suits known as stockholders' suits may be

64. Ind.—Drumheller v. First Universalist Church of Pierceton, 45 Ind. 275. **Me.**—Ministerial, etc., Fund v. Parks, 10 Me. 441. **Va.**—Bank of Virginia v. Craig, 6 Leigh. 399.

Regents of State University.—A statute may make the regents of a state university a body corporate, and authorize suits to be brought by or against the corporation under such a name. See Kan. St., 1909, §8396.

65. 1 Kyd Corp., 281; Dummer v. Chippenham, 14 Ves. 245, 254, 33 Eng. Reprint 515.

Dean and Chapter.—Thus, in Newton v. Travers, 3 Salk. 103, 91 Eng. Reprint 718, it was adjudged that a dean and chapter, or a warden and fellows of a college, may plead or be impleaded without showing their proper names, because in their corporate capacity they have no name of baptism, or any other name than that by which they are incorporated; but it is otherwise in the case of a parson and vicar (a corporation sole), since they must use their name of baptism.

66. "If there be a corporation of one sole person that hath a fee-simple, and may have a writ of right, he may be named in originals, etc., by the common law by his Christian name, without any surname; for the name of his corporation is in lieu of his surname (some say both Christian name and surname), as John, Abbot of D., John, bishop of N., but otherwise of a parson, for he must be named by his Christian name and surname. If it be a corporation aggregate of many persons, as mayor and commonalty, dean and chapter, master of a hospital and confere, the mayor, dean or master need not be named by his Christian name, because such a corporation standeth in lieu of the Christian name and surname." II Coke Inst. 666.

Inhabitants of a Town.—In an early Connecticut case it was held that a town may sue by the description of "A and B and the rest of the inhabitants" of such town, instead of using the corporate name merely. Barkhamsted v. Parsons, 3 Conn. 1.

Death of Member of Corporation. A suit by a corporation aggregate does not abate by the death of some of the members, although in case of a corporation sole a suit by the member, instituted in his corporate capacity, does abate. Blackburn v. Jepson, 3 Swans. 132, 138, 36 Eng. Reprint 802; Dan. Ch. Pl. & Pr. 24. See, however, the following note.

Bonds Payable to an Officer Having Succession.—When a statute directs bonds for the public benefit to be made payable to the governor, or other functionary having legal succession, the officer is the payee, and the successor, whether described *eo nomine*, either in the statute or bond, or not, may yet maintain the action, such officer being made for this purpose a corporation sole; and each successor continues the suit without abatement by death or expiration of term of office. James K. Polk v. Plummer, 2 Humph. (Tenn.) 500; Governor v. Allen, 8 Humph. (Tenn.) 176; Cannon v. Snowdon, 4 Humph. (Tenn.) 360; Felts v. Mayor, etc., of Memphis, 2 Head (Tenn.) 650. It is, however, otherwise if the bond be not statutory. Jones v. Wiley, 4 Humph. (Tenn.) 146.

67. U. S.—McGeorge v. Big Stone Gap. Imp. Co., 57 Fed. 262; Langdon v. Hillside Coal & Iron Co., 41 Fed. 609. **Ga.**—Blackman v. Central Railroad, etc., Co., 58 Ga. 189. **Ind.**—Tomlinson v. Bricklayers' Union, 87 Ind. 308. **N. J.**—Silk Mfg. Co. v. Campbell, 27 N. J. L. 539.

brought by stockholders for the protection of the interests of the members.⁶⁸

4. Receivers.—A receiver of a corporation may bring such suits as the corporation may have brought,⁶⁹ and he may also proceed against directors for their negligence in the management of the corporate affairs.⁷⁰

5. Agents.—The agent of a corporation cannot sue in its behalf, since the action must be brought by the corporation itself.⁷¹

6. Joinder of Parties.—A corporation may, in a proper case, be a joint party plaintiff either with another corporation or with a natural person.⁷²

7. Change in Corporate Name.—In case the name of a corporation is legally changed, the corporation sues or is sued in its new name.⁷³

68. See, in general, *infra*, XVIII, E. See, also, the following cases: Ala. *Ex parte* Gray, 157 Ala. 358, 47 So. 286. Conn.—Allen v. Curtis, 26 Conn. 456. Me.—Hodsdon v. Copeland, 16 Me. 314. Mass.—Smith v. Hurd, 12 Metc. 371, 46 Am. Dec. 690. Tex.—Evans v. Brandon, 53 Tex. 56.

69. Ga.—Branch v. Augusta Glass Works, 95 Ga. 573, 23 S. E. 128. Ill. Young v. Stevenson, 180 Ill. 608, 54 N. E. 562, 72 Am. St. Rep. 236. N. Y.—Jones v. Blun, 145 N. Y. 333, 39 N. E. 954; McQueen v. New, 45 App. Div. 579, 61 N. Y. Supp. 464.

70. U. S.—Robinson v. Hall, 59 Fed. 648. Md.—Fisher v. Parr, 92 Md. 245, 48 Atl. 621. N. Y.—O'Brien v. Fitzgerald, 143 N. Y. 377, 38 N. E. 371.

71. Krell Piano Co. v. Kent, 39 W. Va. 294, 19 S. E. 409.

72. Ark.—See Bloch-Queensware Co. v. Metzger, 70 Ark. 232, 65 S. W. 929. Mo.—Gathwright v. Callaway County, 10 Mo. 663. N. Y.—New York & Sharon Canal Co. v. Fulton Bank, 7 Wend. 412.

Cannot Join in Writ of Entry.—Two corporations claiming rights as tenants in common cannot join as party plaintiffs. Rehoboth v. Hunt, 1 Pick. (Mass.) 224, 228.

73. Cal.—Cumberland College v. Ish, 22 Cal. 641. Ill.—Newlan v. Lombard University, 62 Ill. 195. Ia.—Northwestern College v. Schwagler, 37 Iowa 577. N. Y.—Hyatt v. McMahon, 25 Barb. 457. Va.—Wilson v. Chesapeake & O. R. Co., 21 Gratt. 654. Wis. Dousman v. Town of Milwaukee, 1 Pinn. 81.

Railway Corporation.—**Change in Name of Branch Line.**—A resolution by a board of railway directors changing the name of a branch line, under statutory authority to make such change in name, does not create another corporation distinct and different from the already existing corporation; and the corporation does not become, by virtue of such a statute and resolution, liable to be sued by the name given to the branch line in respect of a contract, theretofore made, for materials to be used in the construction of such branch. Morris v. The St. Paul & Chicago R. Co., 19 Minn. 528.

Mistake in Corporate Name When Contracting.—Where a contract is entered into with a corporation and a mistake is made, at the time, in the name of the corporation, the corporation may, nevertheless, upon such contract, sue in its own right name. The declaration or petition should set up the fact of the mistake in name, and show that the corporation plaintiff is, in fact, the real party with whom the contract was made. A contract may be made to or with a person by description as well as by name, and where the party can be ascertained, the contract will be valid, although the names be mistaken or the description be incorrect. Md.—Hagerstown Turnp. R. Co. v. Creeger, 5 Har. & J. 122, 9 Am. Dec. 495. Mass.—Commercial Bank v. French, 21 Pick. 486, 32 Am. Dec. 280. N. J.—Inhabitants, etc., v. String, 10 N. J. L. 323. N. Y.—New York African Society v. Varick, 13 Johns. 38.

The change in name does not affect the corporation's right of action,⁷⁴ neither does it abate a pending suit.⁷⁵

Where after a change in name a corporation is sued by its former name, a plea in abatement will lie for the misnomer.⁷⁶

B. ACTIONS AGAINST CORPORATIONS. — 1. Corporation Necessary Party.—Corporations must be sued in their corporate names.⁷⁷

Actions against directors, trustees, or other officers of the corporation, are not actions against the corporation, and judgment upon such actions will not support execution against the corporation.⁷⁸

74. *Lomb v. Pioneer Savings & Loan Co.*, 106 Ala. 591, 671, 17 So. 670; *Ready v. Tuskaloosa*, 6 Ala. 327; *Beene v. Cahawba & M. R. Co.*, 3 Ala. 660; *Newlan v. Lombard University*, 62 Ill. 195.

Changing From State to National

Bank.—Where a plaintiff corporation, a banking company having been originally created by the laws of a state, had, in accordance with the National Banking Act, become a national bank, and its name been changed accordingly, its identity was not affected, or its right to sue upon liabilities incurred to it by its former name. *U. S. Michigan Insurance Bank v. Eldred*, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. ed. 162; *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520, 12 Sup. Ct. 60, 35 L. ed. 841. *Mass.*—*Atlantic Bank v. Harris*, 118 Mass. 147. *N. Y.* *City Nat. Bank v. Phelps*, 86 N. Y. 484, 97 N. Y. 44.

75. *Thomas v. Frederick County School*, 7 Gill & J. (Md.) 369.

76. *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 2 S. W. 202. And see, in general, *infra*.

77. *Cal.*—*King v. Randlett*, 33 Cal. 318. *Ill.*—*Campbell v. Brunk*, 25 Ill. 210; *Illinois State Insane Hospital v. Higgins*, 15 Ill. 185. *Ind.*—*Harod v. Rodman*, 16 Ind. 241; *Hay v. McCoy*, 6 Blackf. 69. *Ia.*—*Keller v. Tracy*, 11 Iowa 530. *N. Y.*—*The Ogdensburgh Bank v. Van Rensselaer*, 6 Hill 240. *N. C.*—*Ramsay v. Richmond & D. R. Co.*, 91 N. C. 418; *Young v. Barden*, 90 N. C. 424. *Pa.*—*Edinboro Academy v. Robinson*, 37 Pa. 210, 78 Am. Dec. 421.

More Than One Name.—A corporation may have more than one name; it may have one in which to contract, grant, etc., and another in which to sue and be sued. It may be known by

different names and may be sued in either. *U. S.*—*Liverpool, etc., Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. ed. 1029. *N. Y.*—*Thomas v. Dakin*, 22 Wend. 9. *Eng.*—*The President and College of Physicians v. Salmon*, 2 Salk. 451, 91 Eng. Reprint 391; 2 Bac. Abr. 5.

78. *Ia.*—*State v. Montaguds*, 48 La. Ann. 1417, 20 So. 911. *N. Y.*—*Licansi v. Ashworth*, 78 App. Div. 486, 79 N. Y. Supp. 631. *N. C.*—*Davidson v. Alexander*, 84 N. C. 621; *North Carolina, etc., Ins. Co. v. Hicks*, 48 N. C. 58.

Action Against President.—An action upon the common money counts against V, naming him, followed by the words "president of the St. Lawrence Bank," without specific allegation that the bank was indebted and promised to pay, is an action against V individually, the words added to his name being merely a description of the person. *The Ogdensburgh Bank v. Van Rensselaer*, 6 Hill (N. Y.) 240. See, also, *Early v. Wilkinson*, 9 Gratt. (Va.) 68, 71; *Exchange Bank v. County of Lewis*, 28 W. Va. 273, 292; *Rand v. Hale*, 3 W. Va. 495.

Attachment Proceedings.—Likewise, an attachment against M., president *Shenandoah Valley Railroad Company, garnishee*, is not an attachment against the corporation. The railroad company is not, thereby, as a corporation a party, and a judgment on the attachment is not a judgment against the corporation, but personal, against *Fidelity Ins., etc. Co. v. Shenandoah Val. R. Co.*, 33 W. Va. 761, 11 S. E. 58.

Amendment of Parties.—Where a summons commands the sheriff to summon "B, president of the Southern Improvement Co.," this is a summons only upon B. The trial court may amend so as to make the corporation an additional party defendant, or sub-

2. Sued by Wrong Name.—In an attempted suit against a corporation, substantial error in the corporate name amounts to no suit at all against it,⁷⁹ but immaterial errors caused by transposing, altering, or even omitting some of the words or syllables of the full corporate name will be disregarded by the court unless the misnomer is taken advantage of by a plea in abatement,⁸⁰ or, in some code states, by answer.⁸¹

stitute it as the sole party defendant, providing an amended summons is issued and served, but without such service, the mere striking out of the words, "B, president of," will not have the effect to make the corporation a party. *Plemmons v. Southern Imp. Co.*, 108 N. C. 614, 13 S. E. 188.

Individual Members.—Individual members of a corporation cannot be sued for its debts. *Curtiss v. Murry*, 26 Cal. 633.

Suits Against Members; Discontinuance.—Where an action is commenced originally against three individuals, who are described as "constituting the Equitable Nuptial Benefit Union, organized under the laws of Alabama," but the body of the complaint reads, "The plaintiff claims of the defendant, the Equitable Nuptial Benefit Union, a corporation composed of" (naming the three individuals), the filing of such complaint, and going to trial thereon, operates a discontinuance of the suit against the three individuals, and converts it into an action against the corporation as the sole defendant. *White v. Equitable Nuptial Benefit Union*, 76 Ala. 251, 264.

79. *In re Binney*, 2 Bland (Md.) 99, where a bill prayed for an injunction against "the president and directors of the Chesapeake & Ohio Canal Co." It was held that the corporation was not a party to the bill. To like effect, see *Bank of Virginia v. Craig*, 6 Leigh (Va.) 399.

Mistake in Substance.—If the true name of a corporation is "The Savings Bank for the County of Stratford," a writ containing the name, "The President and Trustees of the Savings Bank for the County of Stratford," is a substantial mistake. When a corporation is sued, if the name of the corporation is mistaken materially and substantially, the corporation cannot be affected by the proceedings. *Burnham v. The President, etc., of the Savings Bank*, 5 N. H. 446.

80. *U. S.*—*Bate Refrigerating Co. v.*

Gillett, 31 Fed. 809. *Ia.*—*Wilson & Co. v. Baker*, 52 Iowa 423. *Kan.*—*School Dist. v. Griner*, 8 Kan. 224. *Mass.*—*Gilbert v. Nantucket Bank*, 5 Mass. 97. *Mich.*—*Lake Sup. Build. Co. v. Thompson*, 32 Mich. 293. *N. H.*—*Burnham v. Savings Bank*, 5 N. H. 446. *N. Y.*—*Whittlesey v. Frantz*, 74 N. Y. 456; *Trustees of M. E. Church v. Tryon*, 1 Denio 451. *Ohio.*—*State v. Bell Tel. Co.*, 36 Ohio St. 296. *Pa.*—*Gray v. Monongahela Nav. Co.*, 2 Watts & S. 156, 37 Am. Dec. 500. *Tenn.*—*Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 2 S. W. 202; *Louisville, etc., R. Co. v. Reidmond*, 11 Lea 205. *Vt.* *Stone v. Berkshire Soc.*, 14 Vt. 86.

Addition of Word "The."—Where the corporate name is "Philadelphia, Baltimore & Washington Railroad Company," a declaration naming such defendant as "The Philadelphia, Baltimore & Washington Railroad Company" is a misnomer, and may be taken advantage of by a plea in abatement. *Lapham v. Philadelphia, etc., R. Co.*, 4 Penne. (Del.) 421, 56 Atl. 366.

Plea in Abatement.—It is well settled that a misnomer, in the case of a corporation, must be pleaded in abatement, as well as in the case of a natural person. A distinction, however, is made between a variance in words and syllables only, and a variance in substance. Where the misnomer varies only in words and syllables, the misnomer must be pleaded in abatement, otherwise it will not be regarded. *Burnham v. Savings Bank*, 5 N. H. 446.

81. **At common law**, misnomer, whether of plaintiff or defendant, is pleadable in abatement, and this rule applies equally to corporations as shown above. See, further, 1 Chit. Pl. 451; Gould, Pl., c. 5, §§69-84. Under the English practice, however, the plea in abatement for this cause was abolished by the Procedure Act, 3 & 4 Wm. IV., c. 42, sec. 11, and a summary process for correcting the error substituted. Bliss, Code Pl., §427.

The mistake may, however, be corrected by amendment,⁸² and by appearance and answer, on the part of the corporation, the misnomer will be waived.⁸³ A motion to arrest judgment on the ground of misnomer is too late.⁸⁴

3. Corporations as Joint Defendants.—Two or more corporations may be sued jointly in a proper action, as, for example, when both are joint tortfeasors.⁸⁵

4. Officers, Directors, Agents.—The officers, directors, and agents of corporations are not, ordinarily, necessary or proper parties, in suits against corporations,⁸⁶ yet a corporation and its officer, or agent, or

Code Procedure.—Judge Bliss says, Code Pl., §427, *et seq.*, that under the codes there is a want of harmony as to the remedy for misnomer. Some judges have said that answer was the proper remedy, but nothing seems to be settled upon authority, except that the objection for misnomer is waived by answering to the merits. Some code states still allow the plea in abatement. (See *Sinton v. The Steamboat R. R. Roberts*, 46 Ind. 476; *State v. Bell Tel. Co.*, 36 Ohio St. 296). Mr. Morawetz says, that, in New York state, in an action or special proceeding brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer, or other pleading in the defendant's behalf. *Mor. Corp.*, §355, *quoting*, §1777, N. Y. Code of Civil Procedure.

82. Ga.—*Johnson v. Central Railroad*, 74 Ga. 397. **Mass.**—*Sherman v. Connecticut Bridge Co.*, 11 Mass. 338. **N. H.**—*Burnham v. Savings Bank*, 5 N. H. 573.

Term "Christian Name" Applies to Corporations.—In the case of *Johnson v. Central Railroad*, *supra*, the court says: "Where suit was brought against 'the Central Railroad and Banking Company,' and a motion was made to dismiss the case on the ground that there was no such corporation, an amendment, adding the words, 'of Georgia,' to the name of the defendant, should have been allowed. The act which declared that all misnomers . . . on the civil side of the court might be amended and corrected on motion instantan, was not limited or restricted by the insertion of the words, 'whether in the Christian or surname.' The term, 'Christian name,' is used in the sense of given name, and includes the

name given to a corporation by the legislature."

83. U. S.—*Bate Refrigerating Co. v. Gillett*, 31 Fed. 809. **Ala.**—*Mobile & M. R. Co. v. Yeates*, 67 Ala. 164. **Mass.**—*Bullard v. Nantucket Bank*, 5 Mass. 99. **Mo.**—*State v. Bacon Club of Neosho*, 44 Mo. App. 86.

84. Bullard v. Nantucket Bank, 5 Mass. 99; *Louisville, etc., R. Co. v. Reidmond*, 11 Lea (Tenn.) 205; *East Tennessee & G. R. Co. v. Evans*, 6 Heisk. (Tenn.) 607.

85. Mass.—*Bryant v. Bigelow Carpet Co.*, 131 Mass. 491. **Minn.**—*Flaherty v. Minneapolis, etc., R. Co.* 39 Minn. 328, 40 N. W. 160, 12 Am. St. Rep. 654, 1 L. R. A. 680. **N. Y.**—*Colegrove v. New York, etc., R. Co.*, 6 Duer 382.

Consolidation of Corporations.—Where, however, one corporation has been consolidated with another, a party injured by the original company has his option to sue either the original company with which committed the injury, or the new company with which such company has been consolidated, but he cannot sue both jointly in the same action at law. *Langhorne v. Richmond R. Co.*, 91 Va. 369, 22 S. E. 159.

Several Liability in Contractual Obligation.—Likewise, under a statute providing that parties severally liable upon the same obligation or instrument may all or any of them be included in the same action, at the option of the plaintiff, two corporations may be joined as defendants. *Blasingame v. Home Ins. Co.*, 75 Cal. 633, 17 Pac. 925.

86. Ala.—*Norwood v. Memphis, etc., R. Co.*, 72 Ala. 563. **Fla.**—*State v. Jacksonville, etc., R. Co.*, 15 Fla. 201. **N. Y.**—*Chase v. Vanderbilt*, 62 N. Y.

servant causing the injury may be sued jointly in tort.⁸⁷

307; *Allen v. New Jersey Southern R. Co.*, 49 How. Pr. 14.

Suit To Compel Issue of Stock.—Where the board of directors of a corporation, in issuing new stock to the shareholders generally, refuse to issue to a particular stockholder his due proportion thereof, he may compel its issue to him by suit in equity against the corporation, and the directors need not be made parties defendant to the action. *Dousman v. The Wisconsin, etc., Smelting Co.*, 40 Wis. 418.

Action To Cancel Unlawful Issue of Stock.—Also in a suit by a stockholder, to obtain the cancellation of stock alleged to have been illegally issued by the corporation, it has been held that while the directors would be proper parties, at the election of the plaintiff to make them such, yet they are not necessary parties. *Wood v. Union Gospel, etc., Assn.*, 63 Wis. 9, 22 N. W. 756.

Demurrer to Improper Joinder.—In the case of *Chase v. Vanderbilt, et al.*, *supra*, the directors of the Lake Shore Railway Company, and the treasurer thereof, were individually made parties to an action against the corporation, brought to enforce an alleged contract to pay specified dividends. The court of appeals were unanimous in sustaining a demurrer of the individual defendants that they were improperly joined as defendants. The court said: "Their being parties can make no difference whatever, and can in no manner affect the final result as to the corporation or themselves. If a remedy exists against the railway company, and a judgment is obtained, it is obligatory upon the defendants, as the representatives of, as well as the corporation itself, and the former cannot escape the consequences. Upon principle, it seems to us that there is no foundation for the doctrine that directors and individual stockholders are necessary or proper parties defendant in an action of this character."

Suing the Corporation and Directors as Principals.—Where, however, the petition alleges that both the corporation and one of its directors were by contract bound to the plaintiff for an agreed compensation for services rendered in the sale of stock; and where the plaintiff does not seek to make the

said director liable as an agent, but sues both the corporation and the director as principals, the plaintiff may maintain his action against both defendants jointly. *Mason v. Morin*, 19 Ky. L. Rep. 794, 42 S. W. 88.

May Be Proper Although Not Necessary Parties.—In a suit by contractors in connection with a railway construction contract, such suit being based upon the mistake or fraud of the company's engineer in estimating the amount of the work, the joinder as defendants of officers taking part in such proceedings is quite usual and proper, although no decree against them personally may be appropriate. *O'Brien v. Champlain Construction Co.*, 107 Fbd. 338.

Corporation Organized by a Partnership.—Where a corporation is formed by a firm, the corporation being simply a merger of the firm, getting all the firm's property, and assuming all its debts, an action against the corporation to set aside a fraudulent conveyance of a bankrupt to the firm, may be maintained, and the individual members of the partnership need not be made parties, because if other creditors should sue the firm, and not the corporation, the firm can set up in defense the recovery from the corporation. *Holloway v. McRaney & Brame*, 83 Miss. 335, 36 So. 1.

87. **U. S.**—*Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. ed. 528; *Louisville R. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. ed. 473. **Mo.**—*Favorite v. Cottrill*, 62 Mo. App. 119. **N. J.**—*Brokaw v. New Jersey, etc., R. Co.*, 32 N. J. L. 328, 90 Am. Dec. 659. **N. Y.**—*Losee v. Buchanan*, 61 Barb. 86.

May Be Sued Jointly or Separately. A corporation acts only through its agents, for whose negligence it is liable, and who may be sued jointly with it. Plaintiff, however, is not compelled to make a joint *tort-feasor* a party, since it is an elementary rule that a plaintiff may sue one or more of several joint *tort-feasors*. *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956; *Wright v. Compton*, 53 Ind. 337.

Improper Joinder of President.—In a personal injury action against a corporation, where the president was in no

Where, also, it appears, in a bill in equity, that the complaint is not wholly against the corporation, but is in great part and substantially against its officers and directors, the latter are necessary parties.⁸⁸

The practice, furthermore, of making the officers of a corporation parties defendant to a suit for the purpose of eliciting discovery, has been previously referred to.⁸⁹

5. Bills in Equity in General.—If an entire controversy to which a bill in equity relates be between certain plaintiffs on one side and the corporation as an entity on the other, no other parties defendant need be added.⁹⁰ It is equally true, however, that all persons materially

way responsible for the alleged negligence, it is error to join him as a party defendant. *Brooks v. Galveston City R. Co.* (Tex. Civ. App.), 74 S. W. 330.

Motive in Suing Jointly Not Material.—It is of no importance that it is alleged by the defendant corporation that, in a joint action for a tort against a corporation and one of its agents, the agent was fraudulently joined for the purpose of preventing a removal to a federal court. If the plaintiff had the right to bring the joint action, his motive in doing so is immaterial. *Charman v. Lake Erie, etc. R. Co.*, 105 Fed. 449, 451.

Law of State Governs.—In determining whether an action is properly brought against joint defendants, the law of the state governs. *Chesapeake, etc., R. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. ed. 121; *Helms v. Northern Pacific R. Co.*, 120 Fed. 389; *Batey v. Nashville, etc., R.*, 95 Fed. 368.

88. *Morse v. Bay State Gas Co.*, 91 Fed. 944.

Not All Directors Need Be Made Parties.—Where only certain directors are the only directors interested in the transaction complained of, the other directors not appearing to have received or to have any interest in the fruits of such transaction, it is not necessary to join such other directors as defendants. *Woodrooff v. Howes*, 88 Cal. 184, 26 Pac. 111. See, also, *Morrison v. Blue Star Nav. Co.*, 26 Wash. 541, 67 Pac. 244, holding that in an action by a creditor to recover moneys fraudulently diverted not all the guilty corporate officials need be made parties.

Official Negligence or Fraud.—Where there are frauds or breaches of duty perpetrated against a corporation by its officers, the subject of complaint are

not wrongs committed by the corporation, but, in reality, against it. The corporation though properly made a nominal defendant, in a suit brought, in such a case, by stockholders, is to be regarded as the real complainant, and the guilty corporate officers must be also made parties defendant. *Edwards v. Bay State Gas Co.*, 91 Fed. 942.

President May Be Proper Party.—Where, in a suit against a corporation for an accounting, it is alleged that the president, with others, fraudulently converted certain funds of the corporation, which property complainant is endeavoring to reach, the president is a proper party defendant. *Berwind v. Van Horne*, 104 Fed. 581.

Intervention.—Cross-Bill.—Where an officer of a corporation is charged with gross negligence, working great injury to the corporation, and he is not made a party to a suit brought to set aside a transaction on the ground of such officer's fraud, the officer may come in, by intervention, and be made a party defendant, and may file a cross-bill to meet and controvert the allegations of the bill. *Brinckerhoff v. Holland Trust Co.*, 159 Fed. 191.

89. See *supra*, p. 573.

Rule no Longer Exists Under the Code.—The reason of the rule, under the old chancery practice, authorizing officers to be made parties in a bill of discovery, does not exist under the code procedure, because any party can be examined as a witness. No reported American case of a recent date has been cited sanctioning the practice. *Chase v. Vanderbilt*, 62 N. Y. 307, 314. See, *supra*, however, for further consideration of this subject.

90. *Morse v. Bay State Gas Co.*, 91 Fed. 944. And see *Heath v. Erie R.*

interested, either legally or beneficially, in the subject-matter of a suit in equity, must be made parties to it, and courts of equity will dismiss a bill if the granting of the relief prayed for would injuriously affect persons materially interested who are not made parties.⁹¹

It follows, therefore, that, in general, a corporation is an indispensable party to any suit in equity which affects its corporate rights or liabilities.⁹² Thus, a corporation is a necessary party in a bill by a creditor of the corporation against its officers or stockholders who have divided its assets among themselves;⁹³ likewise, a necessary party defendant to a bill for a receiver;⁹⁴ in suits, according to some of the cases, to enforce the statutory liability of stockholders;⁹⁵ in stock-

Co., 8 Blatchf. 347, 11 Fed. Cas. No. 6,306; *Hatch v. Chicago, etc. R. Co.*, 6 Blatchf. 105, 11 Fed. Cas. No. 6,204.

Naming Officers in Prayers for Relief. It is undoubtedly true that a corporation may be compelled to answer a bill in equity, and that naming the officers of a corporation in prayers for relief which are really directed against the corporation itself does not make such officers parties, or necessarily indicate that they should be, but merely imports that, as the agents or servants of the corporation, they should be required to act on its behalf, as the court may direct. *Morse v. Bay State Gas Co.*, 91 Fed. 944.

91. As said by Judge Lurton, now of the federal supreme court, in *Taylor & Co. v. Southern Pac. R. Co.*, 122 Fed. 147: "It must be accepted as altogether fundamental that no court can adjudicate upon the rights, or interests, of one who is neither actually nor constructively before the court. The principle of due process of law unconditionally compels observance of the rule which limits the just jurisdiction of every court to a determination only of the rights of persons who are parties to the litigation." See, further, *U. S. New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 480, 17 Sup. Ct. 161, 41 L. ed. 518; *Weidenfeld v. Northern Pac. R. Co.*, 129 Fed. 305, 63 C. C. A. 537; *Morse v. Bay State Gas Co.*, 91 Fed. 944. **N. Y.**—*Osterhoudt v. Supervisors*, 98 N. Y. 239. **Ohio.**—*Fergus v. City of Columbus*, 6 Ohio (N. P.) 82. **Wis.**—*Board of Suprs. v. Walbridge*, 38 Wis. 179, 188.

Jurisdiction Defeated by Necessary Parties.—In the case of *Minnesota v. Northern Securities Company*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. ed. 499, was presented the anomalous situation

of defeating the jurisdiction of the court by bringing in the necessary parties, namely, *The Great Northern* and the *Northern Pacific Railway* companies, both being Minnesota corporations. The court said, that when it appears to a court of equity that a case cannot be dealt with because of the absence of essential parties; and it further appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, as in this case, when made parties, the jurisdiction of the court will thereby be defeated (see, 2 of Article 3 of the Const. of the United States), it would be useless for the court to grant leave to amend.

92. **U. S.**—*Swan Land and Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. ed. 577; *St. Louis, etc., R. Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738, 29 L. ed. 66; *Davenport v. Dows*, 18 Wall. 626, 21 L. ed. 938; *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. ed. 349; *Coiron v. Millaudon*, 19 How. 113, 15 L. ed. 575; *Shields v. Barrow*, 17 How. 130, 141, 15 L. ed. 158. **Conn.**—*Samis v. King*, 40 Conn. 298. **Ga.**—*Atlanta Real Estate Co. v. Atlanta Nat. Bank*, 75 Ga. 40. **Ill.**—*Patterson v. Lynde*, 112 Ill. 196; *Turner v. Alabama Min., etc., Co.*, 25 Ill. App. 144. **Kan.**—*Dixon v. Sumner County Comrs.*, 25 Kan. 519. **Md.**—*Fiery v. Emmert*, 36 Md. 464. **Mass.**—*Deerfield v. Nims*, 110 Mass. 115; *Price v. Minot*, 107 Mass. 49; *Lyman v. Bonney*, 101 Mass. 562. **R. I.**—*Hazard v. Durant*, 11 R. I. 195, 207.

93. *Deerfield v. Ninis*, 110 Mass. 115.

94. *Elkhart Nat. Bank v. Northwestern G. L. Co.*, 84 Fed. 76.

95. *Walsh v. Memphis, C. & N. W.*

holders' suits, in general;⁹⁶ and to a bill to compel the transfer of stock upon its books,⁹⁷ although the contrary has also been held.⁹⁸

It is also held that a railroad company is an indispensable party to a suit seeking to enjoin another railway company from building a road under a lease by it.⁹⁹

Where, however, a majority of the directors are unlawfully proceeding to dispose of corporate property, a single director may file a suit to restrain his fellow directors, and in such case it seems that the corporation is not a necessary party.¹

6. Stockholders.—Ordinarily in actions either by or against corporations, it is not necessary to mention by name any of the individual stockholders.² Yet a private corporation may be sued in an action at law by one of its own stockholders,³ and where, in a stockholder's suit, a stockholder files a bill against officers to obtain redress for wrongs arising from corporate negligence, the corporation is a necessary party defendant.⁴ Stockholders, also, may be made parties defendant for the purpose of making them answerable for unlawful acts done by them

R. Co., 6 Fed. 797; *Dormitzer v. Illinois & St. L. Bridge Co.*, 6 Fed. 217; *First Nat. Bank v. Smith*, 6 Fed. 215.

96. See *infra*, XVIII, E.

97. *Kendig v. Dean*, 97 U. S. 423, 24 L. ed. 1061; *Rogers v. Van Nortwick*, 45 Fed. 513.

98. See *Williamson v. Krohn*, 66 Fed. 655, 13 C. C. A. 668; *Gould v. Head*, 41 Fed. 240, 248. And compare *Dennis v. Perry*, 12 R. I. 540. See *Sayward v. Houghton*, 82 Cal. 628, 23 Pac. 120, where it is held that, in an action to compel a stockholder to transfer to plaintiff certain shares of stock of the corporation defendant, the corporation is not in any sense interested in the action, and although not improperly made a party defendant is not a necessary party.

99. *Northern Ind. R. Co. v. Michigan C. R. Co.*, 15 How. (U. S.) 233, 14 L. ed. 674.

1. *Green v. Compton*, 41 Misc. 21, 83 N. Y. Supp. 588.

2. *Kennebec & Port. R. R. Co. v. Portland & Kennebec R. Co.*, 54 Me. 173; *Peabody v. Flint*, 6 Allen (Mass.) 52.

Stockholder Not Proper Party Plaintiff.—Where a contract was made with "M. W. Lee & Co.," incorporated, M. W. Lee, individually, is not a proper party plaintiff in an action upon such a contract. The defense that defendant did not contract with Lee individually, may also be set up under a

general denial. *Lee v. Young (Wis.)*, 132 N. W. 595.

Persons are not made parties to litigation by the mere fact that one of the parties thereto is a corporation of which such persons are stockholders. *Hearn v. Clare*, 131 Ga. 374, 62 S. E. 187; *Blackman v. Central R., etc. Co.*, 58 Ga. 189.

3. *Mass.*—*Pierce v. Partridge*, 3 Met. 44. *S. C.*—*Waring v. Catawba Co.*, 2 Bay 109. *Vt.*—*Sawyer v. Methodist Episcopal Society*, 18 Vt. 405. *Eng.* *Hill v. Manchester Water Works*, 5 B. & Ad. 866, 110 Eng. Reprint 1011. And see *supra*, p. 564.

4. *U. S.*—*Eldred v. American, etc. Co.*, 105 Fed. 457, 44 C. C. A. 554. *Ill.* *Bruschke v. Der Nord, etc. Verein*, 145 Ill. 433, 34 N. E. 417. *N. J.*—*Willoughby v. Chicago, etc. Co.*, 50 N. J. Eq. 656, 25 Atl. 277. *N. Y.*—*Niles v. New York, etc. R. R.*, 69 App. Div. 144, 74 N. Y. Supp. 617. *Va.*—*Mount v. Radford, etc. Co.*, 93 Va. 427, 25 S. E. 244. *W. Va.*—*Kyle v. Wagner*, 45 W. Va. 349, 32 S. E. 213.

Demurrer Will Lie.—Although a stockholder in a corporation may bring suit when the corporation refuses, yet, as in such case the suit can be maintained only on the ground that the rights of the corporation are involved, the corporation should be a party to the suit, and a demurrer will lie if it is not so made. *Davenport v. Dows*, 18 Wall. (U. S.) 626, 21 L. ed. 938.

in the name of, or with the consent of, the corporation.⁵ Where, moreover, stockholders agree to be responsible for future debts of a corporation, all so agreeing should be made parties, likewise the corporation, in an action to enforce the agreement.⁶

State a Stockholder.—Although the state may be a stockholder, or even the only stockholder, in a corporation, nevertheless the corporation may be sued.⁷

C. ACTIONS TO COLLECT SUBSCRIPTIONS.—As long as the corporation is solvent, actions to collect unpaid subscriptions to stock are properly brought by the corporation itself.⁸ In case, however, of the corporation's insolvency, the receiver or assignee is the proper party plaintiff.⁹ It has been held, however, that creditors may proceed in equity against stockholders to enforce unpaid subscriptions,¹⁰ and in such suits by creditors the corporation is a necessary party.¹¹

5. *Attorney General v. Wilson*, C. & P. 1, 21, 41 Eng. Reprint 389; *Betts v. De Vitre*, 11 Jur. N. S. 9, 11; 34 L. J. Ch. 289. See *Daniell's Ch. Pl. & Pr.* (6th Am. Ed.), p. 143.

6. *Farmers' Nat. Bank v. Hannon*, 14 Fed. 593.

7. *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat. (U. S.) 904, 6 L. ed. 244; *Briscoe v. Bank of Kentucky*, 11 Pet. (U. S.) 257, 9 L. ed. 709.

Sovereign State Distinguished.—While a canal, for example, belonged to a state, the state was exempt from suit by virtue of her sovereignty; but when the state created a corporation, of which she became a member, and transferred to such corporation the canal, the fact that the state is a member of the corporation does not protect the corporation against suits and their incidents. *Moore v. The Board of Trustees*, etc., 7 Ind. 462.

8. *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329.

9. *N. Y.*—*Dayton v. Borst*, 31 N. Y. 435. *Pa.*—*Mean's Appeal*, 85 Pa. 75. *B. I.*—*Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376.

Suit by Directors.—Under a statute authorizing the bank commissioners to make assessments for the speedy settlement of the affairs of an insolvent bank, it has been held that the directors may issue a call for unpaid subscriptions, and may sue thereon, since if the commissioners do not object, no one else may. *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329.

10. *U. S.*—*Handley v. Stutz*, 137

U. S. 366, 11 Sup. Ct. 117, 34 L. ed. 706; *Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. 432, 27 L. ed. 265; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885; *Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294. *N. J.*—*Bickley v. Schlag*, 46 N. J. Eq. 533, 20 Atl. 250; *Wetherbee v. Baker*, 35 N. J. Eq. 501. *Ohio.*—*Umsted v. Buskirk*, 17 Ohio St. 113. *Wis.*—*Carpenter v. Marine Bank*, 14 Wis. 705n.

Plaintiffs.—One or more creditors may file the bill in behalf of himself, or themselves, and, also, of such other creditors as may care to come in. *Handley v. Stutz*, 137 U. S. 366, 11 Sup. Ct. 117, 34 L. ed. 706.

Subsequent Suit Enjoined.—When a bill has been filed by a creditor, the other creditors, if they desire to participate in the proceedings, must come in. An independent suit filed by a creditor subsequently to original suit, will be enjoined. *Pierce v. Milwaukee Construction Co.*, 38 Wis. 253. See also, *Crease v. Babcock*, 10 Metc. (Mass.) 525.

11. Corporation and Delinquent Stockholders.—The general rule as to parties defendant in a creditor's suit in equity to enforce unpaid subscriptions, is that the corporation must be made a defendant, and also all the stockholders whose subscriptions are due and unpaid. See the following cases: *U. S.*—*Swan Land, etc. Co. v. Frank*, 39 Fed. 456; *First Nat. Bank v. Smith*, 6 Fed. 215. *Mich.*—*Dunston v. Hoptonie Co.*, 83 Mich. 372, 47 N. W. 322. *N. H.*—*Erickson v. Nesmith*, 46

D. CREDITOR'S SUITS.—In suits by creditors to enforce the statutory liability of stockholders, the rules regulating parties depend upon the form of the remedy, that is, whether it be at law or in equity. In the action at law, one creditor may sue one stockholder separately.¹² In the suit in equity, while the cases are not in harmony, yet the weight of authority is to the effect that, inasmuch as the fund is exclusively for the benefit of creditors, and constitutes no part of the assets of the corporation, only the creditors are proper parties plaintiff,¹³ and a receiver cannot sue unless some statute confers such a right.¹⁴

While some cases hold that a single creditor may sue alone,¹⁵ or that

N. H. 371. N. J.—*Wetherbee v. Baker*, 35 N. J. Eq. 501. Ohio.—*Umsted v. Buskirk*, 17 Ohio St. 113. Wis.—*Pierce v. Milwaukee Construction Co.*, 38 Wis. 253.

Dissolved Corporation.—Where, however, a corporation has been dissolved, or where it is beyond the jurisdiction of the court, it need not be joined as a party. *Walser v. Seligman*, 21 Blatchf. (U. S.) 130, 13 Fed. 415; *Wellman v. Howland Coal & Iron Works*, 19 Fed. 51.

Suing Part of Stockholders.—By the rule in some jurisdictions, one or more stockholders may be sued for unpaid subscriptions, it being held unnecessary to join them all. *Baines v. Babcock*, 95 Cal. 581, 30 Pac. 776, 27 Pac. 674; *Potter v. Dear*, 95 Cal. 578, 30 Pac. 777; *Wilson v. California, etc. Co.*, 95 Mich. 117, 54 N. W. 643.

May Enforce Contribution.—It has also been held that where a suit is filed against less than all of the stockholders, the defendants may apply for a receiver, or may file a cross-bill to obtain a discovery from the other stockholders, and enforce contribution from all who are in arrears upon their subscriptions. *Hatch v. Dana*, 101 U. S. 205, 214, 25 L. ed. 885; *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797.

12. *Perry v. Turner*, 55 Mo. 418; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473; *Abbott v. Aspinwall*, 26 Barb. (N. Y.) 202; *Woodard v. Holland Medicine Co.*, 39 N. Y. St. 411.

Partners.—Where, however, the shareholders are liable as partners, all must be sued jointly. *Allen v. Sewall*, 2 Wend. (N. Y.) 327.

13. U. S.—*Terry v. Little*, 101 U. S.

216, 25 L. ed. 864; *Hornor v. Henning*, 93 U. S. 228, 23 L. ed. 879; *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376; *New Hampshire Sav. Bank v. Richey*, 121 Fed. 956, 58 C. C. A. 294. Ala.—*Smith v. Huckabee*, 53 Ala. 191. Colo.—*Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565. Ill.—*Wincock v. Turpin*, 96 Ill. 135. Ind.—*Runner v. Dwiggin*, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645. Mo.—*Liberty, etc. Assn. v. Watkins*, 70 Mo. 13. N. Y.—*Farnsworth v. Wood*, 91 N. Y. 308; *Pfohl v. Simpson*, 74 N. Y. 137; *Griffith v. Mangam*, 73 N. Y. 611. Ohio.—*Umsted v. Buskirk*, 17 Ohio St. 113; *Wright v. McCormack*, 17 Ohio St. 86. Utah.—*Steinke v. Loofbourov*, 17 Utah 252, 54 Pac. 120.

14. Ala.—*Smith v. Huckabee*, 53 Ala. 191. Ind.—*Runner v. Dwiggin*, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645. Utah.—*Steinke v. Loofbourov*, 17 Utah 252, 54 Pac. 120. See also, cases in preceding note.

Statutory Provisions.—In a number of jurisdictions, however, a more expeditious method of procedure is provided by statutes permitting the receiver or assignee to sue. See *Moore v. Ripley*, 106 Ga. 556, 32 S. E. 647; *Watterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041. And consult the statutes of the various states. See, also, *State v. Union Stock Yards State Bank*, 103 Iowa 549, 70 N. W. 752, 72 N. W. 1076.

National Banks.—In case of the insolvency of a national bank, the receiver may enforce the statutory liability by an action at law. *Keyser v. Hitz*, 133 U. S. 133, 10 Sup. Ct. 290, 33 L. ed. 531.

15. Ga.—*Harrell v. Blount*, 112 Ga. 711, 38 S. E. 56. Kan.—*Ball v. Reese*,

two or more creditors may join as plaintiffs,¹⁶ the prevailing rule is that any one or more creditors may sue both for themselves, and for the benefit of all other creditors who may desire to come in.¹⁷

All the stockholders should regularly be made defendants,¹⁸ although it may not be necessary in some jurisdictions to join them all.¹⁹

Some cases, moreover, hold that the corporation should, also, be made a party defendant,²⁰ although in other jurisdictions the courts take

58 Kan. 614, 50 Pac. 875. **N. Y.**—Bank of Poughkeepsie v. Ibbotson, 24 Wend. 473.

Suits by Single Creditors Criticised. The supreme court of Washington has said that a method which would allow a single creditor to maintain an action at law against one or more of the stockholders for his own benefit would be so unjust to other creditors, and might result in such annoyance to the stockholders that only positive language would justify the courts in holding that the liability might be thus enforced. *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939, quoted and approved in *Elson v. Wright*, 134 Iowa 634, 112 N. W. 105.

16. **Kan.**—Buist v. Citizens' Savings Bank, 4 Kan. App. 700, 46 Pac. 718. **Nev.**—Thompson v. Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797. **Wis.**—Cleveland v. Marine Bank, 17 Wis. 545.

17. **Colo.**—Adams v. Clark, 36 Colo. 65, 85 Pac. 642. **Neb.**—Hastings v. Barnd, 55 Neb. 93, 75 N. W. 49. **N. Y.**—Hagmayer v. Alten, 41 App. Div. 487, 57 N. Y. Supp. 684. **Wis.**—Finney v. Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486; Booth v. Dear, 96 Wis. 516, 71 N. W. 816.

18. Unless for some sufficient reason they cannot be brought before the court, all the stockholders must be joined as defendants. *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335. And see, also, the following cases: **Neb.**—Pickering v. Hastings, 58 Neb. 201, 76 N. W. 587. **N. H.**—Crippen v. Loughton, 69 N. H. 540, 44 Atl. 538, 76 Am. St. Rep. 192. **N. Y.**—Hagmayer v. Alten, 41 App. Div. 487, 58 N. Y. Supp. 684.

19. This difference in the rules as to parties defendants turns upon the character of the remedy, whether at law or in equity. The statute, for example, may make each stockholder individually and personally liable for such proportion of the corporate in-

debtedness as the amount of stock owned by him bears to the whole of the subscribed capital stock. The supreme court of the United States has said that where a stockholder is liable only for his pro rata proportion of the debts, such proportion can be ascertained only upon an accounting, making a suit in equity the only appropriate remedy in such a case. Where, however, the statute makes every stockholder individually liable for a fixed amount, as, for example, an amount equal to the amount of his stock, then any creditor may sue any stockholder at law. *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966 (construing Florida statute). And see the following cases: **U. S.**—Mills v. Scott, 99 U. S. 25, 25 L. ed. 294 (Georgia statute). **Ark.**—Lanigan v. North, 69 Ark. 62, 63 S. W. 62. **Ga.**—Moore v. Ripley, 106 Ga. 556, 32 S. E. 647. **Ill.**—Chester Nat. Bank v. Zinser, 55 Ill. App. 510. **Minn.**—Hencke v. Twomey, 58 Minn. 550, 60 N. W. 667. **N. Y.**—Weeks v. Suydam, 64 N. Y. 173. **S. D.**—Union Nat. Bank v. Halley, 19 S. D. 474, 104 N. W. 213.

Stockholders May Be Joined.—Stockholders, in California are proper parties defendant. It is held there that the liability of a stockholder is founded upon contract made by the corporation for and on account of its stockholders, their personal liability attaching to and attending that of the corporation. If a debt be established as that of a corporation, when an action to recover the same is brought, the stockholders who were such when the debt was contracted may be joined as parties defendant and appropriate judgments entered in the action. *Kennedy v. Cal. Sav. Bank*, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163; *Kiefhaber Lumber Co. v. Newport Lumber Co.*, 15 Cal. App. 37, 113 Pac. 691.

20. **Colo.**—See *Tabor v. Goss*, etc. Co., 11 Colo. 419, 18 Pac. 537. **N. H.**—Crippen v. Loughton, 69 N. H. 540, 44

the position that the corporation need not be made a party defendant.²¹

Under some of the codes, all parties having "a common interest" must join as far as practicable.²²

E. FORECLOSURE SUITS.—In suits instituted for the foreclosure of mortgages given to secure bondholders, the trustee is the proper party plaintiff,²³ although a bondholder may intervene and be made a party defendant.²⁴ A bondholder should not, however, as a rule, be made a party plaintiff jointly with the trustee.²⁵ In case, however, of the trustee's refusal to bring suit to foreclose, any bondholder may institute such proceedings, making the trustee a defendant.²⁶

Atl. 538. **N. Y.**—Pfohl v. Simpson, 74 N. Y. 137; Masters v. Rossie Lead Mining Co., 2 Sandf. Ch. 301. **Pa.** Patterson & Co. v. Wyomissing, etc. Co., 40 Pa. 117. **W. Va.**—Nimick & Co. v. Mingo Iron Works Co., 25 W. Va. 184. **Wis.**—Coleman v. White, 14 Wis. 700, 80 Am. Dec. 797.

Character of the Remedy.—A review of the above cases will show that, as in the case of stockholders, so likewise whether the corporation should be made a party defendant depends frequently upon the nature of the remedy. Where the suit is equitable in character, the corporation is generally required to be made a party. At times, the question of the proper parties defendant turns upon the form of the statute.

21. Minnesota.—Thus, under the Minnesota statute, where a creditor has obtained judgment against a corporation, which judgment is unsatisfied, the creditor may sue a stockholder to enforce his individual liability, without joining the corporation as a party. Nolan v. Hazen, 44 Minn. 478, 47 N. W. 155. See also, **U. S.**—Flour City Nat. Bank v. Wechselberg, 45 Fed. 547. **Fla.**—Gibbs v. Davis, 27 Fla. 531, 8 So. 633. **N. Y.**—Perkins v. Church, 31 Barb. 84; Mickles v. Rochester City Bank, 11 Paige 118, 42 Am. Dec. 103.

22. See, for example, Bronson v. Wilmington, etc. Ins. Co., 85 N. C. 411, where it is held that, when the complaint avers that the defendants and others whose names are not known are stockholders, and that it is impracticable from their great number to bring them all before the court, no demurrer will lie for defect of parties, since in such a case one may sue or be sued for all the others. See also Glenn v. Farmers Bank, 72 N. C. 626.

23. U. S.—Grand Trunk R. Co. v. Central Vermont R. Co., 88 Fed. 622.

Ind.—Wright v. Bundy, 11 Ind. 398. **Mass.**—Shaw v. Norfolk, etc. R. Co., 5 Gray 162. **N. J.**—See Willink v. Morris Canal, etc. Co., 4 N. J. Eq. 377.

Two or More Trustees.—The action should be brought by the trustees jointly, and if one refuses to join he should be made a party defendant. Tillinghast v. Troy, etc. R., 48 Hun 420, 1 N. Y. Supp. 243, 121 N. Y. 649, 24 N. E. 1091.

24. Central Trust Co. v. Washington County R. Co., 124 Fed. 813; **Grand Trunk R. Co. v. Central Vermont R. Co.,** 88 Fed. 622; **Farmers' L. & T. Co. v. Cape Fear, etc. R. Co.,** 71 Fed. 38; **Toler v. East Tenn., etc. R. Co.,** 67 Fed. 168; **Williamson v. New Jersey S. R. Co.,** 25 N. J. Eq. 13.

Not Necessary Parties.—The bondholders are not, however, necessary parties. **U. S.**—Shaw v. Little Rock, etc. R. Co., 100 U. S. 605, 25 L. ed. 757; **Chicago, etc. R. Co. v. Howard, 7 Wall.** 392, 415, 19 L. ed. 117. **Mo.**—Rumsey v. People's R., 154 Mo. 215, 55 S. W. 615. **Mass.**—Shaw v. Norfolk, etc. R. Co., 5 Gray 162. See, however, **Chicago, etc. Land Co. v. Peck,** 112 Ill. 408, holding that the bondholders, as beneficiaries, should be joined unless too numerous.

25. Consolidated Water Co. v. City of San Diego, 92 Fed. 759. *Compare* Brooks v. Vermont Central R., 14 Blatchf. 463, 4 Fed. Cas. No. 1,964.

26. U. S.—Omaha Hotel Co. v. Wade, 97 U. S. 13, 24 L. ed. 917. **Cal.**—Citizens Bank v. Los Angeles, etc. Co., 131 Cal. 187, 63 Pac. 462. **Ky.** Louisville, etc. R. Co. v. Schmidt, 21 Ky. L. Rep. 556, 52 S. W. 835. **Mass.** First Nat. Fire Ins. Co. v. Salisbury, 130 Mass. 303. **N. J.**—Schultze v. Van Doren, 64 N. J. Eq. 465, 53 Atl. 815, 65 N. J. Eq. 764, 55 Atl. 1133. **Pa.** Com v. Susquehanna & D. R. E. Co., 122 Pa. 306, 15 Atl. 448.

Where a bondholder brings the suit, the other bondholders must also be brought in as parties.²⁷

VIII. PROCESS.—**A. FORM OF PROCESS.**—In early times, it seems that, at common law, an original writ was the only way of proceeding against corporations,²⁸ and the only forms of process against corporations aggregate were summons, and distress.²⁹

Owing to the incorporeal nature of corporations, no *capias* lay against them,³⁰ and members of a corporation aggregate are not liable to *capias* for anything done by them in their corporate capacity.³¹

In chancery proceedings, the regular process employed was the writ of subpoena.³²

Pledges of Corporate Bonds.—Where a trusteeship is vacant, in a suit by the pledgee of corporate bonds who seeks to have a new trustee appointed and also the appointment of a receiver for the purpose of winding up the affairs of the corporation, the pledgor of the bonds having an equity of redemption in the bonds held by complainant, must be made a party defendant. *State Nat. Bank v. Syndicate Co.*, 178 Fed. 359.

27. A single bondholder will not be permitted in a court of equity to proceed for his demand without bringing in the other bondholders in some form or manner. *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548; *Story's Eq. Pld.*, §§102, 103, 157.

28. *Tidd's Pr.*, 102, 104.

No Form of Writ Extant.—It has been said that "no precedent of an original writ against a corporation has been known" (*Ang. & Am. on Corp.*, §637, citing *Lynch v. The Mechanics' Bank*, 13 Johns. (N. Y.) 127). The case does not, however, bear out the proposition, but holds that the original writ, in assumpsit, against a corporation must be in the nature of a summons and not by *pone* or attachment. The court does say, however, that "no precedent of an original writ against a corporation has been shown"; that is, in the argument of the case. It is further said in this same case, by counsel, that "there is not any form of a writ against a corporation to be found in the Register" (*i. e.* *Registrum Brevium*, Register of Writs, kept in Chancery, and first printed in the time of Henry VIII), "but it is the same as against a peer."

29. Lord Chief Justice Holt in *Anon.*, 6 Mod. 184; *Reg. v. Birmingham*,

etc. R. Co., 3 Ad. & El. 223, 2 Gale & D. 236, 243. See, also, *Davis v. New York*, 1 Duer (N. Y.) 451.

Blackstone.—Sir William Blackstone says: "A corporation cannot be outlawed, for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do; for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods." 1 Bl. Com., I, 477. See, also, *Bro. Abr. tit., Corporation*, II; *Com. Dig., Pleader*, 2 B. 2; *Tidd's Pr.*, 112.

Tidd's Practice.—Tidd says (112), "summons, attachment, and distress." Attachment, however, was undoubtedly by attachment of goods and not of person. The old authorities all agree that an attachment of body (*i. e.*, attachment, *pone*) did not lie against a corporation, and that the proper proceedings is by summons. 1 Bac. Abr. Corp. 507; 1 Kyd on Corp. 272; *Tidd, Ch. VI.* And see *Lynch v. The Mechanics' Bank*, 13 Johns. (N. Y.) 127.

30. *Riddle v. The Proprietors, etc.*, 7 Mass. 169, 5 Am. Dec. 35; *Anon.*, 6 Mod. 184; *Smith v. Butler*, *Comberbach's Rep.* (K. B.) 326, 90 English Reprint 507; *Tidd's Pr.*, 104, 112.

31. *Ang. & Ames Corp.*, §637; *Bro. Corp.*, pl. 43; *Tidd's Pr.*, 115.

Particular Person in Fault.—As said, however, by Lord Chief Justice Holt, in *Smith v. Butler*, *supra*: "If the breach could be fixed upon any particular person (of the corporation) we will attach him; as where a *mandamus* is directed to the corporation, and any particular person be in fault, we grant an attachment."

32. Where a corporation is made

Modern Practice.—In actions at law, summons is the regular form of process against corporations.³³ In suits in equity, the writ of subpoena is still used in the federal courts,³⁴ and in some of the state courts.³⁵ In other jurisdictions, however, where proceedings in equity are yet distinguished from proceedings at law, the writ of subpoena has been abolished, and summons accompanied, in some jurisdictions, with a copy of the bill, has taken its place.³⁶

Under the codes of civil procedure, summons is the form of process regularly employed.³⁷

Federal Courts.—In the federal courts, the form and requirements of process are regulated by the federal statutes,³⁸ and a federal statute provides that procedure in civil causes, other than equity and admiralty, shall conform "as near as may be" to the local state prac-

defendant, the process of subpoena is the same as in ordinary cases. Under the English practice, the bill sometimes prayed that, in case of its default to appear and answer the bill, the writ of *distringas* might issue to compel it to do so. Story, Eq. Pl., §44; Fletcher, Eq. Pl. & Pr., p. 113.

Wording of the Penalty.—When the defendant is a corporation aggregate, the words, "you will be liable to have your lands and tenements, goods and chattels distrained upon, and other proceedings taken against you," are substituted for the words, "you will be liable to be arrested and imprisoned." Braithwaite's Pr., 29n; Daniell's Ch. Pl. & Pr., 441.

Served Upon Whom.—A subpoena, in case of a corporation, is usually served on the president, treasurer, secretary, or other principal officer. 1 Barbour, Ch. Pr. 52; 1 Hoffman, Ch. Pr. 108; Fletcher's Eq. Pl. & Pr., p. 165. And see Walker v. Hallett, 1 Ala. 379.

Enforcing Appearance.—According to the former chancery practice, if due service had been made upon a corporation, and the corporation failed to appear, an appearance could be entered by the plaintiff, upon affidavit of service, or a writ of *distringas* could, by leave of the court, be issued. This writ might be followed by an *alias* and also by a *pluries distringas*. If the sheriff returned *nulla bona* to these various writs, a writ of sequestration could be obtained against the corporation. Should the corporation stand out process till the order absolute for sequestration issue, then the plaintiff, upon obtaining such order, could move, as of course, to have the bill taken

pro confesso. Daniell's Ch. Pl. & Pr. 477, 498; Angell & Ames, Corp., §667 *et seq.*; Jones v. Boston Mill Corp., 4 Pick. (Mass.) 507; McKim v. Odom, 3 Bland. 407, 426; Brickwood v. Harvey, 8 Sim. 201, 59 Eng. Reprint 80.

33. **Ind.**—Bank of Vincennes v. State, 1 Blackf. 267. **N. J.**—State Bank v. Van Horn, 4 N. J. L. 382. **N. Y.**—Brown v. Syracuse & U. R. Co., 5 Hill 554; Lynch v. Mechanics' Bank, 13 Johns. 127. **N. C.**—Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667. **S. C.**—Clark v. Porcelain Mfg. Co., 8 S. C. 22. **W. Va.**—Snyder v. Philadelphia Co., 54 W. Va. 149, 46 S. E. 366, 102 Am. St. Rep. 941, 63 L. R. A. 896.

34. See Rule 7, rules of practice for the courts of equity of the United States.

35. The statutes and rules of courts should be consulted in jurisdictions where the procedure in equity is distinguished from the procedure in legal actions.

36. Thus, in England, the writ of subpoena has been abolished, and the defendant is served with a printed copy of the bill. 15 & 16 Vic., c. 86, §2-5; Daniell's Ch. Pl. & Pr., 440.

Tennessee.—In Tennessee, process in suits in equity consists of summons and a copy of the bill. Code, §4340, *et seq.*

37. The statutes of the various code states should be consulted.

38. See U. S. Rev. St., §§911, 912, 954. See also, Hume v. Pittsburgh, C. & St. L. R. Co., 8 Biss. 31, 12 Fed. Cas. No. 6,865.

Service of Process.—The mode of service of process conforms, however,

tice.³⁸ In suits in equity, however, the writ of subpoena is still in use.⁴⁰

To Whom Directed.—The summons must be directed to the corporation, and must run in the corporate name.⁴¹ A summons merely commanding an officer or agent of the designated corporation to appear is not a summons to the corporation itself,⁴² and an individual member summoned may plead want of notice to the corporation.⁴³ Accordingly where a summons was issued against an individual, describing him as a certain officer of a corporation, no evidence appearing that the corporation was suable in such form, it was held only a summons to the officer individually.⁴⁴ A stockholder cannot, moreover, by his appearance waive service upon the corporation.⁴⁵

Under the Louisiana code, a citation addressed to the president of a defendant corporation is an absolute nullity.⁴⁶

Wrong Name.—Process in a wrong name, that is, misnomer of the corporation, may be amended on motion, in some jurisdictions,⁴⁷ but

“as near as may be” to the state practice. See, *infra*, VIII, B.

39. The federal statutes (Rev. Sts., §914) provide that the practice, pleadings and forms and mode of proceeding in civil causes, other than equity and admiralty causes in the district courts shall conform, “as near as may be,” to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held. The words “near as may be” do not mean “as near as may be possible,” nor “as near as may be practicable,” but are to be construed by the federal courts so as to reject, if needs be, any subordinate provision in the state laws which would defeat the ends of justice in their tribunals. *Phelps v. Oaks*, 117 U. S. 236, 6 Sup. Ct. 714, 29 L. ed. 888; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 301, 23 L. ed. 898. See, also, *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. ed. 946. And see following page as to service of process, VIII, B.

40. Rules of Practice for the Courts of Equity of the United States, Rule 7.

41. **U. S.**—*Illinois Steel Co. v. San Antonio, etc. R. Co.*, 67 Fed. 561. **La.** *State v. Voorhies*, 50 La. Ann. 671, 23 So. 871. **Tex.**—*Gulf, etc. R. Co. v. Rawlins*, 80 Tex. 579, 16 S. W. 430; *Sun Mut. Ins. Co. v. Seeligson & Co.*, 59 Tex. 3. **Vt.**—*Nye v. Burlington, etc. R. Co.*, 60 Vt. 585, 11 Atl. 689.

Need Not Allege Incorporation.—The stating of the corporate name in the

summons is, however, sufficient, and the fact of incorporation need not be alleged. **Miss.**—*Winnier v. Weems*, 77 Miss. 682, 27 So. 618. **N. C.**—*Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667. **W. Va.**—*Snyder v. Philadelphia Co.*, 54 W. Va. 149, 46 S. E. 366, 102 Am. St. Rep. 941, 63 L. R. A. 896.

42. **Conn.**—*Rand v. Props. of Upper Locks & Canals on Conn. River*, 3 Day 441. **La.**—*State v. Montegudo*, 48 La. Ann. 1417, 20 So. 911. **Mo.**—*Blodgett v. Schaffer*, 94 Mo. 652, 7 S. W. 436. **N. Y.**—*Ziegler v. George Schleicher Co.*, 56 Misc. 582, 107 N. Y. Supp. 85. **Tex.** *Mutual Life Ins. Co. of N. Y. v. Uecker*, 46 Tex. Civ. App. 84, 101 S. W. 872.

43. *Rand v. Proprietors of Locks, etc.*, 3 Day (Conn.) 441.

44. *Terhune v. Parrott*, 59 N. J. L. 16, 35 Atl. 4.

45. *Moore v. Schoppert*, 22 W. Va. 282.

46. *State v. Voorhies*, 50 La. Ann. 671, 23 So. 871; *State v. Montegudo*, 48 La. Ann. 1417, 20 So. 911.

47. **Ga.**—*Johnson v. Central R. R.*, 74 Ga. 397. **Mass.**—*Sherman v. Conn. River Bridge Co.*, 11 Mass. 338. **N. H.** *Burnham v. Strafford County Sav. Bank*, 5 N. H. 573. **N. C.**—*Lane v. Seaboard & Roanoke R. Co.*, 50 N. C. 25. **Pa.**—*Edinboro Academy v. Robinson*, 37 Pa. 210, 78 Am. Dec. 421. **W. Va.** *Varney & Evans v. Hutchinson Lumber & Mfg. Co.*, 64 W. Va. 417, 63 S. E. 203.

Corporation Not Mised.—Where a

a misnomer in the summons is not cured by an amended petition which correctly states the name of the defendant corporation.⁴⁸ A voluntary general appearance will, however, constitute a waiver of such a defect.⁴⁹

B. SERVICE OF PROCESS. — 1. General Statement. — In proceeding against a municipal corporation, the process should be served on the mayor, or other head officer,⁵⁰ and process against a private corporation must be served on its head, or principal officer, within the jurisdiction of the sovereignty where this artificial body exists.⁵¹

At common law no process can be served upon a foreign corporation because it has no corporate existence within the realm.⁵²

Suits in Chancery. — Under the chancery practice, the subpoena, in case of a corporation, is served, as a rule, upon the president, secretary, or some other principal officer.⁵³ Service upon a mere stockholder is not sufficient.⁵⁴

In the Federal Courts. — In connection with the federal statute providing that procedure in civil causes, other than equity and admiralty, shall conform "as near as may be" to the state practice,⁵⁵ the federal supreme court has said that there can be no doubt that the mode of

summons styled a corporation "Grant's Lick, Claryville & Butler Turnpike Company," when its correct name was "Claryville, Grant's Lick & Butler Turnpike Company," but it was served upon the president of the "Claryville, Grant's Lick & Butler Turnpike Company," and the court, when the error in the name was discovered, entered an order, under authority of the statute relating to amendments, correcting the name, the real corporation was in fact before the court by the summons executed upon its chief officer, and it was not misled or deceived in the slightest degree by the trifling error in the description of its name. *Claryville, Grant's Lick & Butler Turnpike Co. v. Com.*, 32 Ky. L. Rep. 861, 107 S. W. 327; *International Harvester Co. v. Com.*, 30 Ky. L. Rep. 716, 99 S. W. 637.

48. *Southern Pac. Co. v. Block*, 84 Tex. 21, 19 S. W. 300.

Variance Immaterial. — A citation commanding the sheriff to summon the Central & Montgomery Railway Company, when the petition is filed against the Central & Montgomery Railroad Company, is an immaterial variance. *Central & M. R. Co. v. Morris*, 68 Tex. 49, 3 S. W. 457; *Galveston, H. & S. A. Ry. Co. v. Donahoe*, 56 Tex. 162. Compare *Great Northern Hotel Co. v. Farand*, etc. *Organ Co.*, 90 Ill. App. 419.

49. *U. S. — Virginia & M. Steam*

Nav. Co. v. United States, 28 Fed. Cas. No. 18,973. *Ill. — Clarkson v. Erie & N. S. Dispatch Co.*, 6 Ill. App. 284. *Kan. — School Dist. v. Griner*, 8 Kan. 224.

50. *People v. City of Cairo*, 50 Ill. 154, 159; *Ang. & Ames Corp.*, §§575, 637. *Tidd's Pr.*, 116, 121.

51. *In re McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5, per Spencer, J.

At Common Law. — Service was made on such head officer of a corporation as secured knowledge of the process to the corporation. *Mr. Chief Justice Fuller in Kansas City, etc. Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. ed. 963.

Service on Officers Sufficient at Common Law. — *Ga. — Hartford City Fire Ins. Co. v. Carrugi*, 41 Ga. 660. *Mich. Newell v. Great Western R. Co.*, 19 Mich. 336. *N. Y. — Barnett v. Chicago, etc. R. Co.*, 4 Hun 114. *S. C. — Glaiize v. South Car. R. Co.*, 1 Strobb. L. 70.

52. *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301. *Tidd's Pr.*, 116. And see *infra*, XX.

53. 1 Barb. Ch. Pr. 52; 1 Hoffman, Ch. Pr. 108.

54. *De Wolf v. Mallett's Admr.*, 3 Dana (Ky.) 214.

55. *U. S. Rev. St.*, §914. And see *supra*.

service of process is within the act.⁵⁶ In suits in equity, however, the state practice as to service is not binding upon the federal courts, although it may be a proper guide to follow.⁵⁷ Usually, in the federal courts, in suits in equity, the subpoena, in case of domestic corporations, should be served upon one of its officers;⁵⁸ or, in case such service is impossible, by leaving a copy at its principal place of business;⁵⁹ or if it has no such place of business, by service upon its managing agents,⁶⁰ or, possibly, upon one of its stockholders.⁶¹

A foreign corporation, complying with the laws of the state in which it is doing business, and which has not restricted to the state courts its consent to be served with process, may be served in the same way as under the state law.⁶²

The foreign corporation, however, in order to be subject to service,

56. *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. ed. 946.

Not an Entire Adoption of State Modes.—The federal statute takes notice of the impossibility of an entire adoption of state modes of proceeding by providing that conformity is only required "as near as may be." Consequently, where changes in the state law regulating writs of summons have been enacted, such changes will not apply to a federal district court sitting in such state unless such court sees fit to alter its rules, from time to time, in subserviency to such changes. So held where the existing federal rule, in conformity with the previous statute, made the summons returnable in ten days, although the later statute of the state (Colorado) provides for a period of thirty days. *Shepard v. Adams*, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. ed. 602.

57. *Eby v. Northern Pac. R. Co.*, 13 Phila. (Pa.), 144. And see, in general, *St. Clair v. Cox*, 106 U. S. 350, 356, 1 Sup. Ct. 354, 27 L. ed. 222; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *United States v. American Bell Tel. Co.*, 29 Fed. 17, 32.

58. See *Foster's Fed. Pr.*, 3rd ed., §95.

General Rule in Equity Practice.—A subpoena, in case of a corporation, is usually served on the president, treasurer, secretary, or other principal officer. 1 *Barbour*, Ch. Pr. 52.

General Rule in Federal Courts.—The state practice while not binding upon courts of equity is, however, generally followed in the federal courts. *Foster's Fed. Pr.*, 3rd ed., §95. See, also, preceding note.

59. Suits in equity in the federal courts are regulated, not by the state statutes, but by the judiciary acts, and the rules of equity practice adopted for and governing said courts. Equity Rule 13 provides as follows: "The service of all subpoenas shall be by delivery of, a copy thereof, by the officers serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family." The court can acquire jurisdiction over parties in equity suits only by the service of process within the district in compliance with the requirements of this rule, or by their voluntary appearance. *United States v. American Bell Tel. Co.*, 29 Fed. 17, 32.

60. *Foster's Fed. Pr.*, 3rd ed., §95.

61. *Foster's Fed. Pr.*, 3rd ed., §95. In *Daniell's Ch. Pl. & Pr.*, 6th Am. Ed., p. 445, it is said: "If a corporation aggregate be a defendant, the copy of the bill may be served upon any one of its members, or, in the case of a public company, upon the public officer appointed to be sued on its behalf, or if there be no such officer, upon the chairman, manager, or secretary, either personally, or at the office of the company." See, however, *De Wolf v. Mallett's Admr.*, 3 Dana (Ky.), 214, where it is held that service on private corporations is not service upon the corporation.

62. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853. And see *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222.

must carry on its business in the federal district in which the suit is brought.⁶³

If a suit is brought against a state, service is made upon the governor and the attorney-general.⁶⁴

Service upon the United States, as a corporation, is made upon the attorney-general, or the district attorney of the district where the suit is brought.⁶⁵

2. Statutory Provisions.—In all the American states, the service of process upon corporations is regulated by the statutes, which designate, generally, the place or service, the persons upon whom service may be made, and the manner of service.⁶⁶

Statutory provisions are mandatory, and they must be followed,⁶⁷ subject, however, to the rule that the method of service provided must be reasonable.⁶⁸

63. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. ed. 1137; *Riddle v. New York*, etc. R. Co., 39 Fed. 290; *Zambrino v. Galveston*, etc. R. Co., 38 Fed. 449; *Block v. Atchison*, *Topeka & S. F. R. Co.*, 21 Fed. 529.

64. When process at common law or in equity shall issue against a state, the same shall be served on the governor, or chief executive magistrate, and attorney general of such state. Rule No. 5 of the Supreme Court of the United States. See, also, *Grayson v. Virginia*, 3 Dall. (U. S.) 320, 1 L. ed. 619.

Service on Governor Alone.—It has been held that in a suit by one state against another, the service of the subpoena on the governor alone is not sufficient. *New Jersey v. New York*, 3 Pet. (U. S.) 461, 7 L. ed. 741.

65. 1 Hoff. Ch. Pr. 108; *Daniell's Ch. Pl. & Pr.*, 6th Am. Ed., 446n.

66. See the statutes of the various states.

Similar to Process in Case of Natural Persons.—The statutes of the various states generally, if not universally, provide what the original process shall contain, and how it shall be served, not only on natural persons but on corporations. Jurisdiction of the person is usually secured in case of a corporation, by the service of the process on some officer in the same manner as though he were a natural person. Field on Corporations, §382.

67. U. S.—*Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. ed. 946. Cal.—*Kennedy v. Hibernia*, etc.

Soc., 38 Cal. 151; *O'Brien v. Shaw's Flat*, etc. Co., 10 Cal. 343; *Aiken v. Quartz Rock*, etc. Co., 6 Cal. 186. Ill.—*Union Pac. R. Co. v. Miller*, 87 Ill. 45. Miss.—*Southern Ex. Co. v. Craft*, 43 Miss. 508. Mo.—*Cosgrove v. Tebo & N. R. Co.*, 54 Mo. 495. Nev.—*Karns v. State Bank & Trust Co.*, 31 Nev. 170, 101 Pac. 564. N. Y.—*Camph v. Solomon*, 125 N. Y. Supp. 456. N. C.—*Aaron v. Pioneer Lumber Co.*, 112 N. C. 189, 16 S. E. 1010. Tex.—*El Paso & S. W. R. Co. v. Kelley*, 99 Tex. 87, 87 S. W. 660; *Latham Co. v. J. M. Radford Grocery Co.*, 54 Tex. Civ. App. 510, 117 S. W. 909. Wis.—*Kernan v. Northern Pac. R. Co.*, 103 Wis. 356, 79 N. W. 403.

68. "The object of all service of process for the commencement of suit is to give notice to the party proceeded against, and any statutory service which reasonably accomplishes that end answers the requirements of natural justice. Unquestionably the legislative branch of government has the power to prescribe the method of giving such notice to corporations doing business in the state, subject only to the rule that the method provided must be one that, with reasonable certainty, will result in the actual reception by the corporation of the notice served. Otherwise, a defendant, in many instances, would be deprived of property without due process of law. . . . An agent in charge of an important station where all of the business of a railroad with a populous community is transacted would certainly attend to the transmission of all

Different Classes of Corporations.—The statutes may also prescribe different regulations as to service in case of different classes of corporations, distinguishing, for example, domestic from foreign corporations,⁶⁹ and, also, by making special provisions for railway corporations and other common carriers,⁷⁰ and also for insurance companies.⁷¹

The general statute, moreover, regulating service upon corporations may have no application to municipal corporations,⁷² and special statutes may govern the procedure before different courts in the same state.⁷³

Where Service Must Be Made.—In order to give jurisdiction service of process must be made at the place specified by the statutes.⁷⁴ As in

papers served on him to the proper officer, while a section hand, if served, could not be expected to know what to do, nor to care whether or not the company knew of the service. Consequently a statute providing for the service of process on an agent of the character described would be reasonable, while one which authorized service to be made on a mere laborer would be unreasonable." *State ex rel. Quincy, etc. R. Co. v. Myers*, 126 Mo. App. 544, 104 S. W. 1146.

69. Consult the local statutes.

Common Law.—The process of the common law could not reach foreign corporations, for the plain reason that they were not inhabitants of and had not any corporate existence within the realm. *Story, J., in Clarke v. New Jersey Steam Nav. Co.*, 1 Story 531, 5 Fed. Cas. No. 2,859.

Statutory Service Upon Foreign Corporations.—See, in general, the following: **U. S.**—*Henrietta Min. & Mill. Co. v. Johnson*, 173 U. S. 221, 19 Sup. Ct. 402, 43 L. ed. 675; *Boardman v. S. S. McClure Co.*, 123 Fed. 614. **Ala.** *Eagle Life Assn. v. Redden*, 121 Ala. 346, 25 So. 779. **Ind.**—*Rehm v. German Ins. Co.*, 125 Ind. 135, 25 N. E. 173. **Kan.**—*Federal Betterment Co. v. Reeves*, 73 Kan. 107, 84 Pac. 560, 4 L. R. A. (N. S.) 460. **Mass.**—*Reyer v. Odd Fellows' Frat. Acc. Assn.*, 157 Mass. 367, 32 N. E. 469, 34 Am. St. Rep. 288; *Harriman v. Railway Co.*, 173 Mass. 28, 53 N. E. 156. **N. Y.**—*Gibbs v. Queen Ins. Co.*, 63 N. Y. 114, 20 Am. Rep. 513. **S. C.**—*Littlejohn v. Southern R. Co.*, 45 S. C. 96, 22 S. E. 761.

70. The statute should be consulted.

Kansas.—In Kansas, for example, an action against a railway corporation

may be brought in any county into, or through which such railway runs; and the summons may be served by any officer of any county in which the principal office of such corporation may be, or in which any officer, director, or agent of the corporation may be found. Rev. St., 1909, §1773.

71. **Insurance Companies.**—The statutes sometimes make special provisions for the service of process upon life insurance companies. Consult the local statutes. See, also, **U. S.**—*Millan v. Mutual Reserve Fund Life Assn.*, 103 Fed. 764. **Mo.**—*Lohoeffner v. Mercantile, etc., Ins. Co.*, 136 Mo. App. 540, 118 S. W. 515. **N. C.**—*Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667.

Fraternal Insurance Society.—*Travelers' Protective Assoc. v. Gilbert*, 101 Fed. 46, 41 C. C. A. 180; *Grand Lodge A. O. U. W. v. Bartes*, 64 Neb. 300, 90 N. W. 901.

Fire Insurance.—*Lesure Lumber Co. v. Mutual F. Ins. Co.*, 101 Iowa 514, 70 N. W. 761; *Henderson v. Maryland Home Fire Ins. Co.*, 90 Md. 47, 44 Atl. 1020.

72. *People v. City of Cairo*, 50 Ill. 154.

73. **Justice of the Peace.**—Where, for example, there is a special provision of the statutes relating to the way in which a justice's summons shall be served on a corporation, such provision exclusively governs, and a service that might be sufficient under the general provisions regulating service upon corporations, may be, nevertheless null and void. *Farmers' Loan & Trust Co. v. Warring*, 20 Wis. 290.

74. **Ill.**—*Winnesheik Ins. Co. v. Holzgrafe*, 46 Ill. 422. **Mich.**—*Dewey v. Central Car, etc., Co.*, 42 Mich. 399,

the case of the venue of actions,⁷⁵ this varies in different states. Thus, the statute may provide that service may be made in any county in the state where the plaintiff resides;⁷⁶ or within the county where the principal business office is located;⁷⁷ or in the county where the action is brought;⁷⁸ or in any county in which the corporation's property is wholly or partly situated;⁷⁹ or in any county where certain designated officers may reside.⁸⁰

Where the statute provides for service in a particular county, service in another county would not give jurisdiction.⁸¹ It is competent, however, for the legislature to provide for service in other counties upon failure to obtain service in a particular county.⁸²

Service Upon Whom.—While the statutes are much diversified in the designation of officials and agents of corporations upon whom service must be made, yet, as a rule, they require service to be made upon the president, or other chief officer, or upon some person designated as an agent of the corporation.⁸³

4 N. W. 179. **Pa.**—Hawn v. Pennsylvania Canal Co., 154 Pa. 455, 26 Atl. 544. **Va.**—Dillard v. Central Virginia Iron Co., 82 Va. 734, 1 S. E. 124. **W. Va.**—Taylor v. Ohio River R. Co., 35 W. Va. 328, 13 S. E. 1009.

Non-Resident Officer.—Where the president of a domestic corporation resides outside the state, he is liable to service as president, although he is temporarily within the state in attendance upon court as a party or as a witness. The rule applying to foreign corporations does not govern in such a case. Breon v. Miller Lumb. Co., 83 S. C. 221, 65 S. E. 214, 24 L. R. A. (N. S.) 276.

75. See the title "**Venue.**"

76. Swann v. Mutual Reserve Fund Life Assn., 100 Fed. 922; Potter v. Hutchinson Mfg. Co., 79 Mich. 207, 44 N. W. 595.

77. Dewey v. Central Car, etc., Co., 42 Mich. 399, 4 N. W. 179.

Principal Office.—Where the statute requires service to be made at the corporation's "principal office," a return showing that service of summons was made at "defendant's usual business place" is insufficient. Lohoeffer v. Mercantile, etc., Ins. Co., 136 Mo. App. 540, 118 S. W. 515.

Office of the Corporation.—In Louisiana the statute (Act No. 261 of 1908) provides that a corporation may be cited by leaving the citation at its office. It is held in that state that a corporation cannot avoid the effect of this act by providing in its charter that its secretary shall be the

proper person on whom a citation shall be served, and the statute is complied with by leaving the papers at the office of the corporation with a person working in the defendant's office. Abney v. Louisiana & N. W. R. Co., 127 La. 437, 53 So. 678.

"Residence" of a Corporation.—The residence of a corporation, if an artificial person can be said to have a residence, is deemed to be in the county where it has its principal office or place of business. Holgate v. Oregon Pac. R. Co., 16 Ore. 123, 17 Pac. 859.

Any county where an office or agency is located, providing the action grew out of or was connected with the business of that office or agency. Zahron v. Cunard S. S. Co., Ltd. (Iowa), 131 N. W. 18, construing, §3500 of Iowa Code.

78. Cincinnati, etc., Packet Co. v. Malone & Co., 29 Ky. L. Rep. 44, 92 S. W. 306; Adams Exp. Co. v. Crenshaw, 78 Ky. 136.

79. Hawn v. Pennsylvania Canal Co., 154 Pa. 455, 26 Atl. 544; Frick & Lindsay Co. v. Maryland, Pennsylvania, etc., Co., 44 Pa. Super. 518.

80. Taylor v. Ohio River R. Co., 35 W. Va. 328, 13 S. E. 1009.

81. Eminence Land & Mining Co. v. Current River Land & Cattle Co., 187 Mo. 420, 86 S. W. 145; Brobst v. Bank of Pennsylvania, 5 Watts & S. (Pa.) 379.

82. Western Union Tel. Co. v. Claymore, 2 Colo. 32; Cobbe v. State Journal Co., 77 Neb. 619, 110 N. W. 643.

83. See the local statutes. See, also,

In the case of railway corporations, some statutes require the company to designate persons upon whom service may be made.⁸⁴

The statutes also usually provide that service may be made upon any one of several designated persons, in order to guard against the impossibility of service by the absence of some particular person from the jurisdiction.⁸⁵

the following cases: **Ala.**—*Roman v. Morgan*, 162 Ala. 133, 50 So. 273. **Ind.**—*Groff v. Warner*, 44 Ind. App. 544, 89 N. E. 609. **Ky.**—*Breathitt Coal, etc., Co. v. Patrick*, 143 Ky. 614, 136 S. W. 1003. **La.**—*Welch v. New Orleans, etc., Co.*, 128 La. 738, 55 So. 338. **N. J.**—*Martin v. Atlas Estate Co.*, 72 N. J. Eq. 416, 65 Atl. 881; *Philadelphia & C. Ferry Co. v. Intercity Link R. Co.*, 74 N. J. L. 594, 65 Atl. 1118. **N. Y.**—*Kramer v. Buffalo Union Furnace Co.*, 132 App. Div. 415, 116 N. Y. Supp. 1101. **Okla.**—*Ozark Marble Co. v. Still*, 24 Okla. 559, 103 Pac. 586.

Relation of Person Served to Plaintiff.—It is established, however, that even though a person is within the terms of a statute, if his relation to the plaintiff or the claim in suit is such as to make it to his interest to suppress the fact of service, such service is unauthorized. **Colo.**—*White House Mountain Gold Min. Co. v. Powell*, 30 Colo. 397, 70 Pac. 679. **Ill.**—*St. Louis Coal Co. v. Edwards*, 103 Ill. 472. **Mass.**—*Buck v. Ashuelot Mfg. Co.*, 4 Allen 357. **Mich.**—*Atwood v. Sault Ste. Marie Light, Heat & Power Co.*, 148 Mich. 224, 111 N. W. 747. **W. Va.**—*U. S. Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342.

84. Especially so in the case of foreign railway corporations, and of foreign corporations in general. Consult the local statutes. See, also, *The Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249. And see, *infra*, XX. See, also, *St. Louis & S. F. R. Co. v. De Ford*, 38 Kan. 299, 16 Pac. 442.

Such Statutes Constitutional.—Where a foreign corporation is permitted by the statute of another state to do business therein, the latter state has a right to impose, as a condition of this privilege, that it shall be suable by service of process on its agent within the state. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. ed. 451.

85. Thus, some of the statutes provide that service may be made upon an agent of the corporation in case of the absence of such principal officers as president, vice-president, cashier, secretary, general manager and directors. Under such a statute in Florida, it is held that the officer serving the writ must ascertain that none of those of higher degree is within reach of his official arm before effecting service upon one of the inferior agents of the corporation. It is also held that "absence" means absence from the county where the suit is instituted and not absence from the state. *Florida Cent. & P. R. Co. v. Luffman*, 45 Fla. 282, 33 So. 710. See, also, *Peoria, D. & E. Ry. Co. v. Duggan*, 32 Ill. App. 351; *Cunningham Com. Co. v. Rorer Mill, etc., Co.*, 25 Okla. 133, 105 Pac. 676.

Resignation of Officers.—Service made upon one who has resigned his office in a corporation, or whose term of office has expired, is not service upon the corporation. *Yorkville Bank v. Brewing Co.*, 80 App. Div. 578, 80 N. Y. Supp. 839. And see *Combes v. Keyes*, 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369. Where, however, under the by-laws, an officer holds over until the election of his successor, service may be made upon such holding-over officer. *Colorado Debenture Corp. v. Lombard Inv. Co.*, 66 Kan. 251, 71 Pac. 584, 97 Am. St. Rep. 373. And see *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 34 S. W. 209. It has been held, moreover, that where the officers of a corporation have resigned merely to prevent service of process against the corporation, service may, nevertheless, be made upon the former secretary. *Evarts v. Killingworth Mfg. Co.*, 20 Conn. 447. It is sometimes provided by statute that in case a corporation fails to elect officers, service may still be made upon the former officers. *Blake v. Hinkle*, 10 Yerg. (Tenn.) 218. Compare, *United New*

In illustration of the statutory designations of persons upon whom service may be made, may be cited the president;⁸⁶ vice-president;⁸⁷ secretary;⁸⁸ cashier;⁸⁹ treasurer;⁹⁰ director;⁹¹ or a managing agent.⁹²

Jersey R. & C. Co. v. Hoppock, 28 N. J. Eq. 261.

86. *Ill.*—*Illinois & Miss. Teleg. Co. v. Kennedy*, 24 Ill. 319. *Mo.*—*Cornwall v. Star Bottling Co.*, 128 Mo. App. 163, 106 S. W. 591. *S. C.*—*Breon v. Miller Lumber Co.*, 83 S. C. 221, 65 S. E. 214, 24 L. R. A. (N. S.) 276. *S. D.*—*Christierson v. Hendrie & B. Mfg. Co.*, 128 N. W. 603.

Resignation of President.—Service on one who had been president, treasurer and director, but who at the time of service had resigned, is not service on the corporation. *Grossman Bros. & Rosenbaum v. Atlas Const. Co.*, 119 N. Y. Supp. 164; *Klopsch v. Atlas Const. Co.*, 117 N. Y. Supp. 805. See, also, *Lushington v. Seattle Auto & Driving Club*, 60 Wash. 546, 111 Pac. 785.

Non-Resident President.—Where service is proper on a president, it clearly contemplates service on the president, if within the state, even though he be a non-resident and in attendance upon court either as a suitor or witness. *Breon v. Miller Lumb. Co.*, 83 S. C. 221, 65 S. E. 214.

President, Inactive.—Although a president of a corporation removes from the county, and performs no longer the duties of president, and another is elected president, *pro tem.*, yet so long as he has not resigned from the office, service upon him is valid. *Eel Nav. Co. v. Struver*, 41 Cal. 616.

President or "Other Chief Officer."—Where a statute provides that "a summons against a corporation may be served upon the president . . . or other chief officer," a service on the vice-president is sufficient. *Ball v. Warrington*, 87 Fed. 695.

Service Upon A. B., "as President."—Where the service must be made upon the president, the return must show positively that the summons was served upon the proper officer. To serve it upon A. B., "as president," is not a compliance with the statute. *The Illinois & Miss. Teleg. Co. v. Kennedy*, 24 Ill. 319.

87. *U. S.*—*Ball v. Warrington*, 87 Fed. 695. *Colo.*—*Comet Consol. Min.*

Co. v. Frost, 15 Colo. 310, 25 Pac. 506. *Kan.*—*Pond v. National Mortgage Co.*, 6 Kan. App. 718, 50 Pac. 973. *N. J.*—*Martin v. Atlas Estate Co.*, 72 N. J. Eq. 416, 65 Atl. 881.

88. *McCall v. Byram Mfg. Co.*, 6 Conn. 428; *Colorado Debenture Corp. v. Lombard Inv. Co.*, 66 Kan. 251, 71 Pac. 584, 97 Am. St. Rep. 373.

Assistant Secretary.—Service upon an "assistant secretary" is sufficient. *Leavenworth, T. & S. W. R. Co. v. Stone*, 60 Kan. 57, 55 Pac. 346.

89. *Whitman v. Citizens' Bank*, 110 Fed. 503, 49 C. C. A. 122; *Fearing v. Glenn*, 73 Fed. 116, 19 C. C. A. 388; *Pennsylvania R. Co. v. Bennett*, 47 N. J. L. 275.

90. *Facts Pub. Co. v. Felton*, 52 N. J. L. 161, 19 Atl. 123; *Christierson v. Hendrie & B. Mfg., etc., Co. (S. D.)*, 128 N. W. 603.

Acting Cashier or Treasurer.—Service upon the acting cashier or treasurer is sufficient. *Russell v. Pittsburgh Life & Trust Co.*, 62 Misc. 403, 115 N. Y. Supp. 950. But see, *Winslow v. Staten Island Rapid Transit Co.*, 51 Hun 298, 4 N. Y. Supp. 169.

91. *People v. Judge*, 24 Mich. 38; *Lewis Admr. v. Glenn*, 84 Va. 947, 6 S. E. 866.

New Jersey.—Where, however, a subpoena was directed to three persons in a suit against a corporation, and was personally served on them; and it appears that the three persons were part of the board of nine directors of the company, the complainant being another director, it was insufficient service. *Thoroughgood v. Georgetown Water Co. (Del. Ch.)*, 77 Atl. 720.

92. *Ala.*—*Alabama, etc., R. Co. v. Burns*, 43 Ala. 169. *Cal.*—*Kennedy v. Hibernia, etc., Society*, 38 Cal. 151. *Idaho.*—*Densel v. Atlanta Mercantile Co.*, 17 Idaho 432, 106 Pac. 2. *N. Y.*—*Behan v. Phelps*, 27 Misc. 718, 59 N. Y. Supp. 713. *Ore.*—*Coast Land Co. v. Oregon Colonization Co.*, 44 Ore. 483, 75 Pac. 884. *S. D.*—*Christierson v. Hendrie & B. Mfg., etc., Co.*, 128 N. W. 603.

A "foreman" acting under the di-

It has also been held that service may be made on any general agent;⁹³ any station or ticket agent;⁹⁴ or any officer or agent;⁹⁵ chief agent;⁹⁶

rections of the superintendent is neither 'an officer' nor 'a managing or local agent' of the company, and, hence, is not a person upon whom service of summons upon the company can be made." *Simmons v. Defiance Box Co.*, 148 N. C. 344, 62 S. E. 435. But see, *Brun v. North Western Realty Co.*, 52 Misc. 528, 102 N. Y. Supp. 473, holding service upon a foreman sufficient.

The Term "Managing Agent."—"The term 'managing agent,' as used in the statute, is a generic term, and does not and cannot refer to any particular person or officer like the words 'president,' 'secretary,' etc., for there is no officer mentioned in the corporation laws, nor usually in the bylaws of corporations as 'managing agent' . . . We think under the provisions of said statute, that a manager of a corporation is *prima facie* the managing agent of a corporation, and will be presumed to be such until the contrary is shown. Service upon the manager of a corporation is *prima facie* evidence of service upon the managing agent of the corporation." *Densel v. Atlanta Mercantile Co.*, 17 Idaho 432, 106 Pac. 2.

Distinguished From Ordinary Agent. In the case, however, of *Reddington v. Mariposa, etc.*, Min. Co., 19 Hun (N. Y.) 405, the court said: "It is quite clear that the legislature attached importance to the term *managing agent*, and employed it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employe who acted in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of the work and manner of executing the same. The distinction thus attempted to be drawn we deem reasonable."

Superintendent of telephone company is a "managing agent," although a telegraph operator is not. *Barrett v. American Tel. & Tel. Co.*, 56 Hun 430, 10 N. Y. Supp. 138, 138 N. Y. 491, 34 N. E. 289.

Service Unauthorized.—Where the statute does not authorize service up-

on the managing agent, such service is void, even though he deliver the process to the corporation. *Kramer v. Buffalo Union Furnace Co.*, 132 App. Div. 415, 116 N. Y. Supp. 1101.

93. *Great Western Min. Co. v. Woodmas of Alston Mining Co.*, 12 Colo. 46, 20 Pac. 771, holding that a foreman of a mine is not a "general agent" within the meaning of the statute. The court said: "There is a wide distinction between a general and a special or particular agent. . . . A special agency exists where there is a delegation of authority to do a single act, and a general agency exists when there is a delegation to do all acts connected with a particular trade, business or employment."

94. *City of Detroit v. Wabash R. Co.*, 63 Mich. 712, 30 N. W. 321.

95. *Ga.*—*Hartford City Fire Ins. Co. v. Carrugi*, 41 Ga. 660; *Louisville & N. R. Co. v. Mitchell*, 6 Ga. App. 390, 64 S. E. 1134. *Ind.*—*Edwards v. Van Cleave* (Ind. App.), 94 N. E. 596. *Mich.*—*Moinet v. Burnham & Co.*, 143 Mich. 489, 106 N. W. 1126 (holding that a traveling salesman is an agent for the purpose of service); *Potter v. John Hutchinson Mfg. Co.*, 79 Mich. 207, 44 N. W. 595.

Officer, Agent or Employee.—"A statute cannot be said to be unreasonable or to deprive a corporation of any of its fundamental rights which provides for bringing the corporation into court by the service of summons on an officer, agent or employee whose duties are such that any ordinary careful person in his position would be reasonably certain to apprise the corporation of the service." *State ex rel. Quincy, etc., R. Co. v. Myers*, 126 Mo. App. 544, 104 S. W. 1146.

96. *Breathitt Coal, etc., Co. v. Patrick*, 143 Ky. 614, 136 S. W. 1003; *Louisville, etc., R. Co. v. Com.*, 5 Ky. L. Rep. 317.

Railway Superintendent.—"If neither the president, cashier, treasurer or secretary resides within the state, service on the chief agent of the corporation, residing at the time in the county where the action is brought, shall be deemed sufficient." *Kansas City, etc., R. Co. v. Daughtry*, 138

head of the company;⁹⁷ superintendent;⁹⁸ principal clerk;⁹⁹ nearest station or freight agent;¹ any agent or clerk;² local agent;³ and special agent.⁴

U. S. 293, 11 Sup. Ct. 306, 34 L. ed. 963, *quoting*, the Tennessee statute, and holding that service in the county where the action was brought, upon the superintendent of the railroad company, was sufficient.

97. "President or other head of the corporation." City of Sacramento v. Fowle, 88 U. S. 119, 22 L. ed. 592; Winslow v. Staten Island Rapid Transit R. Co., 2 N. Y. Supp. 682, 15 Civ. Proc. 202.

98. Peoria, D. & E. R. Co. v. Dugan, 32 Ill. App. 351, the Illinois statute providing for service upon the "president, secretary, superintendent, general agent, cashier or principal clerk" if either be found in the district. If not found, then on any agent of the corporation who may be found in the district.

99. Peoria, D. & E. R. Co. v. Dugan, 32 Ill. App. 351.

1. City of Detroit v. Wabash R. Co., 63 Mich. 712, 30 N. W. 321; Heath v. Missouri, K. & T. R. Co., 83 Mo. 617; Dunn v. Missouri Pac. R. Co., 45 Mo. App. 29.

Freight Agent.—Under a statute providing for service upon "a special agent" (see *infra*), a local freight agent has been held a proper person to receive service of process. Toledo, etc., R. Co. v. Owen, 43 Ind. 405.

Local Depot Agents.—In further illustration of valid service upon local depot or station agents, see, *Ark.*—*Ex parte* St. Louis, etc., R. Co., 40 Ark. 141. *Ia.*—Smith v. Chicago, etc., R. Co., 60 Iowa 512. *Mo.*—Hudson v. St. Louis, etc. R. Co., 53 Mo. 525, *Wis.*—Ruthe v. Breen Bay, etc., R. Co., 37 Wis. 344.

2. Where the statute provides that when a corporation "has an office or agency" in any county other than where the principal resides, service may be made "on any agent or clerk" employed in the former county, a traveling agent of a railway company, who has no permanent place of business, is not such an agent or clerk. Chicago & Alton R. Co. v. Walker, 9 Lea. (Tenn.) 475.

One who sold goods on commission, paid his own expenses, was master of his own time and movements and had

no authority to fix prices, collect accounts or transact any business for defendant, except to procure orders for defendant's goods, is in no sense the company's agent, upon whom process can be served. Temby v. William Brunt Pottery Co., 127 Ill. App. 441.

3. U. S.—Mexican Central R. Co. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. ed. 699. *Ind.*—Globe Acc. Ins. Co. v. Reid, 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291. *N. Y.*—People v. Tilden, 121 App. Div. 352, 106 N. Y. Supp. 247. *Ore.*—Hildebrand v. United Artisans, 46 Ore. 134, 79 Pac. 347, 114 Am. St. Rep. 852. *Tex.*—Latham Co. v. Radford Groc. Co., 54 Tex. Civ. App. 510, 117 S. W. 909.

Name Need Not Be Stated.—The petition and citation need not state the name of the local agent or general manager. El Paso & S. W. R. Co. v. Kelley, 99 Tex. 87, 87 S. W. 660.

4. Thus, under such a provision in an Indiana statute, it is held, in the case of a railroad corporation, that service may be made upon the conductor of a passenger train. Ohio, etc., R. Co. v. Quier, 16 Ind. 440; New Albany & Salem R. Co. v. Tilton, 12 Ind. 3; New Albany & Salem R. Co. v. Grooms, 9 Ind. 243; or of a freight train. The Indiana supreme court, in the case of New Albany & Salem Railroad Company v. Grooms, *supra*, said: "We think the conductor, at least, a special agent of the railroad company, and one peculiarly proper for receiving service of process; because his duties take him along the line of the road to that extent that will generally enable him daily to communicate with the chief officers of the corporation, whose duty it would be to attend to suits against it."

Michigan.—In Michigan, however, the term "special agent" has been more strictly construed. The supreme court of that state has held that the term "special agent," as well as the term "general agent," is very indefinite, but that it evidently intends an agent who, in respect to some particular department of the corporate business, has a controlling authority. It does not mean every man who is en-

In case a corporation is in the hands of a receiver, it has been held, in absence of express provisions to cover such cases, that service may be made upon the receiver,⁵ and also upon the agents of the corporation as expressly provided.⁶

3. Mode of Service.—If the statute indicate the mode or manner of service, the direction must be obeyed.⁷

Where the statute, however, prescribes no mode, it has been held that the mode prescribed for service upon natural persons will be sufficient.⁸

Service is generally made by delivering a copy of the summons to the proper officer or agent personally, or by leaving a copy at some designated place.⁹ In some jurisdictions, the copy may be left at the officer's

trusted with a commission or an employment. It could hardly be pretended that the legislature had the power to make every inferior agent the agent of the company for such a purpose; if it had, it would be a power which a prudent legislature would be careful not to exercise. The court held, in this case, that a ticket agent is not a general or special agent. *Lake Shore & M. S. R. Co. v. Hunt*, 39 Mich. 469.

5. Grady v. Richmond & D. R. Co., 116 N. C. 952, 21 S. E. 304; *Wert v. Keim*, 2 Pa. Co. Ct. 405.

North Carolina.—Thus, in North Carolina, it is held that "service upon receivers is service upon the corporation, as fully as if made upon the president and superintendent, whose duties they are temporarily discharging, as they come within the term 'other head of the corporation.'"
Grady v. Richmond & D. R. Co., *supra*.

6. Simpson v. East Tennessee, etc., R. Co., 89 Tenn. 304, 15 S. W. 735.

Receiver's Agent.—Where the statute requires that service, in case of a railroad corporation, shall be made on "the station agent," and where the property of such a corporation is in the hands of a receiver and its road operated by him, service of process upon the agent of the receiver will give no jurisdiction over the company. *Heath v. Missouri, K. & T. R. Co.*, 83 Mo. 617.

"Local Agent."—Where, however, the statute provided that service may be made upon "the local agent," it has been held that service upon the local agent of a receiver is merely a substitute for, and has the same legal effect as service upon them personally. *Grady v. Richmond & D. R.*

Co., 116 N. C. 952, 21 S. E. 304. And see *Central Trust Co. v. St. Louis, etc.*, R. Co., 40 Fed. 426; *Ganebin v. Phelan*, 5 Colo. 83.

7. Mo.—*Missouri, etc.*, R. Co. v. Hoereth, 144 Mo. 136, 45 S. W. 1085. **N. H.**—*Sleeper v. Free Baptist Assn.*, 58 N. H. 27. **N. C.**—*Aaron v. Pioneer Lumber Co.*, 112 N. C. 189, 16 S. E. 1010. **Ohio.**—*State v. King Bridge Co.*, 28 Ohio C. C. 147. **Tex.**—*Latham Co. v. Radford Groc. Co.*, 54 Tex. Civ. App. 510, 117 S. W. 909. **Wis.**—*Kernan v. Northern Pac. R. Co.*, 103 Wis. 356, 79 N. W. 403.

8. Martin v. Atlas Estate Co., 72 N. J. Eq. 416, 65 Atl. 881.

9. U. S.—*Eddy v. Lafayette*, 49 Fed. 807. **Del.**—*State v. Bay State Gas Co.*, 4 Penn. 214, 57 Atl. 291. **Ga.**—*Stuart Lumber Co. v. Perry*, 117 Ga. 888, 45 S. E. 251. **La.**—*First Municipality v. Christ Church*, 3 La. Ann. 453. **Mo.**—*Jordan v. Missouri, etc.*, R. Co., 61 Mo. 52. **Nev.**—*Gillig v. Independent, etc.*, Min. Co., 1 Nev. 247. **N. C.**—*Aaron v. Pioneer Lumber Co.*, 112 N. C. 189, 16 S. E. 1010.

Copy and Not the Original.—Where the statute requires a copy of the summons to be left, it is not a valid service to hand the original summons to an officer to be read, the officer returning the summons after reading the same. *Aaron v. Pioneer Lumb. Co.*, 112 N. C. 189, 16 S. E. 1010.

Statute Prevails Over Charter.—Where a statute provides that a corporation may be cited by leaving the citation at its office, a corporation cannot avoid the effect of this act by providing in its charter that its secretary shall be the proper person on whom a citation shall be served. *Ab-*

place of residence,¹⁰ or at any business office with the person having charge thereof;¹¹ or leaving a copy at the principal office during office hours.¹²

4. Substituted Service.—Substituted service of process can be made only when expressly authorized by statute.¹³ A corporation, moreover, cannot "conceal" itself in the sense that a concealment of a natural person will authorize substituted service.¹⁴

5. Service by Publication.—In accordance with the statutory regulations, which generally require an affidavit to the effect that personal service cannot be obtained,¹⁵ service by publication may be made, in some jurisdictions, upon domestic corporations.¹⁶

6. Service on Foreign Corporations.—The requisites of service in connection with foreign corporations are treated elsewhere in this article.¹⁷

7. Municipal Corporations.—As previously stated, service on municipal corporations should be made under the common law, upon the mayor, or other head officer of the municipality.¹⁸ In connection with the statutes governing service, there may be express provisions governing municipal corporations,¹⁹ or such corporations may be held

ney v. Louisiana & N. W. R. Co., 127 La. 437, 53 So. 678.

10. Water Lot Co. v. Bank of Brunswick, 30 Ga. 685; Johnson v. American Bill-Posting Co., 13 Pa. Co. Ct. 96.

11. Hill v. St. Louis Ore & Steel Co., 90 Mo. 103, 2 S. W. 289.

12. El Paso & S. W. R. Co. v. Kelly (Tex. Civ. App.), 83 S. W. 855, holding that a return of service during "business hours" was sufficient under the statute designating "office hours."

13. Leach v. Cargill, 60 Mo. 316; Bernhardt v. Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

Substituted or Constructive Service. The doctrine of constructive service of process is altogether the creature of statutory enactments, and has no existence, except where expressly declared by the law-making power. Cloud v. Inhabitants of Pierce City, 86 Mo. 357.

14. Hahn v. Anchor Steamship Co., 2 N. Y. City Ct. 25.

15. Consult the local statutes. See, also, the following cases: Leavenworth, etc., R. Co. v. Stone, 60 Kan. 57, 55 Pac. 346; Town of Hinckley v. Kettle River R. Co., 70 Minn. 105, 72 N. W. 835.

16. The statutes should be consulted. See the following cases: Fla.—Clearwater Mercantile Co. v. Roberts, Johnson, Rand Shoe Co., 51 Fla. 176,

40 So. 436, 4 L. R. A. (N. S.) 117. Ill.—Mt. Olive Coal Co. v. Hughes, 45 Ill. App. 566. Kan.—Leavenworth T. & S. W. R. Co. v. Stone, 60 Kan. 57, 55 Pac. 346. Va.—Wytheville Ins. Co. v. Stultz, 87 Va. 629, 13 S. E. 77; Baltimore & O. R. Co. v. Gallahue, 12 Gratt. 655, 65 Am. Dec. 254.

17. See, *infra*, XX.

18. Head Officer of Town.—The chairman of a board of trustees of a town is the head officer of such a town, and, in absence of a statute to the contrary, service of process may be made upon him. Sacramento v. Fowle, 21 Wall. (U. S.) 119, 22 L. ed. 592; Cloud v. Pierce City, 86 Mo. 357.

Head Officer of City.—Where a city is defendant, the service may be made upon the mayor. Lyon v. Lorient, 3 Ala. 151.

19. Thus, the statutes may designate the officials upon whom service may be made. See the local statutes; also, the following cases: U. S.—Amy v. City of Watertown, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. ed. 946; Alexandria v. Fairfax, 95 U. S. 774, 24 L. ed. 583; Stabler v. Village of Alexandria, 42 Fed. 490; Perkins v. Watertown, 5 Biss. 320, 19 Fed. Cas. No. 10,991. Ill.—Kane County Suprs. v. Young, 31 Ill. 194. N. J.—Gabler v. Elizabeth, 41 N. J. L. 316. Ore.—

to be included within the provisions governing corporations in general.²⁰

On the other hand, it may be held that the statutes regulating service upon corporations in general, do not apply to municipal corporations, and that, consequently, the common law applies.²¹

Where service is provided for by statute, such provisions must be strictly observed.²² Where, for example, the statute requires service upon two officers of a town, service upon only one officer is invalid,²³ and where a statute provides for service upon "the clerk" of a corporation, an assistant town clerk is not a proper person on whom to make service of a writ.²⁴

A statute requiring service upon the mayor of a city is not complied with by service upon the chairman of the board of street commissioners and the city clerk.²⁵

8. Return of Service.—The return of the service of a summons or other writ upon a corporation must show that the requirements of the statute have been duly complied with.²⁶ It should show that service

Altman v. School Dist., 35 Ore. 85, 56 Pac. 291. **Wis.**—Mariner v. Town of Waterloo, 75 Wis. 438, 44 N. W. 512; City of Watertown v. Robinson, 69 Wis. 230, 34 N. W. 139.

20. Dugan v. Mayor, etc., of Baltimore, 70 Md. 1, 16 Atl. 501, *semble*.

21. People v. City Council of Cairo, 50 Ill. 154. And see McNeal v. Gloucester City, 51 N. J. L. 444, 18 Atl. 112.

Private Corporations.—The statutes of 1865, relating to private corporations have no application to municipal corporations. There are no statutory provisions in this state regulating the service of process upon cities or towns, and in the absence of such provisions, the manner of service remains as at common law. Cloud v. Inhabitants of Pierce City, 86 Mo. 357.

22. **Ill.**—City of Waverly v. Auditor of Public Accounts, 100 Ill. 354. **Kan.**—City of North Lawrence v. Hoysradt, 6 Kan. 170. **Wash.**—Downs v. School District, 4 Wash. 309, 30 Pac. 147.

23. Mariner v. Town of Waterloo, 75 Wis. 438, 44 N. W. 512.

24. Town of Fairfield v. King, 41 Vt. 611.

25. Amy v. City of Watertown, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. ed. 946; City of Watertown v. Robinson, 69 Wis. 230, 34 N. W. 139.

Failure To Elect Officers.—Under a constitutional provision that "all officers within this state shall continue to perform the duties of their offices

until their successors are qualified," where a city fails to elect officers for the purpose of defeating the collection of debts owed by the city, service of process may be made upon the officials last elected, although their nominal terms of office have expired. Jones v. City of Jefferson, 66 Tex. 576, 1 S. W. 903. See, also, Badger v. United States, 93 U. S. 599, 23 L. ed. 991; 2 Dill. Munic. Corp., §878.

26. **U. S.**—Collins v. American Spirit Mfg. Co., 96 Fed. 133. **Ark.**—Arkansas Const. Co. v. Mullins, 69 Ark. 429, 64 S. W. 225. **Colo.**—White House Mountain Gold Min. Co. v. Powell, 30 Colo. 397, 70 Pac. 679; Tabor v. Goss & Phillips Mfg. Co., 11 Colo. 419. **Ga.**—Hayden v. Atlanta Savings Bank, 66 Ga. 150. **Mo.**—Little Rock Trust Co. v. Southern Missouri & A. R. Co., 195 Mo. 669, 93 S. W. 944. **Pa.**—Park Bros. & Co. v. Oil City Boiler Works, 204 Pa. 453, 54 Atl. 334.

Safer To Follow Exact Language.

In making his return an officer is not required to follow the exact language of the statute, although it is always safer to do so. If he has done what the law commands, it is easier to say so in the language of the statute which commands him. To clothe his return with the conclusive effect imputed to it by law, the facts constituting lawful service must appear in his return with all reasonable certainty. If it is susceptible of two rational interpretations it is shorn of the conclusiveness which

was made upon the proper person,²⁷ and the mode of service should be specified.²⁸

In case the statute provides for an alternative or substituted service when principal service cannot be made, the return should show the existence of the conditions that authorize the substituted service.²⁹

9. Objections to Service.—Objections to defective service on the ground that the proper person was not served may be made by motion

distinguishes an official return. *Heath v. Missouri K. & T. R. Co.*, 83 Mo. 617.

27. Cal.—*O'Brien v. Shaw's Flat, etc., Co.*, 10 Cal. 343. **Colo.**—*White House Mountain Gold Min. Co. v. Powell*, 30 Colo. 397, 70 Pac. 679. **Ill.**—*Rock Valley Paper Co. v. Nixon*, 84 Ill. 11. **Kan.**—*Dickerson v. Burlington, etc., R. Co.*, 43 Kan. 702, 23 Pac. 906. **La.**—*Prince v. Tremont R. Co.*, 128 La. 834, 55 So. 474. **Miss.**—*Watkins Machine & Foundry Co. v. Cincinnati Rubber Mfg. Co.*, 96 Miss. 610, 52 So. 629. **Mo.**—*Stanley v. Sedalia Transit Co.*, 136 Mo. App. 388, 117 S. W. 685. **N. Y.**—*Tenement House v. Atlantic Realty Co.*, 121 N. Y. Supp. 229; *Eureka Soap Co. v. Jungmann*, 121 N. Y. Supp. 233. **S. D.**—*Mars v. Oro Fino Min. Co.*, 7 S. D. 605, 65 N. W. 19.

Trifling Error in Name of Corporation.—Where the real corporation was, in fact, before the court by summons executed upon its chief officer, the return of a summons in aid of execution containing a trifling error in the name of the corporation, showing that the same "was executed on the *G. C. & B. T. Co.*, by delivering a copy to *J. T. H.*, the president of the *G. C. & B. T. Co.*," it was held valid, since the corporation was not misled or deceived by the error. *Claryville, etc., Turnp. Co. v. Com.*, 32 Ky. L. Rep. 1157, 107 S. W. 327.

Name of Person Served.—The name of the officer, or other person, upon whom service is made should, generally, be given. *Southern Ind. R. Co. v. Indianapolis, etc., R. Co.*, 168 Ind. 360, 81 N. E. 65. And see, *Illinois Steel Co. v. San Antonio, etc., R. Co.*, 67 Fed. 561.

Official Designation.—The return should show the official position of the person served, and that he was served in his official capacity. *Oxford Iron*

Co. v. Spradley, 42 Ala. 24; *Jones v. Hartford Ins. Co.*, 88 N. C. 499.

Return Must Show Proper Place.—Return must also show that the service was made at the proper place. *Tomasson v. Mercantile Town Ins. Co.*, 217 Mo. 485, 116 S. W. 1092; *Little Rock Trust Co. v. Southern Mo. & A. R. Co.*, 195 Mo. 669, 93 S. W. 944; *Stanley v. Sedalia Transit Co.*, 136 Mo. App. 388, 117 S. W. 685; *El Paso & S. W. R. Co. v. Kelley*, 99 Tex. 87, 87 S. W. 660.

Decree Pro Confesso; Proof of Identity.—The failure of the record to show that proof was made to the satisfaction of the register that the party served was at the time of such service the president of the defendant corporation renders a decree *pro confesso* void. *Boyett v. Frankfort Chair Co.*, 152 Ala. 317, 44 So. 546; *Oxanna Building Assn. v. Agee*, 99 Ala. 571, 13 So. 279; *Manhattan Fire Ins. Co. v. Fowler*, 76 Ala. 372; *So. Express Co. v. Carroll*, 42 Ala. 437.

28. Hayden v. Atlanta Savings Bank, 66 Ga. 150; *Behan v. Phelps*, 27 Misc. 718, 59 N. Y. Supp. 713.

29. U. S.—*Collins v. American Spirit Mfg. Co.*, 96 Fed. 133. **Ark.**—*Arkansas Coal, etc., Mfg. Co. v. Haley*, 62 Ark. 144, 34 S. W. 545. **Fla.**—*Drew Lumber Co. v. Walter*, 45 Fla. 252, 34 So. 244. **Ind.**—*Southern Indiana R. Co. v. Indianapolis & L. R. Co.*, 168 Ind. 360, 81 N. E. 65; *Groff v. Warner*, 44 Ind. App. 544, 89 N. E. 609. **Kan.**—*Colo. Debuture Corp. v. Lombard Inv. Co.*, 66 Kan. 251, 71 Pac. 584, 97 Am. St. Rep. 373. **La.**—*Prince v. Tremont R. Co.*, 128 La. 834, 55 So. 474. **Ohio.**—*Bucket Pump Co. v. Eagle Iron & Steel Co.*, 21 Ohio C. C. 229, 11 O. C. D. 418. **Okla.**—*Cunningham Commission Co. v. Rorer Mill & Elevator Co.*, 25 Okla. 133, 105 Pac. 676; *Ozark Marble Co. v. Still*, 24 Okla. 559, 103 Pac. 586. **Ore.**—*Hildebrand*

to quash the return.³⁰ A plea in abatement is not in itself sufficient.³¹

While a motion to quash the return may not be required to show who was the proper officer upon whom service should have been made,³² yet where it is not apparent upon the return that service was improperly made, a plea in abatement may be necessary to show such fact.³³

Irregularities in the return are amendable in most jurisdictions,³⁴ and a corporation by its appearance waives a defective service.³⁵

IX. APPEARANCE.—A. GENERAL STATEMENT.—At common law, both plaintiff and defendant were originally required to appear in person, and could not appear by attorney, without the king's special warrant.³⁶ A corporation aggregate, however, being invisible and intangible, and not capable of a personal appearance, could appear only by attorney.³⁷

v. United Artisans, 46 Ore. 134, 79 Pac. 347, 114 Am. St. Rep. 852.

30. **U. S.**—*American Cereal Co. v. Eli Pettijohn Cereal Co.*, 70 Fed. 276. **Ky.**—*Youngstown Bridge Co. v. White's Admr.*, 105 Ky. 273, 49 S. W. 36; *Newport News & M. V. R. Co. v. Thomas*, 96 Ky. 613, 29 S. W. 437. **Vt.**—*Nye v. Burlington & L. R. Co.*, 60 Vt. 585, 11 Atl. 689. **Va.**—See *Norfolk & W. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517.

31. *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

Pennsylvania.—In Pennsylvania, irregular service may be set aside on rule, a plea in abatement being unnecessary. *Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. 453, 54 Atl. 334; *Jenson v. Phila. & S. R. Co.*, 201 Pa. 603, 51 Atl. 311; *Platt v. Bel-sena Coal Min. Co.*, 191 Pa. 215, 43 Atl. 207; *Bailey v. Williamsport, etc.*, R. R. Co., 174 Pa. 114, 34 Atl. 556; *Hawn v. Penn. Canal Co.*, 154 Pa. 455, 26 Atl. 544.

32. *Youngstown Bridge Co. v. White's Admr.*, 105 Ky. 273, 49 S. W. 36. See, however, *Arnold v. Sentinel Printing Co (Del.)*, 77 Atl. 966.

33. *Harriman v. Reading & L. St. R. Co.*, 173 Mass. 28, 53 N. E. 156.

34. **Ia.**—*Liston v. Central Iowa Ry. Co.*, 70 Iowa 714, 29 N. W. 445. **N. C.**—*Grady v. Richmond & D. R. Co.*, 116 N. C. 952, 21 S. E. 304. **Va.**—*Commercial Union Assur. Co. v. Everhart's Admr.*, 88 Va. 952, 14 S. E. 836; *Shenandoah Val. R. Co. v. Ashby's Trustees*, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.

Before and After Judgment.—The power of the court to permit the sheriff to amend his return, both before and after judgment, so as to make it speak the truth, is settled beyond discussion. The amendment relates back to the original return, and has the same effect as if the amended return had been originally made. *Grady v. Richmond & D. R. Co.*, *supra*; *Campbell v. Smith*, 115 N. C. 498, 20 S. E. 723; *Murfree, Sheriffs*, §880; *Freem, Exns.*, 358.

35. **U. S.**—*Flanders v. Aetna Ins. Co.*, 3 Mason 158, 9 Fed. Cas. No. 4,852. **Del.**—*Thoroughgood v. Georgetown Water Co. (Del. Ch.)*, 77 Atl. 720. **Ind.**—*Bank of Vincennes v. State*, 1 Blackf. 267. **Md.**—*Ireton v. City of Baltimore*, 61 Md. 432. **Ohio.**—*Fee v. Big Sand Iron Co.*, 13 Ohio St. 563. **S. C.**—*School Dist. v. Fowles*, 87 S. C. 552, 70 S. E. 315, holding that defective service is cured by judgment.

36. *Co. Lit.* 128, a; 2 *Inst.* 249, 378; *F. N. B.* 25; *Page v. Tulse*, 1 *Mod.* 239, 86 *Eng. Reprint* 855.

37. *Co. Lit.* 66b; *Bro. Abr. tit. Corp.*, 28; *Com. Dig. tit. Pleader*, 2, B, 2; 1 *Blk. Comm.*, 476. **U. S.**—*Commercial, etc., Bank v. Slocomb*, 14 Pet. 60, 10 L. ed. 354. **Ill.**—*Nispel v. Western Union R. Co.*, 64 Ill. 311; *Nixon v. Southwestern Ins. Co.*, 47 Ill. 444. **Ind.**—*State Bank v. Bell*, 5 Blackf. 127. **Kan.**—*Union Pac. R. Co. v. Horney*, 5 Kan. 340. **Ky.**—*Noble v. Kentucky Bank*, 3 A. K. Marsh. 262. **N. Y.**—*Atty. Gen. v. Guardian Mut. L. Ins. Co.*, 77 N. Y. 272.

Not Entitled to Essoins.—Anciently,

Likewise in chancery practice, where corporations aggregate are sued, they must appear by attorney, and answer under the common seal of the corporation.³⁸

Corporation Sole.—Where a suit is instituted against a corporation sole, the person comprising the corporation must appear and defend, and be proceeded against in the same manner as if he were a private individual.³⁹

B. WHO MAY APPEAR.—An officer, or the official head of a corporation may appear for the corporation, it not being necessary that the "attorney" should be an attorney at law.⁴⁰ It has, moreover, been said that for a special appearance, in connection with a plea to the jurisdiction, a corporation should not appear by attorney, but that its president may appear for that purpose.⁴¹

C. AUTHORITY TO APPEAR.—Anciently, an attorney who appeared for a corporation must have been authorized to appear by a written "warrant of attorney," under the corporation's common seal.⁴² Under modern practice, it is not necessary that an attorney should present any warrant of attorney,⁴³ or that such warrant should appear in the record.⁴⁴ An attorney who appears for a corporation will be pre-

a defendant, being summoned, was allowed an *essoins*, that is, an excuse, sent by some messenger, for his non-appearance. *Essoins* were not allowed, however, to defendants who appeared by attorney, consequently, corporations were not entitled to *essoins*. Tidd's Pr., 109; Bro. Abr. tit. Corp., 28; Argent v. Dena & Chapter of St. Paul's, cited, in 2 Durnf. & East. 10, 104 Eng. Reprint 992; also, 16 East. 8.

38. **N. J.**—Ransom v. Stonington Savings Bank, 13 N. J. Eq. 212. **N. Y.**—Fulton Bank v. Canal Co., 1 Paige 311; Vermilyea v. Fulton Bank, 1 Paige 37; Brumly v. Westchester County Mfg. Soc., 1 John. Ch. 366. **Va.**—Baltimore & O. R. Co. v. Wheeling, 13 Gratt. 40.

39. Daniell's Ch. Pl. & Pr., 146.

40. Sturgis v. Rogers, 26 Ind. 1; City of North Lawrence v. Hoysradt, 6 Kan. 170.

41. Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582. See, however, Cadle v. Tracy, 11 Blatchf. 101, 4 Fed. Cas. No. 2,279; Commercial, etc. Bank v. Slocomb, 14 Pet. (U. S.) 60, 10 L. ed. 354.

Plea to Jurisdiction by Person.—It is a familiar rule that a plea to the jurisdiction must be stated to be pleaded in person and not by attorney, because the latter would admit the jurisdiction of the court. See Mineral Point R. Co. v. Keep, 22 Ill. 9;

Chit. Pl., 444. The Supreme Court of the United States has held, however, that a plea to the jurisdiction, by a corporation, put in by its attorney, is good, because, as a corporation, it can appear only by attorney, and to hold that such an appearance would amount to a waiver of the objection, would be to say, that the corporation must from necessity forfeit an acknowledged right, by using the only means which the law affords of asserting that right. Commercial, etc. Bank v. Slocomb, 14 Pet. (U. S.) 60, 10 L. ed. 354.

42. Co. Lit. 66 b; Com. Dig. tit. Pleader, 2 B. 2; Steph. Pl. 32; 1 Tidd's Prac., 93.

43. **U. S.**—Osborn v. United States Bank, 9 Wheat. 738, 6 L. ed. 204. **Ind.**—Brookville Ins. Co. v. Records, 5 Blackf. 170; Vance v. Farmers' etc. Bank, 1 Blackf. 80. **Me.**—Bridgton v. Bennett, 23 Me. 420; Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656.

44. Gaines v. Tombeckbee Bank, Minor (Ala.) 50.

Appearance Presumably Lawful. "The practice has always prevailed (says the supreme court of New Jersey) to permit attorneys of our courts to appear for corporations they claim to represent. In fact, corporations cannot appear in person. They must appear by attorney." Consequently

sumed to have authority to appear,⁴⁵ and where an attorney has entered appearance without authority, the corporation may subsequently ratify such action on the attorney's part.⁴⁶

D. EFFECT OF APPEARANCE.—If a corporation appears without being served with process,⁴⁷ it thereby admits its corporate existence.⁴⁸

A general appearance waives want of service;⁴⁹ cures defective service;⁵⁰ and waives any right to object to the jurisdiction of the court.⁵¹ By specially appearing, however, for the purpose of pleading to the jurisdiction of the court, a corporation does not submit itself to the jurisdiction.⁵²

E. PRACTICE ON FAILURE TO APPEAR.—Anciently, the only proper process against bodies corporate which failed to appear in court was *distringas*, to restrain them of their goods, chattels, rents, and profits, till they should obey the summons.⁵³ If a corporation had neither

where the record shows that a practicing attorney of this court appeared and filed a demurrer, his appearance was presumably lawful. If he had appeared without authority, it would have been in contempt of the trial court. It has never been the practice, where a corporation appears by attorney, to require him to establish his right to do so by competent evidence. Where a corporation claims that it did not appear by attorney, the burden is on it to show that the person who did appear for it was unauthorized. *State v. Passaic County Agr. Soc.*, 54 N. J. L. 260, 23 Atl. 680.

45. *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83, 12 L. ed. 60; *State v. Passaic County Agr. Soc.*, 54 N. J. L. 260, 23 Atl. 680.

46. *Famous Mfg. Co. v. Wilcox*, '80 Ill. App. 54.

47. *Attorney General v. Guardian Mut. Life Ins. Co.*, 77 N. Y. 272.

48. *Ind.*—*Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse*, 168 Ind. 438, 78 N. E. 1033. *Kan.*—*Missouri River, Ft. S. & G. R. Co. v. Shirley*, 20 Kan. 660. *Mo.*—*Witthouse v. Atlantic & P. R. Co.*, 64 Mo. 523. *Okla.*—*Herald Shoe Co. v. Oklahoma Pub. Co.*, 15 Okla. 29, 79 Pac. 111.

Waiver of Misnomer.—Where a corporation appears and answers the merits of a petition intended to be against it, but incorrectly designating it by name, and which asserts a cause of action otherwise sufficient as against the corporation intended to be sued, the corporation so appearing, and, without suggesting the misnomer, answering the

merits of the petition, will be held to have waived the mistake of name and the suit will be deemed to have been pending against the corporation so answering from and after the date of such appearance. *Mecca Fire Ins. Co. of Waco v. First State Bank of Hamlin* (Tex. Civ. App.), 135 S. W. 1083. See, also, *School District v. Griner*, 8 Kan. 224. And see *United States Exp. Co. v. Bedbury*, 34 Ill. 459.

49. *U. S.*—*Kelsey v. Pennsylvania R. Co.*, 14 Blatchf. 89, 14 Fed. Cas. No. 7,679; *Flanders v. Aetna Ins. Co.*, 3 Mason 158, 8 Fed. Cas. No. 4,852. *Ark.*—*Oakleaf Mill Co. v. Lash*, 135 S. W. 872. *Me.*—*Buckfield Branch R. R. v. Benson*, 43 Me. 374. *N. Y.* *Meyers v. American Locomotive Co.*, 201 N. Y. 163, 94 N. E. 605.

50. *Thoroughgood v. Georgetown Water Co.* (Del. Ch.), 77 Atl. 720; *Southern Bank of Ga. v. Mechanics' Savings Bank*, 27 Ga. 252.

51. *U. S.*—*Kelsey v. Pennsylvania R. Co.*, 14 Blatchf. 89, 14 Fed. Cas. No. 7,679. *Ky.*—*L. Dodge Lumber Co. v. Macquithy*, 14 Ky. L. Rep. 142. *Minn.* *Anderson v. Southern M. R. Co.*, 21 Minn. 30.

52. *Decker v. New York Belt. & Pack. Co.*, 11 Blatchf. 76, 7 Fed. Cas. No. 3,727.

53. *Bac. Ab.*, tit. Corp.; 3 Blk. Com. 445; 1 Tidd Pr., 116.

Compelling Appearance To Answer Indictment.—At common law, if a corporation did not appear in answer to a summons, when the corporation was charged with a criminal offense, a *distringas* was awarded, under which its

lands nor goods, there was no way to make it appear, either in a court of law or equity, since the sheriff could not distrain any individual member of a corporation.⁵⁴ In modern practice, however, judgments by default may be rendered against either private,⁵⁵ or municipal corporations;⁵⁶ while bills *pro confesso* may be taken against them in equity.⁵⁷

X. ATTACHMENT AND GARNISHMENT. — A. ATTACHMENT.

1. Corporation May Attach.—A corporation may avail itself of the provisions of the attachment laws in the same way as may a natural person.⁵⁸

2. Corporation May Be Attached.—Under some of the statutes regulating the attachment of property, corporations have been held

goods and lands were seized to compel an appearance. *State v. Western N. C. R. Co.*, 89 N. C. 584.

54. *Thusfeld v. Jones, Skin.* (K. B.) 27, 90 Eng. Reprint 14.

Private Members Made Liable.—In a case, however, as early as 1671, where a corporation had no property and would not appear, and where, consequently, a court of equity could give no relief, the plaintiff was given a specific order of relief by the House of Lords, the individual members being made liable for the company's debts. *Salmon v. The Hamborough Company*, 1 Ch. Cas. 204, 22 English Reprint 763. And see *Harvey v. East-India Co.*, 2 Vern. 395, 23 English Reprint 856.

55. **Ala.**—*Oxanna Bldg. Assn. v. Agee*, 99 Ala. 571, 13 So. 279; *Manhattan Fire Ins. Co. v. Fowler*, 76 Ala. 372. **Ark.**—*Southern Bldg., etc. Assn. v. Hallum*, 59 Ark. 583. **Kan.**—*Union Pac. R. Co. v. Pillsbury*, 29 Kan. 652. **Tex.**—*Jones v. Jefferson*, 66 Tex. 576, 1 S. W. 903; *Galveston, etc. R. Co. v. Gage*, 63 Tex. 568.

56. *Randolph County v. Hutchins*, 46 Ala. 397.

57. See *Non-Magnetic Watch Co. v. Association Horlogere Suisse*, 45 Fed. 210; *Salmon v. The Hamborough Company*, 1 Ch. Cas. 204, 22 Eng. Reprint 763.

58. **Ala.**—*Planters' & Merchants' Bank v. Andrews*, 8 Port. 404. **Ky.** *Kentucky Jeans Clothing Co. v. Bohn*, 104 Ky. 387, 47 S. W. 250. **N. J.**—*Trenton Banking Co. v. Haverstick*, 11 N. J. L. 171. **Tenn.**—*Union Bank v. United States Bank*, 4 Humph. 369; *State v. Nashville University*, 4 Humph. 157.

Tennessee.—Under the broad and comprehensive section of the Code, says the supreme court of Tennessee, any creditor may have the writ, whether he is a natural person or a corporation; and if there are two or more debtors, he may commence his action against one or more, by summons, and against the others by original attachment. *Swan v. Roberts*, 2 Coldw. (Tenn.) 153.

Foreign Corporation.—A foreign corporation may maintain an action in attachment, providing it has complied with the local law by the time a motion to dismiss the suit is filed, although at the time of the bringing of the suit it had not so complied. *Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420. And see *Pech Mfg. Co. v. Groves*, 6 S. D. 504, 62 N. W. 109. See, also, *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51.

United States.—The United States may maintain a suit in attachment, since proceedings by attachment are merely an incident to the main action of a suit; a conservative process provided by law in aid of and to protect the creditor's rights, and as such has long been exercised under the common law. *United States v. Murdock*, 18 La. Ann. 305, 89 Am. Dec. 651. Moreover, in such a proceeding by the United States no bond is required. *United States v. Ottman*, 3 MacArthur (D. C.) 73; U. S. Rev. St., §1001.

County Commissioners.—A quasi-public corporation, such as a board of county commissioners, may bring an action in attachment. *State v. Fortinberry*, 54 Miss. 316.

not liable to attachment,⁵⁹ yet it is the general rule that the statutory provisions apply to corporations,⁶⁰ and that within the word "person," as used in the attachment laws, corporations are included.⁶¹

3. Causes for Attachment.—Among the varying grounds for attachment in the different states, the causes that particularly apply to corporations are intents to defraud creditors as indicated by secret and fraudulent disposals of property,⁶² or the removal of property

59. Thus, it has been held that an attachment under an act relating to absconding and absent debtors, does not lie against the estate of a corporation existing in another state, and indebted within the state in which the action is brought. Such an act applies only to natural persons and not to bodies corporate. *M'Queen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5. And see *Vogle v. New Granada Canal Co.*, 1 Houst. (Del.) 294; *Martin v. Mobile & O. R. Co.*, 7 Bush (Ky.) 116. See, also, *infra*, XX, B, 9.

Colorado.—Under a statute providing that a corporation may be attached, providing its chief office "or" place of business is not out of the state, a domestic corporation whose chief place of business is within the state, cannot be attached. *Rocky Mountain Oil Co. v. Central Nat. Bank*, 29 Colo. 129, 67 Pac. 153.

60. **U. S.**—*Gokey v. Boston & M. R. Co.*, 130 Fed. 994. **Ala.**—*Planters' & Mechanics' Bank v. Andrews*, 8 Port. 404. **Ga.**—*Wilson v. Danforth*, 47 Ga. 676. **Ill.**—*State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519, 48 N. E. 82. **La.**—*Hazard v. Agricultural Bank*, 11 Rob. 326. **Me.**—*Poor v. Chapin*, 97 Me. 295, 54 Atl. 753. **Mass.**—*Marr v. Washburn, etc. Mfg. Co.*, 167 Mass. 35, 44 N. E. 1062. **Mich.**—*Michigan Dairy Co. v. Runnels*, 96 Mich. 109, 55 N. W. 617. **Mo.**—*St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 421. **Wash.**—*Compton v. Schwabacher Bros. & Co.*, 15 Wash. 306, 46 Pac. 338. **Wis.**—*Ruthe v. Green Bay, etc. R. Co.*, 37 Wis. 344.

Lien of Judgment.—"Where the plaintiff in the attachment sustains the grounds upon which the attachment is sued, and prosecutes his case to final judgment, the lien of the judgment relates back to the levy of the writ of attachment." *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519, 48 N. E. 82.

Attachment of Shares.—An attachment of the shares of a stockholder

does not, however, encumber in the least the property of the company, or prevent the assignment of the corporate property. *Gottfried v. Miller*, 104 U. S. 521, 26 L. ed. 851; *Morgan v. The Railroad Co.*, 1 Woods (C. C.), 15, 17 Fed. Cas. No. 9,806; *Arnold v. Rugles*, 1 R. I. 165. Compare *Van Norman v. Jackson*, 45 Mich. 204.

Attaching Corporation and Stockholder.—Where a corporation and the other defendants are jointly sued, the action being to enforce a stockholder's statutory liability, and where the complaint demands different amounts from the several defendants, the writ of attachment "must conform to the complaint and direct the attachment of so much property of the respective defendants as will secure the amount alleged to be due from each." If the writ is issued for an amount exceeding the demand which is made against the defendant in the complaint, the writ must be discharged as to such defendant on his motion. This, moreover, is true, although in executing the writ no more of the defendant's property was actually attached than was sufficient to satisfy the amount of the claim against him. *Kennedy v. California Savings Bank*, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163.

61. **U. S.**—*Gokey v. Boston & M. R. Co.*, 130 Fed. 994. **La.**—*Martin v. Branch Bank of Ala.*, 14 La. 415. **Pa.**—*Bushel v. Commonwealth Ins. Co.*, 15 Serg. & R. 173. **Va.**—*Bank of United States v. Merchants' Bank*, 1 Rob 605.

62. **Ky.**—*Wyeth v. Renz-Bowles Co.*, 23 Ky. L. Rep. 2337, 66 S. W. 825; *Louisville Banking Co. v. Etheridge Mfg. Co.*, 19 Ky. L. Rep. 908, 43 S. W. 169. **La.**—*Poittevent & Favre Lumber Co. v. Standard Planing Mill & Mfg. Co.*, 49 La. Ann. 72, 21 So. 194. **Mo.**—*Union Nat. Bank v. Mead Mercantile Co.*, 151 Mo. 149, 52 S. W. 196. **N. Y.**—*Davis v. Reflex Camera Co.*, 97 App. Div. 73, 89 N. Y. Supp. 587; *J. Walter Thompson Co. v. Queen City Cycle Co.*,

from the state,⁶³ or the giving of unfair preferences to creditors.⁶⁴ A transfer of property, however, to certain officers of the corporation in payment of bona fide debts,⁶⁵ payment of wages to factory hands and laborers,⁶⁶ an application for the appointment of a receiver,⁶⁷ the mere changing of the location of a factory to another state,⁶⁸ or a mere threat to give certain creditors a preference,⁶⁹ do not in themselves amount to intents to defraud, and no attachment lies in such cases.⁷⁰ That an officer of the corporation has converted corporate funds to his own use does not, moreover, render a corporation liable to attachment on the ground of defrauding its creditors.⁷¹

4. Foreign Corporations.—Some of the statutes provide that the property of foreign corporations may be attached in any suit, a distinction being made between such corporations and domestic corporations which can be attached only on some other specified ground.⁷² It is held, however, in some jurisdictions, that a foreign corporation cannot be attached on the ground of being a "non-resident" providing

16 App. Div. 522, 44 N. Y. Supp. 1049. Ohio.—*Shawnee Commercial & Savings Bank Co. v. Miller*, 24 Ohio C. C. 198. Wis.—*Senour Mfg. Co. v. Clarke*, 96 Wis. 469, 71 N. W. 883.

President's Appropriation of Funds. Where the president of a corporation appropriates its funds to his own use, the corporation as such is not chargeable with fraud upon its creditors so as to justify an attachment of its property upon such ground. *Shuler v. Birdsall, etc. Mfg. Co.*, 17 App. Div. 228, 45 N. Y. Supp. 725.

63. *Bicknell v. Speir*, 18 N. Y. Supp. 590. See *Davis v. Reflex Camera Co.*, 97 App. Div. 73, 89 N. Y. Supp. 587.

64. La.—*A. Baldwin & Co. v. Central Sugar Mfg. Co.*, Man. Unrep. Cas. 195. N. Y.—*Wallabout Bank v. Military Club of N. Y.*, 36 App. Div. 156, 55 N. Y. Supp. 422. S. D.—See *Trebilcock v. Big Missouri Min. Co.*, 9 S. D. 206, 68 N. W. 330.

65. *Lexow v. St. Lawrence Marble Co.*, 16 Misc. 133, 38 N. Y. Supp. 831.

Intent To Defraud Creditors.—While, a "mortgage executed to its president by the corporation may have been ineffectual to give its president a preference over its other creditors, it affords but very slight, if any, evidence of bad faith, or an actual intent to defraud its creditors. In other words, it may be constructively fraudulent, as to creditors, but not actually fraudulent, or made with an actual intent to defraud creditors. The mere mistake of the corporation as to its legal rights

affords no evidence of a fraudulent intent." *Trebilcock v. Big Missouri Min. Co.*, 9 S. D. 206, 68 N. W. 330.

66. *Baldwin & Co. v. Central Sugar Mfg. Co.*, Man. Unrep. Cas. (La.) 195.

67. *Shuler v. Birdsall Waite & Perry Mfg. Co.*, 17 App. Div. 228, 45 N. Y. Supp. 725; *J. Walter Thompson Co. v. Queen City Cycle Co.*, 16 App. Div. 522, 44 N. Y. Supp. 1049.

68. *Davis v. Reflex Camera Co.*, 97 App. Div. 73, 89 N. Y. Supp. 587.

69. *McLoughlin v. Consumers' Brewing Co.*, 20 Misc. 144, 45 N. Y. Supp. 716.

70. Grounds Must Come Clearly Within the Statute.—"The remedy by attachment owes its existence entirely to the statute, and unless a case clearly comes within its provisions it cannot be maintained." *Rocky Mt. Oil Co. v. Central Nat. Bank*, 29 Colo. 129, 67 Pac. 153; *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

Individual Disposal of Property. That the president and largest stockholder of a corporation is, as alleged, fraudulently disposing of his individual property, no ground therefrom exists for the attachment of the property of the corporation. *Central Nat. Bank v. Ft. Ann Woolen Co.*, 143 N. Y. 624, 37 N. E. 827, 76 Hun 610, 27 N. Y. Supp. 1114.

71. *Shuler v. Birdsall, etc. Co.*, 17 App. Div. 228, 45 N. Y. Supp. 725.

72. The statutes should be consulted.

it has a business office in the state,⁷³ although a contrary view is taken by the courts of some other jurisdictions.⁷⁴

Where the property of a foreign corporation is attached, and the corporation served by publication, the jurisdiction is quasi *in rem*, and the judgment effective only as it concerns the property attached.⁷⁵

5. Affidavits in Attachment.—The statutes generally provide that the affidavit required as a basis for an order of attachment shall be executed by the plaintiff, his agent, or attorney.⁷⁶ An instrument, however, reciting that it is sworn to by the "plaintiff," and signed by one designating himself as "agent" is not the affidavit of either.⁷⁷

It is also held that the secretary of a corporation is not, by virtue of his office, an "agent" of the corporation for the purpose of making an affidavit.⁷⁸ Where the "chief-officer" is authorized by the state to execute the affidavit, its execution by the vice-president is *prima facie* sufficient.⁷⁹

B. GARNISHMENT.—1. Corporation May Be Garnishee.—Garnishment proceedings may be instituted against corporations.⁸⁰ The

See, for example, *Mich. Dairy Co. v. Bunnels*, 96 Mich. 109, 55 N. W. 617.

73. *Middough v. St. Joseph & D. C. R.*, 51 Mo. 520; *Farnsworth v. Terre Haute, A. & St. L. R. Co.*, 29 Mo. 75; *Phillipsburgh Bank v. Lackawanna R. Co.*, 27 N. J. L. 206.

74. Ga.—*South Carolina R. Co. v. Peoples' Sav. Inst.*, 64 Ga. 18. **Ill.** *Voss v. Evans Marble Co.*, 101 Ill. App. 373. **Pa.**—*Diener v. Wopsononock Hotel Co.*, 23 Pa. Co. Ct. 376, 10 Pa. Dist. 57. **Va.**—*Cowardin v. Universal L. I. Co.*, 32 Gratt. 445.

75. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. And see *Wilson v. Danforth*, 47 Ga. 676.

76. The statutes should be consulted. See *North Penn Iron Co. v. Boyce*, 71 N. J. L. 434, 58 Atl. 1094.

Attorney of Banking Corporation.

Where a bank was plaintiff in an attachment suit, the attorney of the bank was held qualified to make the affidavit although he had not been expressly authorized to do the particular act. *Trenton Banking Co. v. Haverstick*, 11 N. J. L. 171.

Grounds and Amount.—The affidavit for an attachment must specify the amount of the claim, and grounds for the attachment. *Citizens' Bank v. Corkings*, 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891.

Alleging Corporate Capacity.—It is held in some jurisdictions that the affidavit of attachment must show the

corporate capacity to sue. In such states, "unless it affirmatively appears from the affidavit for an attachment that there is an action pending between persons capable of becoming parties to an action, the court is without jurisdiction to issue an attachment, and must, upon proper application, discharge the same." Where the affidavit designates plaintiff by a name which is apparently not a natural person, the plaintiff's corporate existence and capacity to sue must, therefore, be alleged. *Citizens' Bank v. Corkings*, 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891; *State v. Chicago, etc. R. Co.*, 4 S. D. 261, 56 N. W. 894, 46 Am. St. Rep. 783; *Barbour v. Albany Lodge*, 73 Ga. 474. See, in general, *infra*, XI.

77. *Blyth & Fargo Co. v. Swenson*, 7 Wyo. 303, 51 Pac. 873.

78. *North Penn Iron Co. v. Boyce*, 71 N. J. L. 434, 58 Atl. 1094.

79. *Kentucky Jeans Clothing Co. v. Bohn*, 104 Ky. 387, 47 S. W. 250.

80. Conn.—*Knox v. Protective Ins. Co.*, 9 Conn. 430, 25 Am. Dec. 33. **Ill.** *Toledo, etc. R. Co. v. Reynolds*, 72 Ill. 487. **Ia.**—*Burton v. Warren Twp.*, 11 Iowa 166; *Taylor v. Burlington, etc. R. Co.*, 5 Iowa 114. **Mo.**—*St. Louis, etc. Ins. Co. v. Cohen*, 9 Mo. 421. **Va.** *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. 655, 65 Am. Dec. 254.

Payment to Another Creditor.—Where, after service of a writ of garnishment,

statutes sometimes expressly give this right,⁸¹ but a statute providing for the garnishment of "persons" is also held to include corporations.⁸²

Where the statute authorizes garnishment proceedings only against resident corporations, a foreign corporation having an office in the state may be summoned as a resident corporation.⁸³

2. The Affidavit.—The statute may require that the affidavit recite that the garnishee is a corporation,⁸⁴ but it is not usually necessary to allege the fact of incorporation.⁸⁵ The affidavit must, however, allege the indebtedness of the corporation.⁸⁶

3. Serving the Summons.—Service of the summons in garnishment must be in accord with the statutory requirements in order to give jurisdiction.⁸⁷ Unless the summons is served upon one of the persons designated by the statute, the service is void.⁸⁸ The place in which the summons may be lawfully served may not, moreover, be identical with the place of service of process in general, and due care must be taken to consult the local statute.⁸⁹

a railroad corporation, acting by its treasurer who was in ignorance of the service of the writ, paid the money in its hands, and thus garnished, to an attorney of the person to whom the money was due, the money was, nevertheless, thus wrongly paid, and the payment did not discharge the obligation of the corporation under the garnishment against it. *McFaddin v. Texas & N. O. R. Co.* (Tex. Civ. App.), 129 S. W. 634.

81. *Ex parte Cincinnati, etc. R. Co.*, 78 Ala. 258; *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348.

82. *Wales v. City of Muscatine*, 4 Iowa 302.

Liable as Garnishee.—A corporation is liable as garnishee under the attachment laws, being included in the word "person" used in the statute. *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. (Va.) 665.

83. *Bushel v. Com. Ins. Co.*, 15 Serg. & R. (Pa.) 173.

84. *First Nat. Bank v. Brown*, 42 Tex. Civ. App. 584, 32 S. W. 1052.

85. *Stoddard v. Martin*, 3 Wills. Civ. Cas. (Tex.), §35; *First Nat. Bank v. Brown*, 42 Tex. Civ. App. 584, 32 S. W. 1052.

86. *Bowers v. Continental Ins. Co.*, 65 Tex. 51.

87. *Mich.*—*Kirby Carpenter Co. v. Trombley*, 101 Mich. 447, 59 N. W. 809.

Pa.—*Silva v. Greenwald*, 2 Pa. Co. Ct.

131. *Utah.*—*Cole v. Utah Sugar Co.*, 35 Utah 148, 99 Pac. 681.

Amending Defective Return.—"The omission to state in the return of service of a summons in garnishment that the agent of the corporation served was the 'agent in charge of the office or business of the corporation in the county' can be cured by an amendment made by the officer who made the service and return." *Jones v. Bibb Brick Co.*, 120 Ga. 321, 48 S. E. 25; *Southern Express Co. v. National Bank of Tifton*, 4 Ga. App. 399, 61 S. E. 857.

88. *Fowler v. Dickson* (Del.), 74 Atl. 601; *Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. 900.

Insufficient Service.—Service in garnishment on a person as "manager," without saying of what he is manager is not notice to the company of which he is manager. *Cole v. Utah Sugar Co.*, 35 Utah 148, 99 Pac. 681.

Must Be Addressed to the Corporation.—A citation in garnishment addressed to "A. B. individually and as President," and to "C. D. individually and as cashier," is not effective as against the unnamed corporation in which A. B. and C. D. may hold positions. Citation in such case may be served upon the officer of the corporation designated to receive it; but it must be addressed to the corporation. *Bank of Monroe v. Ouachita Val. Bank*, 124 La. 798, 50 So. 718.

89. See the local statutes. See, also, the following cases as to place of service: *N. Y.*—*Blumenthal v. Hud-*

4. The Answer of the Corporation.—In some jurisdictions, the answer in garnishment proceedings against corporations must be made in writing and under the corporate seal,⁹⁰ a mere verbal disclaimer on the part of counsel for the corporation is insufficient.⁹¹

The answer may be made by some officer or agent having knowledge of the facts, not necessarily the person upon whom the summons was served.⁹²

In case the summons is invalid, the corporation cannot by answering waive any of the rights of the principal debtor to object to the same.⁹³

XI. PLEADING.—A. ACTIONS BY CORPORATIONS.—1. **Sues in Corporate Name.**—That a corporation must sue in its corporate name has been previously considered.⁹⁴ A corporation may, however, sue in a name acquired by usage,⁹⁵ and an abbreviated form of the corporate name may be used if the statute creating the corporation used, in fact, such form.⁹⁶

Suing by Wrong Name.—Where in its petition or declaration a corporation sues by a wrong name, the misnomer of the plaintiff may be met by a plea in abatement.⁹⁷ This is, at least, the rule in common

son R., etc. Mfg. Co., 15 N. Y. Supp. 826, 21 Civ. Proc. 217. **Ohio.**—Conahan v. Cullin, 2 Disney 1, holding that service must be within the county. **Tenn.**—Lambreth v. Clarke, 57 Tenn. 32. **Tex.**—Harrell v. Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863.

90. Ala.—Planters, etc. Bank v. Leavens, 4 Ala. 753. **Ill.**—Hamburg-Bremen Fire Ins. Co. v. Kennedy, 57 Ill. App. 136; Chicago, etc. Ry. Co. v. Mason, 11 Ill. App. 525. **Mich.**—See Whitworth v. Pelton, 81 Mich. 98, 45 N. W. 500.

91. Hamburg-Bremen Fire Ins. Co. v. Kennedy, 57 Ill. App. 136.

92. Ala.—*Ex parte* Cincinnati, S. & M. Ry. Co., 78 Ala. 258. **Mich.**—Whitworth v. Pelton, 81 Mich. 98, 45 N. W. 500. **R. I.**—Duke v. Rhode Island Locomotive Works, 11 R. I. 599.

93. H. B. Claffin Co. v. Bretzfelder, 69 Ark. 271, 62 S. W. 905.

94. See *Parties, supra*. See, also: **U. S.**—Bradley v. Richardson, 2 Blatchf. 343, 3 Fed. Cas. No. 1,786. **Mass.**—Norton Hodges, 100 Mass. 241; Bartlett v. Brickett, 14 Allen 62; Minot v. Curtis, 7 Mass. 441. **Va.**—Porter v. Nekervis, 4 Rand. 359.

Corporate Head.—A corporation aggregate which has a head, cannot sue or be sued without it, because without it the corporation is incomplete. **Bac.**

Ab. tit. Corp. E. 2; I Kyd Corp. 281. See also *Parties, supra*.

Bill in Equity.—A corporation is usually described in its bill in equity by its corporate name, with the addition of the fact that it is a corporation duly established by law in such a state, and having its place of business at such a place. **Winnipiseogee Lake Co. v. Young**, 40 N. H. 420, 428.

95. Thus an adjudication in bankruptcy made against a corporation designated by its original name, retained by the corporation after a legislative change, is valid. **Alexander v. Berney**, 28 N. J. Eq. 90.

96. See *Merrick v. Trustees, etc. of Bank of Metropolis*, 8 Gill (Md.) 59.

Identity Inferred.—Where the true name of a plaintiff corporation is the Campbell & Zell Company of Baltimore, while in the pleadings it is described simply as the Campbell & Zell Company, the identity of the corporation will be inferred to be that of the Campbell & Zell Company named in a bond sued upon, unless defendant shows that there were two Campbell & Zell corporations. **Campbell & Zell Co. v. American Surety Co.**, 129 Fed. 491.

97. U. S.—Baltimore, etc. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. ed. 784. **Ill.**

law actions, and the misnomer cannot be availed of under the general issue, or other plea in bar, or even under a plea of *nul tiel* corporation.⁹⁸

The rule is the same in equity pleading, the misnomer may be met by abatement and not by answer.⁹⁹

Under the codes, there seems to be no uniformity as to the proper remedy, some courts holding that the misnomer should be pleaded in the answer,¹ others, by a plea in abatement.²

Hoereth v. Franklin Mill Co., 30 Ill. 151; *Riemann v. Tyroler, etc. Verein*, 104 Ill. App. 413. **Ky.**—*Wilhite v. Convent of Good Shepherd*, 25 Ky. L. Rep. 1375, 78 S. W. 138. **Md.**—*Bank of Metropolis v. Orme*, 3 Gill 443; *Hanover Sav. Fund Soc. v. Suter*, 1 Md. 502. **Mass.**—*Gilbert v. Nantucket Bank*, 5 Mass. 97. **N. Y.**—*M. E. Church v. Tryon*, 1 Denio 451. **Ohio.**—*State v. Bell Telephone Co.*, 36 Ohio St. 296. **Pa.**—*Gray v. Monongahela Nav. Co.*, 2 Watts & S. 156, 37 Am. Dec. 500. **Va.** *Bank of Virginia v. Craig*, 6 Leigh 399. **Eng.**—*Mayor, etc. of Stafford v. Bolton*, 1 B. & P. 40.

Plaintiff and Defendant Distinguished. While the misnomer of a corporation is only a matter of abatement, where it is plaintiff, yet where it is defendant, it may be met by a plea of *nul tiel* corporation, and this is a plea in bar. *Bank of Virginia v. Craig*, 6 Leigh (Va.) 399.

98. See Chit. Pl., 16th Am. ed., p. 581; Gould's Pl., c. 5, §69-84. See, also, the following cases: **U. S.**—*Baltimore, etc. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. ed. 784. **Md.**—*President, etc. of Hanover Savings Fund v. Suter*, 1 Md. 502. **Mass.**—*Medway Cotton Manufactory v. Adams*, 10 Mass. 360; *Gilbert v. Nantucket Bank*, 5 Mass. 97. **Eng.**—*Dickinson v. Bowes*, 16 East 110, 104 Eng. Reprint 1030; *Mayor, etc. of Stafford v. Bolton*, 1 B. & P. 40.

Abolished in England.—The plea in abatement for misnomer was abolished in England by the Procedure Act of 3 and 4 Wm. IV, c. 42, s. 11, and a summary process for correcting the error substituted. Bliss, Code Pl., §427.

99. *Young v. South Tradegar Iron Co.*, 85 Tenn. 182, 2 S. W. 202, 4 Am. St. Rep. 752.

May Be Amended.—Where in a bill in equity the corporation plaintiff is

misnamed, the bill may be amended on the hearing. *Hoboken Bldg. Assn. v. Martin*, 13 N. J. Eq. 427.

1. *Whittlesey v. Frantz*, 74 N. Y. 456; *M. E. Church v. Tryon*, 1 Denio (N. Y.) 451. Compare *Traver v. Eighth Ave. R. Co.*, 4 Abb. Dec. 422, 433.

Plaintiff Not Real Party in Interest. It is held in some cases that where the plaintiff is incorrectly named it amounts to an action brought by one who is not the real party in interest, and that the infirmity of the plaintiff's position is one affecting the cause of action, and that it may be taken advantage of under a general denial. See *Lee v. Young* (Wis.), 132 N. W. 595; *Hilliard v. Wisconsin Life Ins. Co.*, 137 Wis. 208, 117 N. W. 999. In the case of *Robbins v. Deverill*, 20 Wis. 142, it was held that the objection that an action was not brought in the name of the real party in interest must be taken advantage of by demurrer or specifically by answer.

2. See *Sinton v. The R. R. Roberts*, 46 Ind. 476; *Peden's Admr. v. King*, 30 Ind. 181; *State v. Bell Telephone Co.*, 36 Ohio St. 296.

Remedy for Misnomer.—Judge Bliss, in his treatise on Code Pleading, §427, says that the remedy for misnomer has not often been considered, and there is a want of harmony in the few cases, although it is universally held that if the defendant pleads to the merits the objection is waived, unless an instrument in writing, offered in evidence, shows a variance. In a case in New York (*Bank of Havana v. Magee*, 20 N. Y. 355), the appellate court held that the objection could not have been taken by demurrer or answer, had the attempt to do so been made, and that, having gone to trial on the merits, the judgment was not erroneous. Judges Denio and Comstock gave separate opinions, both agreeing in the result.

2. General Rules of Pleading.—The general rules of pleading are applicable to corporations as well as to natural persons; where the statutes make no exceptions in case of corporations, the courts have no authority to interpolate any; exceptions in the rules of pleading in favor of corporations cannot be made with any more propriety than similar exceptions in the rules of evidence.³

3. Pleading Incorporation.—*a. General Statement.*—Whether or not an allegation of incorporation is required in the pleadings, is a question giving rise to much conflict of opinion in the cases. It is the general rule, however, that when an action is brought by a corporation it is not necessary to allege in the declaration or petition the fact of incorporation.⁴

Common Law Rule.—It is said that at common law no corporation is required to aver its corporate existence.⁵

Judge Denio thinks that the court should at any stage of proceedings, when attention was called to the defect, before or after judgment, have amended the complaint by correcting the mistake in the name of the plaintiff. Judge Comstock agrees that the misdemeanor is an irregularity which could not be the subject of demurrer or answer, and that the objection was waived by taking issue on the merits.

West Virginia.—Under the West Virginia code, the misnomer of a corporation cannot be taken advantage of by plea in abatement; but where formerly pleaded in abatement, the declaration and summons may, on the motion of either party, on affidavit of the right name, be amended by inserting the same therein. *First Nat. Bank v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. 792.

3. Baldwin, J., in *Hunt v. San Francisco*, 11 Cal. 250.

Verified Complaint.—In pleading, the same rule must prevail with corporations as with individuals. The rule, for example, which requires a defendant to answer positively as to the facts alleged in a verified complaint, which are presumptively within his own knowledge, applies to municipal corporations. The statute makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons. *The San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, per Field, J.

Special Cases.—In certain proceedings, however, owing to the peculiar character of the corporate body, and the extent or limit of the duties and powers of the corporation; dependent

upon the charter or act under which it is instituted, matter may be required to be pleaded that would have no pertinence except that a corporation was a party. Thus in an action by a corporation, for an alleged libel, on demurrer to the declaration, it was held that the charter should be set out at length, in order that it might be seen whether the publication was false in stating the mode in which it authorized the business of the corporation to be done. *Field, Corp.*, §383; *The Hahnemannian Life Ins. Co. v. Beebe*, 48 Ill. 87.

4. U. S.—*Soc. for Propagation of the Gospel v. The Town of Pawlet*, 4 Pet. 480, 7 L. ed. 927. **Ala.**—*Seymour v. Thomas Harrow Co.*, 81 Ala. 250, 1 So. 45. **Ark.**—*Odd Fellows Bldg. Assn. v. Hogan*, 28 Ark. 261; *Miss.*, etc. *R. R. Co. v. Gaster*, 20 Ark. 455. **Ill.**—*Frye v. Bank of Ill.*, 10 Ill. 332. **Ind.**—*Cicero*, etc. *Co. v. Craighead*, 28 Ind. 274; *Harris v. Muskingum Mfg. Co.*, 4 Blackf. 267, 29 Am. Dec. 372. **Kan.**—*Ryan v. Farmers Bank*, 5 Kan. 658. **Md.**—*Powhatan Steamboat Co. v. Potomac Steamboat Co.*, 36 Md. 238. **Mich.**—*Prussian Nat. Ins. Co. v. Eisenhardt*, 153 Mich. 198, 116 N. W. 1097. **Neb.**—*Exchange Nat. Bank v. Capps*, 32 Neb. 242, 49 N. W. 223, 29 Am. St. Rep. 433. **N. J.**—*Bennington Iron Co. v. Rutherford*, 18 N. J. L. 105, 35 Am. Dec. 528. **Okla.**—*Jantzen v. Emanuel*, etc. *Church*, 27 Okla. 473, 112 Pac. 1127. **Pa.**—*Zion Church v. St. Peter's Church*, 5 Watts & S. 215. **Va.**—*Rees v. Conococheague Bank*, 5 Rand. 326, 16 Am. Dec. 755. **W. Va.**—*Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

5. At common law, it is not neces-

Equity Rule.—Likewise, in equity practice it has been held to be unnecessary to aver that the complainant is a corporation;⁶ although it is also held that a demurrer will be sustained to a bill in equity which does not allege the incorporation of the party plaintiff.⁷

Code Rule.—Under the code procedure, while the decisions are conflicting, the weight of authority holds that the petition need contain no allegation of incorporation,⁸ although other decisions are to the contrary.⁹

sary to set forth in the declaration the act of incorporation when an action is brought in the corporate name. *Exchange Nat. Bank v. Capps*, 32 Neb. 242, 49 N. W. 223, 29 Am. St. Rep. 433. And see *Angell & Ames Corp.*, §632, where it is said that it is generally admitted that a corporation may declare in its corporate name, without setting forth in the declaration the act of incorporation or averring that it is a corporation if the act be private. See, also, *Bliss Code Pl.*, §247.

Issue May Be Taken.—At common law, a corporation when it sues, need not set forth its title in its declaration; but if the issue be taken, it must show, by evidence, upon the trial, that it is a body corporate, having legal authority to make the contract which it seeks to enforce, or to sue in that capacity in which it appears in court. *Bank of Michigan v. Williams*, 5 Wend. (N. Y.) 478, 482; *Smith v. Weed Sewing Machine Co.*, 26 Ohio St. 562, 565.

Applies to Motions.—A corporation need not set forth in its declaration how it is a corporation, but must prove it at the trial, and this rule applies to motions as well as to suits by a corporation. *Grays v. Turnpike Co.*, 4 Rand. (Va.) 578; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507.

6. *German Reformed Church v. Von Puechelstein*, 27 N. J. Eq. 30.

Address of Corporation.—In a bill of equity, the address of a corporate body, suing as plaintiff, need not be stated. *Braithwaite's Pr.*, 25; *Dan. Ch. Pl. & Pr.*, 6th Am. ed., 360.

7. "The practice, we think, is nearly universal, that a corporation is described in its bill by its corporate name, with the addition of the fact that it is a corporation duly established by law in such a state, and having its place of business at such a place; and a corporation defendant is de-

scribed in the same way." *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420, 428.

8. *Cal.*—*Moynihan v. Drobaz*, 124 Cal. 212, 56 Pac. 1026, 71 Am. St. Rep. 46. *Ind.*—*Stein v. Ind. Bldg. & L. Assn.*, 18 Ind. 237, 81 Am. Dec. 353. *Kan.*—*Ryan v. Farmers' Bank*, 5 Kan. 658. *Ky.*—*Wood v. Friendship Lodge*, 20 Ky. L. Rep. 2002, 50 S. W. 836. *Minn.*—*Holden v. Great W. El. Co.*, 69 Minn. 527, 72 N. W. 805, 65 Am. St. Rep. 585. *Neb.*—*Exchange Nat. Bank v. Capps*, 32 Neb. 242, 49 N. W. 223, 29 Am. St. Rep. 433. *Ohio.*—*Brady v. Nat. Supply Co.*, 64 Ohio St. 267, 60 N. E. 218, 83 Am. St. Rep. 218. *Okla.*—*Jantzen v. Emanuel German Baptist Church*, 27 Okla. 473, 112 Pac. 1127. *S. C.*—*Parker v. Carolina Sav. Bank*, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

Nebraska.—In this state it is held, for example, that there is no requirement of the code that authorizes a court to insist upon setting out the act of incorporation in an action brought in the corporate name. The code has not changed the common law in this respect. *Exchange Nat. Bank v. Capps*, 32 Neb. 242, 49 N. W. 223, 29 Am. St. Rep. 433.

9. *Ky.*—*Pryse v. Three Forks, etc. Bank*, 20 Ky. L. Rep. 1057, 48 S. W. 415. *N. Y.*—*Kaulbach v. Knickerbocker Trust Co.*, 139 App. Div. 566, 124 N. Y. Supp. 286. *S. D.*—*Citizens Bank v. Corkings*, 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891.

Texas.—In the case of *Holloway v. The Memphis, etc. R. Co.*, 23 Tex. 465, 76 Am. Dec. 68, the court says: "It is the settled rule of the English law, and in some of the states that where a body politic institutes legal proceedings, either on a contract or to recover property, it must, at the trial, under the general issue, prove the fact of incorporation. . . . The Eng-

Judicial Notice. — The doctrine of judicial notice of incorporation influences many of the decisions, it being held that in the case of domestic, public or private corporations created by public laws, the courts will take judicial notice of their corporate character, and that no averment of incorporation is needed.¹⁰ On the other hand, some jurisdictions hold that the existence of corporations created by private acts will not be judicially noticed, and that such a corporation plaintiff must aver and prove the fact of incorporation.¹¹ Neither can the court take judicial knowledge of the incorporation of foreign corporations.¹²

Implied Averment. — Other cases hold that the very use by the plaintiff of a corporate name is an implied statement that the plaintiff is a corporation, and that no express averment is required.¹³

Estoppel. — Some of the cases, holding that no allegation of incorporation is necessary, are based upon the doctrine that by previous contractual dealings with the plaintiff as a corporation, defendant is estopped to deny its corporate character.¹⁴

lish rule seems most in consonance with principle. The merely naming themselves a company shows the fact of an association acting under a particular name, but not that they have the legal capacity to sue, and prosecute suits by that name. . . . It would seem, therefore, on principle, that a private domestic corporation, equally with a foreign corporation, must aver and prove the fact of incorporation."

Required by Statute.—In some of the code states it is expressly required by statute that the corporate existence must be alleged. See *infra*.

10. See Dillon Mun. Corp., 4th ed., §83, also the following cases: **Ala.** City Council of Montgomery v. Wright, 72 Ala. 411; Selma v. Perkins, 68 Ala. 145. **Ark.**—Mississippi R. Co. v. Gaster, 20 Ark. 455. **N. H.**—Lebanon v. Griffin, 45 N. H. 558, 563; Winnipiseogee Lake Co. v. Young, 40 N. H. 420, 428. **Va.**—Rees v. Conococheague Bank, 5 Rand. 326. **Wis.**—Smith v. City of Janesville, 52 Wis. 680, 9 N. W. 789. **Eng.**—See Withers v. Warner, 1 Str. 309, 93 Eng. Reprint 539.

England.—The courts take judicial notice of a corporation created by act of parliament. Church v. Imperial Gas Co., 6 Ad. & El. 846, 33 E. C. L. 230.

11. **Minn.**—St. Paul, etc. v. Brown, 9 Minn. 157. **N. H.**—Winnipiseogee Lake Co. v. Young, 40 N. H. 420, 428. **N. Y.**—American Baptist, etc. Soc. v. Foote, 52 Hun 307, 5 N. Y. Supp. 236. **Ohio.**—Devoss v. Gray, 22 Ohio St. 159.

Tex.—Holloway v. Memphis, etc. R. Co., 23 Tex. 465, 76 Am. Dec. 68. **Vt.** State v. Vermont Cent. R. Co., 28 Vt. 584.

12. A foreign corporation is required to prove its corporate legal existence, because the court cannot judicially know the legal being of such a corporation. The court cannot take notice, *ex officio* of the foreign law, by which it is created a body corporate. Holloway v. The Memphis, etc. R. Co., 23 Tex. 465, 76 Am. Dec. 68.

Ohio.—In suits brought by corporations of our own state, the court will take judicial notice of their capacity to sue; while those claiming to be foreign corporations must prove their corporate character under the general issue. Smith v. Weed Sewing Machine Co., 26 Ohio St. 562, 565; Lewis v. The Bank of Kentucky, 12 Ohio 151.

13. **Ga.**—Edenfield v. Bank of Milen, 7 Ga. App. 645, 67 S. E. 896; Minchew v. Mahunta Lumb. Co., 5 Ga. App. 154, 62 S. E. 716; Charles v. Valdosta Foundry & Machine Co., 4 Ga. App. 733, 62 S. E. 493. **Ind.**—United Brotherhood v. Dinkle, 32 Ind. App. 273, 69 N. E. 707. **N. Y.**—Phoenix Bank v. Donnell, 40 N. Y. 410. **Va.**—Gillett v. American Stove, etc. Co., 29 Gratt. 565.

14. **Ind.**—Ryan v. Valandingham, 7 Ind. 416. **Mass.**—Worcester Medical Inst. v. Harding, 11 Cush. 285. **Mo.** National Ins. Co. v. Bowman, 60 Mo. 252. **N. H.**—Congregational Society v.

Statutory Requirement.—The statute may, however, expressly require that an allegation of incorporation be made.¹⁵

b. *What Allegation Sufficient.*—Where an allegation of incorporation is required, a general allegation is sufficient.¹⁶ Thus, a petition alleging that plaintiff is a corporation duly organized under the laws of the state, sufficiently sets forth the fact of incorporation, it being unnecessary to allege the act creating the corporation, or the proceedings in connection with the act.¹⁷

Perry, 6 N. H. 164. **N. Y.**—Dutchess Cotton Manufactory *v.* Davis, 14 Johns. 238; Connecticut Bank *v.* Smith, 17 How. Pr. 487. **Eng.**—Henriques *v.* Dutch West India Co., 2 Ld. Raym. 1532, 92 Eng. Reprint 494.

Contra.—Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480.

15. Consult the local statutes. See, also, the following references, where the statute requires the complaint or petition to allege the corporate existence. **Ia.**—McClain's Code, §3223. **N. Y.**—Code Civ. Proc. (1890) §§1775, 1776. **N. D.**—Comp. Laws, §2908. **S. D.**—Comp. Laws, §2908. **Wis.**—Rev. St. (1898), §3205.

Wisconsin.—The statute of this state, for example, provides that in an action by or against a corporation the complaint must aver that the plaintiff or defendant, as the case may be, is a corporation, and, if organized under the laws of this state, that fact must be averred, and, if not so incorporated, an averment that it is a foreign corporation. State *v.* Minahan Bldg. Co., 141 Wis. 400, 123 N. W. 258; Carpenter *v.* McCord L. Co., 107 Wis. 611, 83 N. W. 764.

16. **U. S.**—Stanley *v.* Northwestern Life Assn., 36 Fed. 75. **Mich.**—Imperial Curtain Co. *v.* Jacob, 163 Mich. 72, 17 Detroit Leg. N. 751, 127 N. W. 772. **Minn.**—Dodge *v.* Minnesota Plastic Slate Roofing Co., 14 Minn. 49. **Mo.**—Stewart *v.* Clinton, 79 Mo. 603; Werth *v.* Springfield, 78 Mo. 107. **N. J.**—Swing *v.* Consolidated Fruit Jar Co., 74 N. J. L. 145, 63 Atl. 899. **N. Y.**—Roberts *v.* Pioneer Iron Wks., 125 App. Div. 207, 109 N. Y. Supp. 230; Avon Springs Sanitarium Co. *v.* Weed, 119 App. Div. 560, 104 N. Y. Supp. 58; Nellis *v.* New York Cent. R. Co., 30 N. Y. 505.

Names of Officers.—Allegations of the names of the plaintiff corporation's officers are not necessary. Yates *v.*

Royston State Bank (Tex. Civ. App.), 131 S. W. 255.

Particular State Law.—It is not necessary for a corporation plaintiff to allege its incorporation under any particular state law. Imperial Curtain Co. *v.* Jacob, 163 Mich. 72, 127 N. W. 772.

Place of Incorporation Surplusage. Where in an action of replevin by a corporation, the chattel mortgage under which plaintiff claimed title showed that plaintiff was a corporation of the state of Ohio, whereas the petition alleged that plaintiff "is a corporation existing under and by virtue of the laws of Illinois," no ground of reversal exists, since the place of incorporation is an immaterial allegation in the petition and mere surplusage. Brunswick-Balke-Collender Co. *v.* Kraus, 132 Mo. App. 328, 112 S. W. 20; Sands *v.* Marquardt, 113 Mo. App. 490, 87 S. W. 1011.

Form of Allegation.—Judge Bliss, in his work on Code Pleading, holds (§249) that, under the codes, the proper rule is that the petition should affirmatively state the fact of incorporation. He also suggests the following form:

State of _____

County of _____

In the.....Court.

The New York Publishing Company,
a corporation organized under the laws
of the State of New York, Plaintiff,

v.

John Doe, Defendant.

17. **Cal.**—Riverdale Mining Co. *v.* Wicks, 14 Cal. App. 526, 112 Pac. 896. **Minn.**—Dodge *v.* Minnesota Plastic Slate Roofing Co., 14 Minn. 49. **Mo.**—Chillicothe Sav. Assn. *v.* Ruegger, 60 Mo. 218. **N. Y.**—Hollis *v.* Brooklyn Heights R. Co., 128 App. Div. 821, 113 N. Y. Supp. 4.

Different Causes of Action.—Where different causes of action are joined in one complaint, yet in a jurisdiction where the corporate entity may be required to be alleged, the repetition of the averment as a part of each action is not necessary or proper.¹⁸

c. **Failure To Allege.**—*How Met.*—A failure to allege incorporation when required may be met, it has been held, by special demurrer.¹⁹ A general demurrer is held inapplicable,²⁰ although it has also been held that the defect may be taken advantage of by general demurrer on the ground that the petition or complaint does not state a cause of action.²¹ Other courts take a contrary view, and hold that demurrer is not a proper pleading to meet plaintiff's failure to allege incorporation,²² but that it should be met by answer.²³

18. *West v. Eureka Imp. Co.*, 40 Minn. 394, 42 N. W. 87.

19. *Pryse v. Three Forks Deposit Bank*, 20 Ky. L. Rep. 1057, 48 S. W. 415; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648. See *Oesterreicher v. Sporting Times Pub. Co.*, 5 N. Y. Supp. 2.

Demurrer May Admit Incorporation. Where a corporation plaintiff alleges that it was duly incorporated under the laws of a certain state, a demurrer grounded upon the failure of the declaration to show a compliance with certain provisions of the laws of such state necessary to constitute the plaintiff a corporation cannot be sustained, since the demurrer itself admits the allegation that it was incorporated. *Swing v. Consolidated Fruit Jar Co.*, 74 N. J. L. 145, 63 Atl. 899.

Words Importing a Corporation.—The words "Valdosta Foundry & Machine Company," import a corporation, and are sufficient as against a special demurrer on the ground that there is no party plaintiff. *Charles v. Valdosta Foundry & Machine Co.*, 4 Ga. App. 733, 62 S. E. 493.

20. *Cal.*—See *South Yuba Water & Min. Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222. *Ohio.*—*Saxton v. Seiberling*, 48 Ohio St. 554, 29 N. E. 179. *Tex.*—*Hunter v. Wm. J. Lemp Brewing Co.* (Tex. Civ. App.), 46 S. W. 371. *Wash.*—*Birmingham v. Cheetham*, 19 Wash. 657; 54 Pac. 37.

21. *Ohio.*—*Saxton v. Seiberling*, 48 Ohio St. 554, 29 N. E. 179. *S. D.* *State v. Chicago, etc. R. Co.*, 4 S. D. 261, 56 N. W. 894. *Wash.*—*Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37.

Incapacity Rather Than Insufficiency.

It is held, however, on the contrary, that a failure to allege incorporation cannot be taken advantage of upon the ground that the complaint does not state facts sufficient to constitute a cause of action, but that the proper ground of such a demurrer is the incapacity of the plaintiff to sue. *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648.

22. *N. Y.*—*Irving Nat Bank v. Corbett*, 10 Abb. N. Cas. 85. *N. C.*—*Stanly v. Richmond, etc., R. Co.*, 89 N. C. 331. *Utah.*—*Crane, etc., Mfg. Co. v. Reed*, 3 Utah 506, 24 Pac. 1056.

23. *Cal.*—*Swamp & Overflowed Land District v. Feck*, 60 Cal. 403. *Minn.* *State v. Torinus*, 22 Minn. 272. *Mo.* See *Kansas City Y. M. C. A. v. Dubach*, 82 Mo. 475. *N. Y.*—*Irving Nat. Bank v. Corbett*, 10 Abb. N. C. 85. *N. C.*—*Stanly v. Richmond, etc., R. Co.*, 89 N. C. 331.

Incapacity Must Appear.—Under the code, says the Ohio supreme court, in order to raise the question on demurrer, the incapacity must appear on the petition. If it does not so appear, the objection may be made by answer, and if not so taken the objection is waived. *Smith v. Weed Sewing Machine Co.*, 26 Ohio St. 562, 565.

Failure To Comply With Statutory Requirements.—Where the complaint shows no averment of having complied with the statute requiring the filing of a copy of its articles of incorporation, the failure to thus comply can be made available as a defense only by specially pleading it in the answer. *South Yuba Water & Min. Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222; *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451.

4. **Whether Corporate Existence Must Be Proved.**—The question of corporate existence becomes a matter to be proved or disproved only when properly raised by the pleadings.²⁴ If then, in an action by a supposed corporation, the defendant desires to show that the plaintiff is not a corporation, it is necessary to consider in what way the issue may be raised.²⁵ Generally, when the issue of incorporation is raised, proof of a *de facto* corporation is sufficient.²⁶

5. **Issue of Incorporation.—How Raised.**—There is a difference of opinion regarding the form of plea or answer required to put in issue the corporate capacity of the plaintiff. It is said, in some cases, that, at common law, the fact of incorporation is raised by the general issue, and that upon such issue being pleaded it becomes necessary for the plaintiff to prove its corporate existence.²⁷ On the other hand, it is held, in other cases, that the general issue is a pleading to the merits and that it is an admission of the corporate character in which the plaintiff sues.²⁸ Under this latter view, if it is desired to

24. **U. S.**—*Society, etc., v. Town of Pawlet*, 4 Pet. 480, 7 L. ed. 927; *Emerson Co. v. Nimocks*, 88 Fed. 280. **Ala.**—*Johnson v. Hanover Nat. Bank*, 88 Ala. 271, 6 So. 909. **Ark.**—*Simon v. Calfee*, 80 Ark. 65, 95 S. W. 1011. **Cal.**—*Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 130. **Ind.**—*Pittsburg, etc., R. Co. v. Lighthouse*, 168 Ind. 438, 78 N. E. 1033. **Me.**—*Taylor v. Portsmouth, etc., R. Co.*, 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216. **Mass.**—*Christian Soc., etc., v. Macomber*, 3 Metc. 235. **Miss.**—*Vicksburg Waterworks, etc., Co. v. Washington*, 9 Miss. 536. **Okla.**—*Herald Shoe Co. v. Okla. Publ. Co.*, 15 Okla. 29, 79 Pac. 111. **S. C.**—*Charleston Live Stock Co. v. Collins*, 79 S. C. 383, 60 S. E. 944. **Tenn.**—*Bristol, etc., Trust Co. v. Jonesboro, etc., Trust Co.*, 101 Tenn. 545, 48 S. W. 228. **Tex.**—*Steely v. Texas Improvement Co.*, 55 Tex. Civ. App. 463, 119 S. W. 319.

New York.—By statute in New York (Code Civ. Proc., §1776), the existence of a corporation need not be proved unless it is affirmatively alleged in a verified answer that plaintiff is not a corporation. An answer stating that on information and belief plaintiff is not a corporation is not sufficient. *Stroock Plush Co. v. Talcott*, 129 App. Div. 14, 113 N. Y. Supp. 214.

25. See *infra*.

26. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. ed. 784.

27. This rule is based upon the principle that the general issue is pre-

sumed to deny every material fact which the plaintiff is bound to prove to entitle it to recover. See the following cases: **Ala.**—*Selma, etc., R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344. **Conn.**—*Phoenix Bank v. Curtis*, 14 Conn. 437, 36 Am. Dec. 492. **Ill.**—*Hargrave v. Bank of Illinois*, 1 Ill. 122. **Ind.**—*Harris v. Muskingum Mfg. Co.*, 4 Blackf. 267, 39 Am. Dec. 372. **Md.**—*Agnew v. Bank of Gettysburg*, 2 Har. & G. 478. **Miss.**—*Carmichael v. Trustees of School Lands*, 4 Miss. 84. **N. Y.**—*Bank of Auburn v. Weed*, 19 Johns. 300; *Jackson v. Plumbe*, 8 Johns. 378; *Bank of Utica v. Smalley*, 2 Cow. 770, 14 Am. Dec. 526; *Welland Canal Co. v. Hathaway*, 8 Wend. 480, 24 Am. Dec. 51. **Ohio.**—*Lewis v. Bank of Ky.*, 12 Ohio 132, 40 Am. Dec. 469. **Tex.**—*Holloway v. Memphis, etc., R. Co.*, 23 Tex. 465. **Va.**—*Rees v. Conococheague Bank*, 5 Rand. 326; *Taylor v. Bank of Alexandria*, 5 Leigh. 471. **Eng.**—*Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1532, 92 Eng. Reprint 494.

28. **U. S.**—*Pullman v. Upton*, 96 U. S. 328, 24 L. ed. 818; *Union Cement Co. v. Noble*, 15 Fed. 502. **Ala.**—*Prince v. Commercial Bank*, 1 Ala. 241, 34 Am. Dec. 773. **Ark.**—*Alderman, etc., v. Finley*, 10 Ark. 423, 52 Am. Dec. 244. **Conn.**—*Phoenix Bank v. Curtis*, 14 Conn. 437; *West, etc., Assn. v. Ford*, 27 Conn. 282, 71 Am. Dec. 447. **Ill.**—*Gay v. Keys*, 30 Ill. 413. **Ind.**—*Dunning v. New Albany, etc., Co.*, 2 Ind. 437. **Ia.**—*Commercial Bank of Keokuk v. King*, 47 Iowa 64. **Ky.**—*Taylor v. Bank of Ill.*, 7 Mon. 576. **Me.**—*Penob-*

raise the question of corporate existence, it must be specially pleaded by a plea in abatement.²⁹ Under some of the codes, it is said that the issue is raised by a general denial,³⁰ although the contrary is also maintained,³¹ and it is held that a specific denial in the nature of a plea in abatement is necessary.³² In chancery practice, the rule

scot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656. **Md.**—Whittington v. Farmers' Bank, 5 Har. & J. 489. **Mass.**—Sutton Parish v. Cole, 3 Pick. 232. **Mich.**—Imperial Curtain Co. v. Jacob, 163 Mich. 72, 17 Det. Leg. N. 751, 127 N. W. 772. **Mo.**—Farmers' etc., Bank v. Williamson, 61 Mo. 259. **Neb.**—National Life Ins. Co. v. Robinson, 8 Neb. 452, 1 N. W. 124. **N. H.**—School Dist. v. Blaisdell, 6 N. H. 197. **N. Y.**—Park Bank v. Tilton, 15 Abb. Pr. 384. **Ohio.**—M. E. Church v. Wood, 5 Ohio 283. **Pa.**—Rheem v. Naugatuck Wheel Co., 33 Pa. 358. **Tenn.**—Marble Co. v. Black, 89 Tenn. 118, 14 S. W. 479. **Vt.**—Aetna Ins. Co. v. Wires, 28 Vt. 93.

29. **U. S.**—Propagation Soc. v. Town of Pawlet, 4 Pet. 480, 7 L. ed. 927; Imperial Refining Co. v. Wyman, 38 Fed. 574, 3 L. R. A. 503. **Ala.**—Alabama M. E. Church v. Price, 42 Ala. 39. **Cal.**—South Yuba, etc., Co. v. Rosa, 80 Cal. 333, 22 Pac. 222. **Conn.**—Brown v. Illius, 27 Conn. 84, 71 Am. Dec. 49. **Ind.**—Northwestern Conference, etc., v. Myers, 36 Ind. 375. **Ky.**—Woodson v. Gallipolis Bank, 4 B. Mon. 203. **Me.**—School Dist. v. Aetna Ins. Co., 66 Me. 370. **Mass.**—Proprietors, etc., v. Call, 1 Mass. 485. **N. Y.**—Park Bank v. Tilton, 15 Abb. Pr. 384. **Neb.**—Davis v. Neb. Nat. Bank, 51 Neb. 401, 70 N. W. 963. **Okla.**—Jantzen v. Emanuel, etc., Church, 27 Okla. 473, 112 Pac. 1127; Leader Printing Co. v. Lowry, 9 Okla. 89, 59 Pac. 242. **Pa.**—Rheem v. Naugatuck Wheel Co., 33 Pa. 358; Zion Church v. St. Peters Church, 5 Watts & S. 215. **Va.**—Aetna Ins. Co. v. Wires, 28 Vt. 93; Boston T. & S. Foundry v. Spooner, 5 Vt. 93.

30. Girls' Industrial Home v. Fritchey, 10 Mo. App. 344; Denver v. Spokane Falls, 7 Wash. 226, 34 Pac. 926.

Massachusetts.—Under a statute abolishing the general issue and special pleas in bar, a general denial of each and every material allegation in the declaration puts in issue the fact of incorporation of the plaintiff. Mosler B. & Co. v. Potter, 121 Mass. 89.

Foreign Corporation; National Bank.

A distinction is sometimes made between a foreign and a domestic corporation, it being held that while no proof of the incorporation of a domestic corporation is required under a general denial, nevertheless, in case of a foreign corporation, the rule is otherwise. It is held, however, in connection with such a doctrine, that a national bank organized and doing business within the limits of the state is not a foreign corporation within the rule raising the issue of corporate existence under a general denial. Hummel v. First Nat. Bank, 2 Colo. App. 571, 32 Pac. 72.

31. **Mere General Denial Not Sufficient.**—**Cal.**—Bank of Shasta v. Boyd, 99 Cal. 604, 34 Pac. 337. **Ind.**—Wiles v. Philippi Church, 63 Ind. 206; Indianapolis Furnace & Min. Co. v. Herkimer, 46 Ind. 142. **Ia.**—Iowa Sav. & Loan Assn. v. Selby, 111 Iowa 402, 82 N. W. 968. **Neb.**—Fletcher v. Co-operative Pub. Co., 58 Neb. 511, 78 N. W. 1070; Kelly v. Nebraska Exposition Assn., 52 Neb. 355, 72 N. W. 356. **S. C.**—Pittsburg Plate Glass Co. v. Monroe Bros., 79 S. C. 564, 61 S. E. 92; Palmetto Lumb. Co. v. Risley, 25 S. C. 309. **Tenn.**—Bank of Jamaica v. Jefferson, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100.

Minnesota; Express Averment.—Section 5254 of the statutes of 1894 provides: "In all actions by or against a corporation it shall not be necessary to prove on the trial of the cause the existence of such corporation, unless the defendant shall, in his answer, expressly aver that the plaintiff or defendant is not a corporation."

32. Erie & J. R. Co. v. Brown, 57 Misc. 164, 107 N. Y. Supp. 983; Swift & Co. v. Crawford, 34 Neb. 450, 51 N. W. 1034.

Verified Denial.—By statute in some states, the plaintiff is not required to prove the fact of incorporation unless defendant files a denial under oath. **Kan.**—Rock Island Lumber & Mfg. Co. v. Fairmount Town Co., 51 Kan. 394, 32 Pac. 1100. **Va.**—Gillett v. Ameri-

is that every allegation of fact not admitted, whether denied or not, must be proved.³³

Plea of Nul Tiel Corporation.—At common law, some controversy exists relative to the old plea of *nul tiel* corporation, whether it is a plea in abatement or a plea in bar.³⁴ The Supreme Court of the United States, speaking by Mr. Justice Gray, has said: "*Nul tiel* corporation, or that the plaintiff is not and never was a corporation, is a good plea in bar, because it goes to show that the plaintiff can never maintain any action whatever."³⁵ In a Massachusetts case, it is, how-

can Stove, etc., Co., 29 Gratt. 565. Wis.—Williams Mower & Reaper Co. v. Smith, 33 Wis. 530. In Kansas, however, a verified denial has been held unnecessary in procedure before a justice of the peace. Stanley v. Farmers' Bank, 17 Kan. 592.

West Virginia; Insufficient Denial. A mere recital in the answer of a defendant, to a bill filed by a corporation, although the answer is sworn to, referring to plaintiff as "a pretended corporation" is not such a denial of the existence of the corporation, under the code, as puts the matter in issue. Iguano Land & Mining Co. v. Jones, 65 W. Va. 59, 64 S. E. 640.

Montana; Denial on Information or Belief.—In Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 95 Pac. 995, it is said: "The provisions of our code authorizing a denial of knowledge or information sufficient to form a belief, are applicable to any or every allegation in a complaint. That form of denial will raise an issue as to the corporate existence of a plaintiff as well as to any other fact pleaded in the complaint." And see Michigan Ins. Bank v. Eldred, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. ed. 162.

Positive Denial Required.—Contrary to the view expressed in the preceding note, it is necessary, under the New York statute (Code Civ. Proc., §1776), which requires a verified answer to put in issue the existence of the corporation, to make an affirmative allegation that the plaintiff is not a corporation. A denial "on information and belief" is not sufficient. Concordia Sav. & Aid Asso. v. Read, 93 N. Y. 474; First Nat. Bank v. Slattery, 4 App. Div. 421, 38 N. Y. Supp. 859.

33. Tennessee.—Bank of Jamaica v. Jefferson, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100; Hill v. Walker, 6 Coldw. 424, 98 Am. Dec. 465.

34. Under the rule that pleas must be pleaded in due order, the question may be important, at times, as a matter of order in the pleadings. Under the codes, however, unless the plea in abatement is expressly retained, pleas amounting to pleas in abatement and pleas in bar may be pleaded in the answer. (See *infra*.) Nevertheless, it is held that the plea of *nul tiel* corporation when held to be a plea in abatement must precede an answer to the merits, and on trial of issue of fact upon which replication to such plea, the proof is limited to the question *de facto* of a corporation, under an authority sanctioning such a corporation *de jure*. See Heaston v. Cincinnati, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; Jones v. Cincinnati Type Foundry Co., 14 Ind. 89; Morgan v. Lawrenceburgh Ins. Co., 3 Ind. 285.

Not in General Use.—As the general issue came to be held to require proof of incorporation, the special plea of *nul tiel* corporation was considered as violating the rule forbidding special pleas of matter which was in effect denied by the general issue. Consequently, the plea of *nul tiel* corporation went out of general use. It is still recognized, however, in some jurisdictions. See Bliss, Code Pl., §248.

35. Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. ed. 784. See, also, the following cases. Ark.—Mahony v. State Bank, 4 Ark. 620. Ill.—Lewiston v. Proctor, 27 Ill. 414. Ind.—Excelsior Draining Co. v. Brown, 47 Ind. 19. Mass.—Christian Soc. v. Macomber, 3 Metc. 235. N. H.—School Dist. v. Aldrich, 13 N. H. 139. Pa.—Northumberland County Bank v. Eyer, 60 Pa. 436.

In Bar and Not in Abatement.—Where a plea of *nul tiel* corporation is permitted, says Judge Bliss in his treat-

ever, said that although a perpetual disability of the plaintiff may be pleaded in bar, it may also be pleaded in abatement at the election of the defendant;³⁶ and, in Kentucky, it has been held that a plea that no such corporation is in existence, is substantially matter of abatement, and cannot be relied on in bar of the action.³⁷ In jurisdictions, however, where it is held that the general issue raises the question of incorporation, the plea of *nul tiel* corporation amounts to such a plea, and, in consequence, has been held bad on special demurrer.³⁸ Where, on the other hand, a corporation's capacity to sue cannot be questioned under the general issue, the defendant who would deny the existence of the corporation must put in a plea for that purpose.³⁹ The replication, thereupon, must show with particularity how plaintiff became a corporation.⁴⁰ Upon the interposition of the plea, the burden is on the corporation to establish its corporate existence.⁴¹

Under code procedure, the nature of the plea is not important, owing to the fact that the distinction between pleas in abatement and pleas in bar, so far as concerns the order of pleading them, is abolished in most of the code states, and matters in abatement and matters in bar may be set up as defenses in the same answer.⁴²

6. Pleading Domicil. — Unless the statute requires, it is not necessary to allege the domicil of a corporation.⁴³ The statute may, however, require the plaintiff to state whether it is a domestic or a foreign corporation.⁴⁴

7. Pleading Citizenship. — For the purpose of federal jurisdiction, an allegation of diverse citizenship is necessary, and a mere averment that the corporation is a citizen of, or "is doing business in," a particular state is not sufficient, since it must appear that the corporation was created under the laws of such state.⁴⁵

ise on Code Pleading, §248, being in the form of a special plea, a replication necessary expressly affirming the incorporation upon which issue is taken. The plea is in bar and not in abatement, as the latter goes only to a misnomer of the plaintiff and not to its existence. See, also, *Kyd, Corp.* 284.

36. *Whiton v. Balch*, 203 Mass. 576, 89 N. E. 1045; *Christian Soc. v. Macomber*, 3 Mete. (Mass.) 235. See also, *Boston T. & S. Foundry v. Spooner*, 5 Vt. 93.

37. *Jones v. Bank of Tennessee*, 8 B. Mon. (Ky.) 122, 46 Am. Dec. 540; *Woodson v. Bank of Gallipolis*, 4 B. Mon. (Ky.) 203.

38. *Bank of Auburn v. Weed*, 19 Johns. (N. Y.) 300.

39. Ala. — *Montgomery R. Co. v. Hurst*, 9 Ala. 513. Ill. — *McIntire v. Preston*, 10 Ill. 48, 48 Am. Dec. 321. Ind. — *Heaston v. Cincinnati, etc., R. Co.*, 16 Ind. 275, 79 Am. Dec. 430. Vt.

Bank of Manchester v. Allen, 11 Vt. 302.

40. Such was the former practice at common law. See *Bank of Auburn v. Aikin*, 18 Johns. (N. Y.) 137.

41. *Schloss v. Montgomery Trade Co.*, 87 Ala. 411, 6 So. 360, 13 Am. St. Rep. 51; *Stone v. Great Western Oil Co.*, 41 Ill. 85.

42. Mo. — *Little v. Harrington*, 71 Mo. 390. N. Y. — *Gardner v. Clark*, 21 N. Y. 399; *Sweet v. Tuttle*, 14 N. Y. 465. Wis. — *Dutcher v. Dutcher*, 39 Wis. 651.

43. *Crow v. Van Sickle*, 6 Nev. 146; *Hafner, etc., Co. v. Grumme*, 10 Civ. Proc. (N. Y.) 176.

44. *Harmon v. Vanderbilt Hotel Co.*, 143 N. Y. 665, 39 N. E. 20; *Kulbach v. Knickerbocker Trust Co.*, 139 App. Div. 566, 124 N. Y. Supp. 286; *Roberts v. Pioneer Iron Works*, 125 App. Div. 207, 109 N. Y. Supp. 230.

45. *Brock v. Northwestern Fuel Co.*,

It has previously been stated that when a corporation is created under the laws of a particular state, it is conclusively presumed that its stockholders are all citizens of that state.⁴⁶

8. Pleading By-Laws.—The by-laws of all corporations, private and public, must, at common law be set forth in pleading when they are sought to be enforced by action, or when made the grounds of defense.⁴⁷ Matters connected with a by-law, however, may be put in issue by other averments in the complaint without the pleading of the by-law itself.⁴⁸

9. Corporate Powers.—The facts showing the power of a corpora-

130 U. S. 341, 9 Sup. Ct. 552, 32 L. ed. 905; *Kansas Pac. R. Co. v. Atchison*, etc., R. Co., 112 U. S. 414, 5 Sup. Ct. 208, 28 L. ed. 794; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. (U. S.) 553, 19 L. ed. 998; *Grand Trunk R. Co. v. Tennant's Admr.*, 14 C. C. A. 190, 21 U. S. App. 682, 66 Fed. 922; *New York & N. E. R. Co. v. Hyde*, 56 Fed. 188, 5 C. C. A. 461.

What Averment Sufficient.—If the declaration sets forth facts from which the citizenship may be presumed or legally inferred, it is sufficient. The presumption arising from the *habitat* of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name, and exercise the faculties conferred by it, the allegation that "The Baltimore and Ohio Railroad Company is a body corporate by an act of the general assembly of Maryland," is sufficient. *Marshall v. Baltimore & O. R. Co.*, 16 How. 314, 14 L. ed. 953.

No Argumentative Inference.—The supreme court of the United States has also said, however, that it is not sufficient that jurisdiction may be inferred argumentatively from the averments. *Wolfe v. Hartford Life & A. Ins. Co.*, 148 U. S. 389, 13 Sup. Ct. 602, 37 L. ed. 493.

Insufficient Averment.—An averment that "the American Sugar-Refining Company, a corporation domiciled and doing business in the city of New Orleans, and a citizen of New Jersey, and found within the eastern district of Louisiana," etc., is doubtful and contradictory. A corporation cannot have two domiciles. The domicile, the residence, and the citizenship of a cor-

porate body are all necessarily within the state which created and organized it. It can only be a citizen of the state which creates it. "If it is a conclusive presumption of law that a corporation is a citizen of a state by whose laws it is created, is it not equally a conclusive presumption of law that a corporation which is a citizen of a state named was created such by the laws of the state?" *American Sugar-Refining Co. v. Johnson*, 60 Fed. 503, 9 C. C. A. 110.

Consolidated Corporation.—It is held, however, that a consolidated corporation may be a citizen of the various states by which the consolidated corporations were chartered. *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. 815. The original corporation may, nevertheless, retain their original citizenship. *Paul v. Baltimore & O. R. Co.*, 44 Fed. 513.

Failure To Show Citizenship; Demurrer.—Failure to show citizenship in order to give the federal court jurisdiction may be objected to by demurrer. *Continental L. Ins. Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. ed. 380; *Susquehanna. etc., Coal Co. v. Blatchford*, 11 Wall. (U. S.) 172, 20 L. ed. 179; *Rike v. Floyd*, 42 Fed. 247. See, however, *Tyler v. Hand*, 7 How. (U. S.) 573, 584, 12 L. ed. 824. *Compare, Nebraska City Nat. Bk. v. Gas Light Co.*, 14 Fed. 763.

46. See *supra*. See, also, *Doe v. Waterloo Min. Co.*, 44 U. S. App. 204, 70 Fed. 455, 17 C. C. A. 190.

47. *Harker v. Mayor*, etc., of New York, 17 Wend. (N. Y.) 199; *Master*, etc., of *Feltmakers v. Davis*, 1 B. & P. (Eng.) 98.

48. See *Hingston v. Montgomery*, 121 Mo. App. 451, 97 S. W. 202, 205.

tion to do an alleged act need not, generally, be stated.⁴⁹ Thus, the declaration or petition need not state its powers to own real property;⁵⁰ nor its power to make the contract sued upon.⁵¹

If, however, the corporation seeks to enforce rights not ordinarily belonging to a corporation, it must set forth its authority.⁵²

10. Mode of Performing Corporate Act.—It is not necessary to allege the mode in which a corporate act was done.⁵³

11. Facts Necessarily Implied.—It is a fundamental rule in pleading that what is necessarily implied in an allegation is as much part of it as if expressly stated.⁵⁴ It follows that the allegation of an act includes an averment of power to do the act.⁵⁵

49. Ala.—*Torrent Fire-Engine Co. v. City of Mobile*, 101 Ala. 559, 14 So. 557. **Conn.**—*New Haven, etc., Co. v. Vanderbilt*, 16 Conn. 420. **Ind. Ter.**—*Rogers Lumb. Co. v. McRea*, 7 Ind. Ter. 468, 104 S. W. 803. **Mo.**—*Glendale Lumb. Co. v. Beekman Lumb. Co.*, 152 Mo. App. 386, 133 S. W. 384. **N. Y.**—*Reformed Dutch Church v. Veeder*, 4 Wend. 494; *Mechanics' Banking Assn. v. Spring Valley Shot & Lead Co.*, 25 Barb. 419; *Lindsley v. Simonds*, 2 Abb. Pr. (N. S.) 69. **Tex.**—*DeZavala v. Daughters, etc.* (Tex. Civ. App.), 124 S. W. 160.

50. Touart v. Jett Bros. Contracting Co., 169 Ala. 638, 53 So. 751; *Reformed Dutch Ch. v. Veeder*, 4 Wend. (N. Y.) 494.

51. U. S.—*Bank of Metropolis v. Guttchlick*, 14 Pet. 19, 10 L. ed. 335. **Ala.**—*Alabama, etc., Life Ins. Co. v. Central, etc., Assn.*, 54 Ala. 73. **Cal.**—*Malone v. Crescent City M. & T. Co.*, 77 Cal. 38, 18 Pac. 858. **Ky.**—*Commercial Bank, etc., v. Newport Mfg. Co.*, 1 B. Mon. 13. **Minn.**—*St. Paul Land Co. v. Dayton*, 37 Minn. 364, 34 N. W. 335; *Lagrange Mill Co. v. Bennewilz*, 28 Minn. 62, 9 N. W. 80. **N. J.**—*Montague v. Church School Dist.*, 34 N. J. L. 218. **N. Y.**—*Feeny v. People's Fire Ins. Co.*, 2 Robt. 599. **Wis.**—*Howard v. Boorman*, 17 Wis. 459.

Pleading Provisions of Charter.—Where, in a particular case, however, the provisions of the charter are material to the cause of action, they must be pleaded. See *Hahnemannian Life Ins. Co. v. Beebe*, 48 Ill. 87, a libel suit.

52. Frye v. Bank of Ill., 10 Ill. 332; *Colo. Canal Co. v. McFarland & Southwell*, 50 Tex. Civ. App. 92, 109 S. W. 435.

Succeeding to Partnership.—Where a corporation sues upon a contract made with a partnership, the petition must allege that the corporation succeeded to the rights of the said partnership. *Candee & Smith v. Fordham Stone Renovating Co.*, 126 App. Div. 15, 110 N. Y. Supp. 355, *affirmed*, 195 N. Y. 160, 89 N. E. 1097.

53. For example, in pleading an acceptance by a corporation of an assignee of the lessee as tenant, it is not necessary to show that the acceptance was by deed, for an acceptance being pleaded, everything that would render it a good acceptance is implied. *The Dean and Chapter of Windsor v. Gover*, 2 Wm. Saund. 302, 85 Eng. Reprint 1096; *Chit. Pl.*, 16th Am. ed. 244.

Vote of City Council.—In a pleading setting forth a resolution adopted by a city council, all the presumptions ought to be indulged in favor of the regularity of the proceedings by which the resolution was adopted. Consequently, no affirmative averment as to the particular manner of its adoption, as by a ye and nay vote (as provided by statute), is necessary. *Over v. City of Greenfield*, 107 Ind. 231, 5 N. E. 872.

54. See *Steph. Pl.*, 220; 1 *Chit. Pl.*, 640.

55. An averment that a corporation, by its treasurer, accepted certain drafts, includes, for example, an averment of authority to the treasurer to accept the drafts, since if they were "accepted" by the corporation the treasurer must have had power to accept for it. *Partridge v. Badger*, 25 Barb. (N. Y.) 146.

Admitting or Denying Execution of Instrument.—Since a valid execution of an instrument necessarily includes the authority of the corporation's agent to execute it, an admission or a denial

12. Verification of Pleadings.—When a verification of pleadings is required, it should be made by some officer of the corporation authorized to act for the corporation.⁵⁶ The statute may designate what officer or officers shall perform that duty,⁵⁷ and in some jurisdictions a verification by an attorney of the corporation may be sufficient.⁵⁸ Where, however, the statute provides that a verification may be made by an officer, a verification by an agent will not suffice.⁵⁹

A verification on information and belief is usually sufficient.⁶⁰

In equity proceedings, the answer of a corporation aggregate had to be under the corporate seal, as a substitute for an oath.⁶¹ A bill,

of an execution includes an admission or a denial of the power to execute. See *Oxford Iron Co. v. Spradley*, 43 Ala. 98; *Montgomery & E. R. Co. v. Trebles*, 44 Ala. 255; *McIntire v. Preston*, 10 Ill. 48.

56. **U. S.**—*Hitchcock v. Galveston*, 3 Woods 287, 12 Fed. Cas. No. 6,534. **Colo.**—*Barrett Min. Co. v. Tappan*, 2 Colo. 124. **N. Y.**—*Wills v. James Rowland & Co.*, 117 App. Div. 122, 102 N. Y. Supp. 386. **Utah.**—*West Mountain Lime & Stone Co. v. Danley*, 111 Pac. 647.

Failure To Verify Denial.—Under the statutes regulating the verification of pleadings, a failure to verify a denial results, usually, in an admission of the plaintiff's averments. See *McIntire v. Preston*, 10 Ill. 48, holding that a failure to verify the denial admitted the authority of the secretary of a corporation to indorse a note payable to the corporation. *Barnum v. Kennedy*, 21 Kan. 181, averment that president of corporation was authorized to assign a judgment held admitted by unverified denial; and see *Great Falls Bank v. Farmington*, 41 N. H. 32.

57. *Fulton Bank v. New York & S. Canal Co.*, 1 Paige (N. Y.) 311; *Glaubenslee v. Hamburg & A. C. Packet Co.*, 9 Abb. Pr. (N. Y.) 104; *Kelley v. Woman Pub. Co.*, 4 N. Y. Supp. 99.

58. **Colo.**—*Tulloch v. Belleville Pump, etc., Works*, 17 Colo. 579, 31 Pac. 229. **Neb.**—*Beatrice, etc., Co. v. German Nat. Bank*, 45 Neb. 147, 63 N. W. 374. **N. Y.**—*In re St. Lawrence & A. R. Co.*, 133 N. Y. 270, 31 N. E. 218. **Ohio.**—*Bullock Beresford Mfg. Co. v. Hedges*, 76 Ohio St. 91, 81 N. E. 171; *Merchants Nat. Bank v. Brooks*, 6 Pa. Co. Ct. 314. **Wis.**—*Market Nat. Bank v. Hogan*, 21 Wis. 317.

59. *Banks v. Gay Mfg. Co.*, 108 N. C. 282, 12 S. E. 741.

60. **Colo.**—*Tulloch v. Belleville, etc., Works*, 17 Colo. 579, 31 Pac. 229. **N. Y.**—*Macauley v. Bromell, etc., Co.*, 67 How. Pr. 252, 14 Abb. N. C. 316. **S. C.**—*Carolina Agency Co. v. Garlington*, 85 S. C. 114, 67 S. E. 225.

Personal Knowledge and Belief.—When in the verification of an agent or attorney the affiant states that he has personal knowledge of the facts, he may also state in his affidavit that he believes the facts stated in the pleading to be true, as provided in the statute. *Bullock Beresford Mfg. Co. v. Hedges*, 76 Ohio St. 91, 81 N. E. 171.

Someone Conversant With the Facts.—The affidavit of the attorney at law of the corporation is not sufficient, since the pleading of a corporation should be verified by the affidavit of someone conversant with the facts, as by the president or some other officer. There may be instances where the attorney may make affidavit for a corporation, but in a pleading where the affidavit calls for personal knowledge of the facts the affiant must state the facts as of his own knowledge, and not as hearsay. *Quesenberry v. People's B. & L. Asso.*, 44 W. Va. 512, 30 S. E. 73.

61. **U. S.**—*French v. First Nat. Bank*, 7 Ben. 488, 9 Fed. Cas. No. 5,099. **Fla.**—*State v. Fla. Cent. R. R. Co.*, 15 Fla. 690. **Ill.**—*Fulton County Suprs. v. Mississippi, etc., R. Co.*, 21 Ill. 338. **Md.**—*Williams Co. v. U. S. Baking Co.*, 86 Md. 475, 38 Atl. 990. **N. J.**—*Ransom v. Stonington Sav. Bank*, 13 N. J. Eq. 212. **N. Y.**—*Brumly v. Westchester County Mfg. Soc.*, 1 Johns. Ch. 366. **Va.**—*Baltimore & O. R. Co. v. Wheeling*, 13 Gratt. 40. **Can.**—*Gildersleeve*

however, did not require that the corporate seal be attached thereto.⁶²

13. Amendments.— Amendments of errors in the corporate name, not amounting to a change of party, will generally be permitted.⁶³

Amendments of pleadings in general in suits by or against corporations are governed by the rules applicable to natural persons.⁶⁴

B. ACTIONS AGAINST CORPORATIONS.— **1. Must Be Sued in Corporate Name.**— That a corporation should be sued in its correct corporate name, and the consequences of failure to observe this rule of pleading, have been previously considered.⁶⁵

2. Allegations of Incorporation.— Contrary to the prevailing rule applying to actions by corporations, in actions against corporations an averment of the defendant's corporate existence is generally necessary.⁶⁶

v. Wolf Island R., etc., Co., 3 Ch. Chamber Rep. 358.

62. *Washington, etc., Assn. v. Pifer*, 62 W. Va. 105, 57 S. E. 270; *Washington, etc., Assn. v. Conley*, 62 W. Va. 65, 57 S. E. 270; *Washington, etc., Assn. v. Daniels*, 62 W. Va. 91, 57 S. E. 1111; *Washington Nat. Building & Loan Assn. v. Buser*, 61 W. Va. 590, 57 S. E. 40.

63. *Ala.*—*Savannah, etc., Ry. Co. v. Buford*, 106 Ala. 303, 17 So. 395; *Singer Mfg. Co. v. Greenleaf*, 100 Ala. 272, 14 So. 109. *N. J.*—*Hoboken Bldg. Asso. v. Martin*, 13 N. J. Eq. 427. *N. Y.*—*Dean v. Gilbert*, 92 Hun 427, 36 N. Y. Supp. 1004. *Pa.*—*Meitzner v. Baltimore & O. R. Co.*, 224 Pa. 352, 73 Atl. 434.

Corporate Existence.—Defect in alleging corporate existence may be amended. *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

64. The statutes, and rules of court should be consulted.

65. See *supra*, VII, B.

Words Importing Corporation.— A suit against the "C. H. Perkins Company" is not void, since these words import a corporation. *C. H. Perkins Co. v. Shewmake & Murphey*, 119 Ga. 617, 46 S. E. 832. See, also, *Adas Yeshurun Society v. Fish*, 117 Ga. 345, 43 S. E. 715; *Mattox v. State*, 115 Ga. 212, 41 S. E. 709.

Georgia; Municipal Corporation.—It is held, however, in the state of Georgia, that where the legislature, by an act incorporating a town, provides that it may sue and be sued by the corporate name, "the mayor and council of the town of East Rome," a suit

brought in the name "the town of East Rome" must be dismissed on demurrer. The suit is a nullity, since there is nothing in the petition to amend, because the suit was not brought in the name of a natural person, a corporation, or a partnership. *Town of East Rome v. City of Rome*, 129 Ga. 290, 53 S. E. 854. See, also, *Town of Dexter v. Gay*, 115 Ga. 765, 42 S. E. 94. And see *Western & Atlantic R. Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978, and cases cited there.

Omission of Word "Railway."— Where the writ ran against "The Southern Pacific Railway Co.," a judgment against "The Southern Pac. Co.," has been held invalid. *Southern Pac. Co. v. Block*, 84 Tex. 21, 19 S. W. 300.

Insertion of Word "The."—The improper insertion of the word "the" before the name of a defendant corporation has been held, in Delaware, a fatal misnomer. *Lapham v. Philadelphia, etc., R. Co.*, 4 Penne. (Del.) 421, 56 Atl. 366. See, however, *contra*, *Western, etc., Trust Co. v. Ogden*, 42 Tex. Civ. App. 465, 93 S. W. 1102.

66. *U. S.*—*Mathieson Alkali Works v. Mathieson*, 150 Fed. 241, 80 C. C. A. 129. *Ia.*—*Byington v. Miss. & M. R. Co.*, 11 Iowa 502. *Mont.*—*Pearce v. Butte Electric R. Co.*, 41 Mont. 304, 109 Pac. 275. *Nev.*—*Little v. Va., etc., Water Co.*, 9 Nev. 317. *N. Y.*—*Mechanics Banking Assn. v. Spring Val. Shot & Lead Co.*, 13 How. Pr. 227; *Oesterreicher v. Sporting Times Pub. Co.*, 5 N. Y. Supp. 2. *N. C.*—*Stanley v. Richmond, etc., R. Co.*, 89 N. C. 331. *S. D.*—*State v. Chicago, etc., R. Co.*,

In criminal prosecutions, when there are several counts, the defendant's corporate existence must be averred in every count of the complaint.⁸⁷

It is held, however, in some jurisdictions that a plaintiff who declares against a defendant in a corporate name need not expressly declare the fact of incorporation,⁸⁸ since the use of the corporate name sufficiently avers that the defendant is a corporation.⁸⁹

4 S. D. 261, 56 N. W. 894, 46 Am. St. Rep. 783. **Tex.**—Texas Mut. Life Ins. Co. v. Davidge, 51 Tex. 244. **Utah.** Minter v. Union Pac. R. Co., 3 Utah 500, 24 Pac. 911. **Wash.**—Tolmie v. Dean, 1 Wash. Ter. 46. *Contra*, Harmon v. Vanderbilt Hotel Co., 79 Hun 392, 29 N. Y. Supp. 783, *affirmed*, 143 N. Y. 665, 39 N. E. 20.

Statutory Provisions.—It is provided by statute, in some states, that in actions either by, or against, corporations, the complaint must aver that the plaintiff or defendant, as the case may be, is a corporation. The Wisconsin statute, for example, further provides that the complaint must also aver whether the corporation was organized under the laws of that state, or whether it is a foreign corporation. *State v. Minahan Bldg. Co.*, 141 Wis. 400, 123 N. W. 258; *Carpenter v. McCord L. Co.*, 107 Wis. 611, 83 N. W. 764.

General Allegation Sufficient.—That a general allegation of incorporation is sufficient, and that plaintiff is not required to state the facts that show the defendant corporation's existence, see, *Dodge v. Minnesota Plastic, etc., Co.*, 14 Minn. 49; *Stoddard v. Onondaga Annual Conference*, 12 Barb. (N. Y.) 573.

No Averment Necessary.—In some jurisdictions, no averment of incorporation is necessary. Thus, in Virginia, it has been held that in a suit against a corporation it is not necessary to aver, in the declaration, that it is a corporation, nor is it necessary to prove the fact unless with defendant's plea there is an affidavit denying the fact. *Code Va.*, 1887, §3280; *Baltimore & O. R. Co. v. Sherman*, 30 Gratt. (Va.) 602. *Contra*, *Gillett v. American Stove, etc., Co.*, 29 Gratt. 565. See, also, as to a similar practice in West Virginia, *Douglas v. Kanawha & M. R. Co.*, 44 W. Va. 267, 28 S. E. 705. The affidavit must deny the corporate existence at the time of the contract sued

on, since it is not sufficient to deny it merely at the time of bringing the suit. *Richmond, etc., R. Co. v. New York, etc., R. Co.*, 95 Va. 386, 28 S. E. 573.

67. *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303; *Loup v. Railroad Co.*, 63 Cal. 97; *State v. Chicago, etc., R. Co.*, 4 S. D. 261, 56 N. W. 894, 46 Am. St. Rep. 783.

Contra—On the other hand it is held, in some jurisdictions, at least in civil actions, that if the defendant's corporate existence is properly alleged in the first count, it is not necessary to repeat this allegation in the following counts. See *West v. Eureka Imp. Co.*, 40 Minn. 394, 42 N. W. 87; *Aull Savings Bank v. Lexington*, 74 Mo. 104.

68. **Ark.**—Odd Fellows Bldg Assn. v. Hogan, 28 Ark. 261. **Ill.**—Nimmo v. Jackman, 21 Ill. App. 607. **Ind.**—Cincinnati, etc. R. Co. v. McDongall, 108 Ind. 179, 8 N. E. 571; *Blake v. Holley*, 14 Ind. 383.

Texas.—In the state of Texas the statute provides that an allegation that defendant was duly incorporated is sufficient. See *Rev. St.*, 1879, art. 1190.

69. **Cal.**—Moynihan v. Drobaz, 124 Cal. 212, 56 Pac. 1026, 71 Am. St. Rep. 46. **Ind.**—Adams Exp. Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527. **Mich.** *Ladd v. M. E. Church*, 1 Mich. (N. P.) 47. **Minn.**—Holden v. Great W. El. Co., 69 Minn. 527, 72 N. W. 805, 65 Am. St. Rep. 585. **Wis.**—Brauser v. New England Fire Ins. Co., 21 Wis. 506.

Insufficient Averment.—An allegation that the defendant is a "pretended corporation" raises the presumption that it is not a corporation. It is difficult to see how the defendant could be a "pretended corporation" and at the same time a real corporation. The complaint is demurrable

3. Pleas and Answers, By Whom Made.—The plea of a corporation aggregate, which is incapable of a personal appearance, must purport to be by attorney.⁷⁰ Thus, a plea in abatement to an action against a corporation should be filed by "its attorney," and not by the president and secretary of the corporation.⁷¹

In equity, however, the answer should regularly be made by the president or other principal officer of the corporation, who is in possession of the facts, or who is able to give satisfactory reasons for not admitting or denying the facts charged.⁷²

The answer, moreover, should be filed not by former officers, but by those who are officers at the time.⁷³

In chancery proceedings, moreover, the answer of a corporation to a bill in equity must be under the corporate seal, and not on oath.⁷⁴

The modern practice, however, is to join one or more officers of the corporation as defendants in order that discovery may be obtained from them in person.⁷⁵

4. Failure To Allege Incorporation.—How Met.—A failure to allege the defendant's incorporation may render the petition or declara-

for insufficient averment of incorporation. *State v. Minahan Bldg. Co.*, 141 Wis. 400, 123 N. W. 258.

70. *Co. Litt.*, 66 b; *Chit.* 577. And see, *supra*, IX.

71. *Nixon v. Southwestern Ins. Co.*, 47 Ill. 444.

Plea to Jurisdiction.—In West Virginia, however, it has been held that a corporation cannot in pleas to the jurisdiction appear either in person or by attorney, but must appear by its president. See *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507.

Form of Plea to Jurisdiction.—The case above cited says that a plea to the jurisdiction by a corporation should conclude "whether the court can or will take further cognizance of the action aforesaid," not "that the plaintiff's aforesaid action may abate and be dismissed." The affidavit should also be positive. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507. See also, *Guarantee Co. v. Nat. Bank*, 95 Va. 480, 28 S. E. 909.

72. *Hale v. Continental Life Ins. Co.*, 16 Fed. 718; *Mechanics Nat. Bank v. Burnet Mfg. Co.*, 32 N. J. Eq. 236.

73. *Mechanics Nat. Bank v. Burnett Mfg. Co.*, 32 N. J. Eq. 236.

74. *U. S.—French v. First Nat. Bank*, 7 Ben. 488, 9 Fed. Cas. No. 5,099. **Fla.**—*State v. Florida Cent. R. R. Co.*, 15 Fla. 690. **Md.**—*Williams Co. v. United States Baking Co.*, 86

Md. 475, 38 Atl. 990. **N. J.**—*Ransom v. Stonington Sav. Bank*, 13 N. J. Eq. 212. **N. Y.**—*Brumly v. Westchester County Mfg. Soc.*, 1 Johns. Ch. 366. **Va.**—*Baltimore & O. R. Co. v. Wheeling*, 13 Gratt. 40.

Official Seal Not Required.—It is held that any seal will answer the requirement, such as a wafer, the regular or common seal of the corporation not being necessary. *Ransom v. Stonington Sav. Bank*, 13 N. J. Eq. 212.

Effect of Such Answer.—A corporation cannot be sworn and therefore must put in its answer under its common seal only. The answer of a corporation not being verified by affidavit, is no evidence for the defendant, though responsive to the bill; but it puts the allegation to which it responds in issue and imposes on the plaintiff the burden of proving it. This is its effect on a motion to dissolve an injunction, as well as on the hearing of the cause. *Baltimore & O. R. Co. v. Wheeling*, 13 Gratt. (Va.) 40; *Teter v. West Virginia, etc. Co.*, 35 W. Va. 433, 14 S. E. 146. And see *Maryland, etc. Iron Co. v. Wingert*, 8 Gill (Md.) 170, 178.

75. **Ala.**—*Nixon v. Clear Creek Lumb. Co.*, 150 Ala. 602, 43 So. 805. **Va.**—*Roanoke St. R. Co. v. Hicks*, 96 Va. 510, 32 S. E. 295; *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. 655. **W. Va.**—*Teter v. West Virginia, etc., R. Co.*, 35 W. Va. 433, 14 S. E. 146.

tion liable to demurrer,⁷⁶ on the ground, it is said, that the petition does not state facts sufficient for a cause of action.⁷⁷

5. Issue of Incorporation.—Where defendant is sued as a corporation, if it would deny its existence or organization as a corporation, a plea in abatement is the appropriate plea at common law,⁷⁸ and also, possibly, under some of the codes.⁷⁹

76. Mechanics' Banking Assn. v. Spring Valley Shot & Lead Co., 13 How. Pr. (N. Y.) 227; **Miller v. Pine Mining Co.,** 2 Idaho 1206, 31 Pac. 803, 35 Am. St. Rep. 289.

Sued in Corporate Name.—Where, however, the bringing of a suit against a defendant in its corporate name is a sufficient allegation of incorporation, the declaration is not demurrable for lack of greater particularity as to corporate existence. **Minn.**—**Dodge v. Minnesota Plaster Slate Roofing Co.,** 14 Minn. 49. **N. Y.**—**Lighte v. Everett Fire Ins. Co.,** 5 Bosw. 716. **Eng.** **Woolf v. City Steamboat Co.,** 7 Man., Gr. & S. 103, 62 E. C. L. 103.

Idaho.—In an action, in Idaho, against a private corporation, the name of the defendant was stated followed by the words "a corporation." It was held that these words did not dispense with the necessity of positive averring corporate existence, since the words "a corporation" was not an allegation that defendant was, in fact, a corporation, but amounted to a mere description of the person of the defendant. It was further held that this defect rendered the complaint liable to a general demurrer, and, further, that it could not be cured by verdict, and might even be objected to for the first time in the supreme court. **Miller v. Pine Mining Co.,** 2 Idaho 1206, 31 Pac. 803, 35 Am. St. Rep. 289. See, however, *note* appended to this case in 35 Am. St. Rep. 283.

77. Idaho.—**Miller v. Pine Mining Co.,** 2 Idaho 1206, 31 Pac. 803, 35 Am. St. Rep. 289. **N. Y.**—**Mechanics' Banking Assn. v. Spring Valley, etc. Co.,** 13 How. Pr. 227. **S. D.**—**State v. Chicago, etc. R. Co.,** 4 S. D. 261, 56 N. W. 894, 46 Am. St. Rep. 783. **Wis.** **Carpenter v. McCord Lumb. R. Co.,** 107 Wis. 611, 83 N. W. 764.

Joint Defendants.—Where, however, several corporations are made defendants, one of the defendant corporations cannot demur on the ground that another defendant has no corporate ex-

istence. **White Oak Dist. Twp. v. Oskaloosa Dist. Twp.,** 44 Iowa 512.

Minnesota.—In an action against a corporation, in Minnesota, the complaint bore the title "J. H. Holden, Plaintiff, against Great Western Elevator Company, a corporation, Defendant," but the complaint contained no allegation that the defendant was a corporation. The defendant appeared by the name in which it was sued, and demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. Demurrer overruled. Defendant appealed. The supreme court held that averment of corporate existence was unnecessary and said that "even if it is necessary, it would seem to be illogical to hold that the omission to do so could be taken advantage of by general demurrer." **Holden v. Great Western Elevator Co.,** 69 Minn. 527, 72 N. W. 805, 65 Am. St. Rep. 585. And see **Sly v. Palo Alto Gold Min. Co.,** 28 Wash. 485, 68 Pac. 871.

78. U. S.—**Kelley v. Mississippi Central R. Co.,** 1 Fed. 564. **Ill.**—**American Exp. Co. v. Haggard,** 37 Ill. 465, 87 Am. Dec. 257; **Wheatley, Buck & Co. v. Chicago Trust & Sav. Bank,** 64 Ill. App. 612, *affirmed*, 167 Ill. 480, 47 N. E. 711. **Vt.**—**Hunneeman & Co. v. Fire Dist.,** 37 Vt. 40; **Bank of Manchester v. Allen,** 11 Vt. 302.

Plea in Abatement.—In the case of **Am. Exp. Co. v. Haggard, supra**, the company was sued as a corporation, and the agent upon whom service was made appeared, filed an affidavit denying that he was agent of such a corporation, and moved to quash the return. The court in overruling the motion said that the object of the affidavit was to raise the question as to whether the defendants were a corporation, and as this was matter *dehors* the record, the question was one to be presented by plea in abatement, and not by motion.

79. See **Hartsville Univ. v. Hamil-**

At common law, the form of the plea in abatement is equivalent to the plea of *nul tiel* corporation,⁸⁰ and like all pleas in abatement must give the plaintiff such information as will enable him to correct his pleadings.⁸¹

It may be said to be a general rule, under the codes, that the issue of incorporation may be raised by answer,⁸² and in some juris-

ton, 34 Ind. 506. See, however, *infra*, as to answer.

80. See *American Express Co. v. Haggard*, 37 Ill. 465, 87 Am. Dec. 257. See also, *Chicago & A. R. Co. v. Glenn*, 175 Ill. 238, 51 N. E. 896, where it was held that summons being served upon a defendant corporation, it was estopped to deny its corporate existence in absence of a plea of *nul tiel* corporation.

Who may make the plea, there being no corporation, who may make the plea? It has been held that the persons served with the process may plead in their own names the facts that no such corporation exists. See *Kelley v. Mississippi Central R. Co.*, 1 Fed. 564.

Alabama; Plea Said To Be Inconsistent.—In Alabama, the supreme court has said: "The plea of *nul tiel* corporation where a defendant is sued as a corporation aggregate, is an inappropriate plea, and an inconsistency in itself. . . . The appointment of an attorney, and an appearance by him for the defendant, is an admission on the record that the defendant is a corporation." *Oxford Iron Co. v. Spradley*, 46 Ala. 98. In the state of Alabama, however, the court will not give a judgment by default against a corporation, without a judicial finding, recited on the record, that the service has been of a character to bring the corporation into court. See *Oxford Iron Co. v. Spradley*, 42 Ala. 24. Moreover, in the case of *McCullough v. Talledega Ins. Co.*, 46 Ala. 376, the Alabama supreme court admits that the plea of *nul tiel* corporation may be pleaded by a dissolved corporation.

Holding the Plea Appropriate.—In commenting upon the case of *Oxford Iron Co. v. Spradley*, *supra*, Judge Hammond, of the federal court, said, in *Kelley v. Mississippi Central R. Co.*, 1 Fed. 564 (U. S. Circuit Court, W. D., Tennessee): "Notwithstanding, it will be found that the plea has been made by the alleged corporation itself in many cases." Citing *U. S.*—Habich v.

Folger, 20 Wall. 1, 22 L. ed. 307. *Ill.* *Inman v. Allport*, 65 Ill. 540. *Md.* *Boyce v. M. E. Church*, 46 Md. 359. *Mass.*—*Thornton v. Marginal Freight R.*, 123 Mass. 32; *Gott v. Adams Exp. Co.*, 100 Mass. 320; *Greenwood v. Lake Shore R. Co.*, 10 Gray 373. *Mo.*—*Foster v. White Cloud*, 32 Mo. 505.

Ohio.—In *Callender v. Painesville & Hudson R. Co.*, 11 Ohio St. 516, the question was directly adjudicated. An officer, not even served with process, was allowed to file his affidavit and move to dismiss the suit, because the defendant had no corporate existence. The court held that any member, under the circumstances, might make the motion to dismiss.

81. *Keokuk & Hamilton Bridge Co. v. Wetzel*, 228 Ill. 253, 81 N. E. 864; *Grand Lodge of Brotherhood of Locomotive Firemen v. Cramer*, 164 Ill. 9, 45 N. E. 165; *American Express Co. v. Haggard*, 37 Ill. 465, 87 Am. Dec. 257.

82. **Ark.**—*Chicago, R. I. & P. R. Co. v. State*, 84 Ark. 409, 106 S. W. 199. **Ia.**—*Costes v. Galena & C. U. R. Co.*, 18 Iowa 277. **Mont.**—*Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995. **N. C.**—*Stanly v. Richmond & D. R. Co.*, 89 N. C. 331.

Negative Pregnant.—To a complaint averring that "defendant is a corporation, organized and existing, as plaintiff is informed and believes, under the laws of England," defendant answered with a denial "that defendant is or even was a corporation organized and existing under the laws of England." The denial was held to be pregnant with the admission that defendant is a corporation, since it might be true that defendant was a corporation, although not organized and existing under the laws of England. *Wright v. Fire Ins. Assn. of London*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211.

Pleading Statute of Incorporation. Where plaintiff alleged "that defendant is a corporation duly incorporated,

dictions that question may be put in issue by a general denial.⁸³

Elsewhere it is required, however, that the facts should be specifically pleaded.⁸⁴

The statute may require a verification of the denial,⁸⁵ or an affidavit stating that defendant is not a corporation, to be filed with the answer.⁸⁶

How Cured.—The failure to allege incorporation may be cured by an allegation in defendant's answer that it contracted as a corporation,⁸⁷ or by admissions equivalent to such an express averment.⁸⁸

An answer to the merits,⁸⁹ or the general issue, or general denial, is also held, in some jurisdictions, to be an admission of capacity to be sued,⁹⁰ while in other states, a general denial does not relieve the plaintiff from the necessity of proving incorporation.⁹¹

6. Plea of Expiration of Charter.—If defendant desires to plead, in defense to an action, that at the time of bringing the suit its corporate existence had expired, either by expiration of time, or by dissolution, or by forfeiture, the pleading must show that its business has

as plaintiff is informed and believes," and to which allegation defendant answered that such allegation "is" untrue, but defendant is also incorporated under the laws of North Carolina, the court presumed the word "untrue" to be a mistake, and that defendant intended to allege that it was incorporated under the laws of both Virginia and of North Carolina, yet, even so presuming, the failure to plead either statute of incorporation was held insufficient to raise the issue of incorporation. *Norris v. Lake Drummond Canal & Water Co.*, 132 N. C. 182, 43 S. E. 593.

83. *Locke v. Merchants Nat. Bank*, 66 Ind. 353; *Gott v. Adams Exp. Co.*, 100 Mass. 320.

84. *Stork v. Supreme Lodge Knights of Pythias*, 113 Iowa 724, 84 N. W. 721; *Montgomery v. Seaboard Air Line R.*, 78 S. C. 503, 53 S. E. 987. But see *Folsom v. Star Union Line*, 54 Iowa 490, 6 N. W. 702.

85. *Schmidt v. Nelke Art Lithographic Co.*, 17 Misc. 124, 39 N. Y. Supp. 353.

86. *White v. Bellefontaine Lodge*, 30 Mo. App. 682.

87. *Denver, etc. R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285; *Johnson v. Gibson*, 78 Ind. 282.

88. *St. Anthony Falls etc. Co. v. King, etc. Bridge Co.*, 23 Minn. 186; *Wood-*

son v. Milwaukee & St. P. R. Co., 21 Minn. 60; *Sengfelder v. Mutual Life Ins. Co.*, 5 Wash. 121, 31 Pac. 428.

89. *Rush v. Halcyon Steamboat Co.*, 84 N. C. 702; *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 430.

90. *Ala.*—*Southern R. Co. v. Hundley*, 151 Ala. 378, 44 So. 195. *Ind.* *Adams Express Co. v. Hill*, 43 Ind. 157. *Me.*—*Freeman v. Machias, etc. Co.*, 38 Me. 343. *Mich.*—*Lake Superior Bldg. Co. v. Thompson*, 32 Mich. 293.

Capacity When.—While the existence of a corporation is admitted by the plea of the general issue in an action against it, the time when it first acquired a valid organization is left undetermined. The only effect of the admission is, that at the time of the institution of the suit, the corporation, a party thereto, was capable of being sued. *Freeman v. Machias Water, Power & Mill Co.*, 38 Me. 343.

91. *Gott v. Adams Exp. Co.*, 100 Mass. 320; *Saltsman v. Shults*, 14 Hun (N. Y.) 256.

Objection Must Be Made in Time. Whether the objection that plaintiff failed to allege the incorporation of the defendant be made by plea or by answer, the objection must be made in time. For example, it is too late after the verdict to raise the objection for the first time. *Cribb v. Waycross Lumb. Co.*, 82 Ga. 597.

been wound up, and that no longer, as a matter of fact, has it capacity to be sued as a corporation.⁹²

7. Defense of Ultra Vires.—The defense of *ultra vires* is not available under a general denial,⁹³ neither can it be raised by demurrer where the complaint does not set forth what the corporate powers are.⁹⁴ It must be specially pleaded in order that a corporation may take advantage of it.⁹⁵

The plea is in the nature of a plea in confession and avoidance,⁹⁶ and will not be allowed when used to commit an injustice or a fraud.⁹⁷

8. Agent's Authority.—In actions on breaches of contract, it is not necessary to allege the authority of an officer or other agent to act for the corporation.⁹⁸

9. Negligence.—In actions based upon corporate negligence, the allegations of negligence may be made either of the corporation or of its officers or servants.⁹⁹

XII. EVIDENCE.—A. IN GENERAL.—The rules of evidence apply to cases in which a corporation is a party in the same general way as where the litigants are natural persons,¹ and the acts and assent of

92. *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600.

93. *Citizens State Bank v. Pence*, 59 Neb. 579, 81 N. W. 623.

94. *Bell v. Mendenhall*, 71 Minn. 331, 73 N. W. 1086.

95. Ill.—*Chicago, etc. Tool Co. v. Munsell*, 107 Ill. App. 344. Ia.—*Iowa Business Men's, etc. Assn. v. Berlau*, 125 Iowa 22, 98 N. W. 766. Mo.—*German Sav. Inst. v. Jacoby*, 97 Mo. 617, 11 S. W. 256; *Williams v. Verity*, 98 Mo. App. 654, 73 S. W. 732. N. Y.—*Bacon v. Montauk Brewing Co.*, 130 App. Div. 737, 115 N. Y. Supp. 617; *Stanton v. Erie R. Co.*, 131 App. Div. 879, 116 N. Y. Supp. 375; *Mason v. Standard, etc. Co.*, 85 App. Div. 520, 83 N. Y. Supp. 343, 13 N. Y. Ann. Cas. 264; *Griesa v. Mass. Ben. Assn.*, 60 Hun 581, 15 N. Y. Supp. 71. Wis.—*Farmers, etc. Bank v. Detroit & M. R. Co.*, 17 Wis. 372.

Michigan; Notice Required by Court Rule.—The defense of *ultra vires* is not available to a defendant corporation unless notice is given under a court rule. *City of Niles v. Benton Harbor, St. Joe R. & L. Co.*, 154 Mich. 378, 117 N. W. 937.

96. *Lewis v. Clyde S. S. Co.*, 131 N. C. 652, 42 S. E. 969, *rehearing*, 132 N. C. 904, 44 S. E. 666.

97. *Lake St. El. R. Co. v. Carmichael*, 82 Ill. App. 344, *affirmed*, 184 Ill. 348, 56 N. E. 372.

98. Ala.—*Perryman & Co. v. Farmers Union Ginning & Mfg. Co.*, 167 Ala. 414, 52 So. 644; *Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 So. 263. Cal.—*Sullivan v. Grass Val., etc. Co.*, 77 Cal. 418, 19 Pac. 757; *Malone v. Crescent City, etc. Co.*, 77 Cal. 38, 18 Pac. 858. Fla.—*Duval Investment Co. v. Stockton*, 54 Fla. 296, 45 So. 497. N. Y.—*Cawthra v. Stewart*, 59 Misc. 38, 109 N. Y. Supp. 770. Wash.—*Belch v. Big Store Co.*, 46 Wash. 1, 89 Pac. 174.

Texas; Agent's Name Should Be Stated.—As a matter of good pleading, the name of the agent who it is sought to prove made a contract binding upon the corporation should be stated. *Gulf & I. R. Co. of Texas v. Campbell* (Tex. Civ. App.), 108 S. W. 972.

99. *Bronson v. Washington*, 57 Conn. 346, 18 Atl. 264; *Farman v. Ellington*, 46 Hun (N. Y.) 41; *Piercy v. Averill*, 37 Hun (N. Y.) 361.

1. No Exceptions in Rules of Evidence.—As said by Baldwin, J., in *Hunt v. City of San Francisco*, 11 Cal. 250, 258, in speaking of the rules of pleading: "We cannot see the necessity or propriety of holding a different rule in respect to corporations of whatever kind. . . . If we were to make exceptions in their favor in the rules of pleading, we do not see why we might not, with the same propriety, make similar exceptions in the rules of

corporations, like those of individuals, may be shown and inferred from facts and circumstances.²

B. PROOF OF INCORPORATION.—Whenever it becomes necessary to prove incorporation,³ the method of proof may vary according to the mode of the corporation's creation, and according to the provisions of the statutes. For example, incorporation may be proved by the original charter, or an exemplified copy of the same, together with evidence of user thereunder;⁴ by a certificate of incorporation;⁵ by

evidence. This would be to break the harmony of the system, and to exercise legislative functions."

2. *Louisville N. A. & C. R. Co. v. Carson*, 151 Ill. 444, 38 N. E. 140; *Chicago, etc. R. Co. v. People*, 79 Ill. App. 529; *Moss v. Averell*, 10 N. Y. 449.

Acceptance of Charter.—While persons can become a private corporation only by their voluntary consent, yet this consent may be inferred from their acts. *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 6 L. ed. 552; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. ed. 629; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344.

3. See *supra*, as to necessity of raising issue by the pleadings, and also as to admission of incorporation.

4. *Ark.*—*Gaines v. Bank of Mississippi*, 12 Ark. 769. *Ill.*—*Ramsey v. Peoria, etc. Ins. Co.*, 55 Ill. 311; *Marsh v. Astoria Lodge*, 27 Ill. 421. *Ind.*—*Walker v. Shelbyville, etc. Turnpike Co.*, 80 Ind. 452; *Heaton v. Cincinnati, etc. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430. *La.*—*State v. Louisiana State Bank*, 20 La. Ann. 468. *Mass.*—*Chester Glass Co. v. Dewey*, 16 Mass. 94. *Me.*—*Came v. Brigham*, 39 Me. 35. *Mich.*—*Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. 124, 43 Am. Dec. 457. *Miss.*—*Henderson v. Mississippi Union Bank*, 6 Smed. & M. 314. *Mo.*—*Merchants Bank v. Harrison*, 39 Mo. 433, 93 Am. Dec. 285. *N. Y.*—*Eaton v. Aspinwall*, 19 N. Y. 119; *United States Bank v. Stearns*, 15 Wend. 314; *Wood v. Jefferson County Bank*, 9 Cow. 194. *N. C.*—*State v. Abernathy*, 94 N. C. 545. *Pa.*—*Cochran v. Arnold*, 58 Pa. 399. *Vt.*—*Searsburgh Turnp. Co. v. Cutler*, 6 Vt. 315.

Incorporation by Private Act.—The

existence of a corporation incorporated by a private act may be proved by an exemplified copy of the act, authenticated by having affixed thereto the seal of the state. *U. S.*—*United States v. Johns*, 4 Dall. 412, 1 L. ed. 888. *Mass.*—*British America Land Co. v. Ames*, 6 Met. 391. *N. H.*—*State v. Carr*, 5 N. H. 367. *N. Y.*—*Williams v. Bank of Michigan*, 7 Wend. 539.

Nonuser.—That a corporation has forfeited its charter rights by non-user, cannot be shown collaterally as a defense in a suit brought by a corporation. The state alone may determine that question in a direct proceeding. *Ga.*—*Union Branch R. Co. v. East Tenn. R. Co.*, 14 Ga. 327. *Ky.*—*Wight v. Shelby R. Co.*, 16 B. Mon. 4. *Pa.*—*Cochran v. Arnold*, 58 Pa. 399.

5. *U. S.*—*Baltimore, etc. R. Co. v. Fifth Baptist Church*, 137 U. S. 563, 11 Sup. Ct. 185, 34 L. ed. 784. *Minn.*—*Brown v. Corbin*, 40 Minn. 508, 42 N. W. 481; *Rock Island Bank v. Loyhed*, 28 Minn. 396, 10 N. W. 421. *S. D.*—*Dowagiac Mfg. Co. v. Higinbotham*, 15 S. D. 547, 91 N. W. 330. *Wash.*—*Knapp, etc. Co. v. Strand*, 4 Wash. 686, 30 Pac. 1063.

Admissible in Foreign State.—The certificate of incorporation is admissible as evidence of incorporation even in another state. *Com. v. Corkery*, 175 Mass. 460, 56 N. E. 711.

Foreign Corporation.—A foreign corporation must show not only the papers and proceedings of incorporation, but the statute of the sister state authorizing such incorporation. *Law Guarantees & Trust Soc. v. Hogue*, 37 Ore. 544, 62 Pac. 380, 63 Pac. 690; *State v. Savage*, 36 Ore. 191, 60 Pac. 610, 61 Pac. 1128. See also, *Savage v. Russell*, 84 Ala. 103, 4 So. 235.

the records of the corporation;⁶ by prescription;⁷ by reputation;⁸ or by a copy of the articles of association.⁹ The statutes sometimes distinguish between different classes of private corporations,¹⁰ and also between foreign and domestic corporations,¹¹ as to the method of

6. *Glenn v. Orr*, 96 N. C. 413, 2 S. E. 538.

7. *The Warden, etc. v. Hart*, 1 Car. & P. 113, 11 E. C. L. 335.

Ancient Charters.—A corporation may prove its existence, at least for certain purposes, by showing a record of its incorporation under a statute enacted forty or fifty years before the action. *Copp v. Lamb*, 12 Me. 312; *Brackett v. Persons* unknown, 53 Me. 228; *Jeffries Neck, etc. v. Ipswich*, 153 Mass. 42, 26 N. E. 239.

Proof of User.—Where no provision is made for any permanent evidence of the fact of organization, more proof of user is necessary than where the essential steps, by which the organization is accomplished, are required to be made a matter of record. In such cases, if the record is perfect, then, perhaps, nothing else need be shown; but, if imperfect, it may still stand in place of, and be equivalent to, a very considerable degree of evidence of user. The rightfulness of its existence not being in issue, of course evidence of such irregularities or defects in its organization, short of such as would show a want of good faith on the part of those concerned in the proceedings, would be wholly irrelevant. If the law exists, and the record shows a bona fide attempt to organize it, a very slight evidence of user beyond this is all that can be required. *Union M. E. Church v. Pickett*, 19 N. Y. 482. And see *Com. v. Bakeman*, 105 Mass. 53.

8. *Stockbridge v. West Stockbridge*, 12 Mass. 399; *Dillingham v. Snow*, 5 Mass. 547.

Based on Estoppel.—The true theory of the proof of corporate existence by reputation is probably based on estoppel. *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76; *Lake Superior Bldg. Co. v. Thompson*, 32 Mich. 293.

Municipal Corporations.—While it is the rule that the charter of a municipal corporation will be judicially noted, yet in case there is no charter in existence, the incorporation of such cor-

porations may also be proved by reputation. *Dillingham v. Snow*, 5 Mass. 547; *Londonderry v. Andover*, 28 Vt. 416; *Barnes v. Barnes*, 6 Vt. 388.

Criminal Prosecutions.—In a number of states it is provided by statute that the existence of a corporation in a criminal prosecution may be proved by general reputation. The same may, however, be so shown even in the absence of an express statute. See *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042.

9. **Ind.**—*Walker v. Shelbyville, etc. Turnpike Co.*, 80 Ind. 452. **Minn.** *Brown v. Corbin*, 40 Minn. 508, 42 N. W. 481. **Ore.**—*Pioneer Hardware Co. v. Farrin*, 55 Ore. 590, 107 Pac. 456. **Wash.**—*Knapp, etc. Co. v. Strand*, 4 Wash. 686, 30 Pac. 1063.

California.—Secretary of State's certified copy of articles of incorporation admissible. Civ. Code (1872), §297.

Colorado.—Articles of incorporation admissible by certified copy under seal of the state. Ann. St. (1891), §504.

Illinois.—Certified articles of incorporation admissible under great seal of Illinois. Rev. St. 1874, c. 32, §128.

Massachusetts.—Certified copy, by secretary of commonwealth, of a record of an incorporation certificate admissible. Pub. St. (1832), c. 106, §22.

10. **Indiana.**—Articles of association of a street railway corporation are provable by a certified copy by Secretary of State or by his deputy. Rev. St. (1897), §5616. Detective association's articles admissible by county recorder's certified copy. Rev. St. (1897), §4622. Insurance company's articles filed with State Auditor, admissible under his certified copy. Rev. St. (1897), §5073.

11. **Colorado.**—Thus, in Colorado, the charter of a foreign corporation, filed in the office of the Secretary of State, is provable by the secretary's certified copy under his official seal. Ann. St. (1891), §502. The articles of incorporation of a domestic corporation are made admissible in the form of a copy under the great seal of the state. Ann. St. (1891), §504.

proof, consequently it is necessary to consult the local law of each jurisdiction.¹²

C. **PROOF OF DE FACTO CORPORATION.**—Proof of a *de facto* corporation is generally sufficient,¹³ as, for example, in an action on contract,¹⁴ or against the plea of *nul tiel* corporation.¹⁵

D. **PRESUMPTIONS.**—As a rule, the same presumptions apply to corporations as to natural persons.¹⁶ It will be presumed, for example, that the acting officers of a corporation were duly elected,¹⁷ and in a contract action against a corporation it will be presumed that the corporation had power to make the contract.¹⁸

With reference, however, to the genuineness of a corporate seal, and also to the authority of an officer or agent to affix such seal to a document, the courts are far from harmonious. In some jurisdictions, the seal is presumed genuine,¹⁹ in others, not.²⁰

The seal being affixed, most of the cases hold that it is to be presumed that the seal was affixed with due authority,²¹ although there

12. **Federal Statute.**—The Act of Congress of May 26, 1790, provides that "The acts of the legislature of any state or territory shall be authenticated by having the seals of such state or territory affixed thereto. U. S. Rev. St., §905. Under this statute, where a foreign corporation was created by a special legislative act, its charter may be made admissible in evidence by having the seal of its state affixed, the seal of a state official being unnecessary. *United States v. Johns*, 4 Dall. (U. S.) 412, 1 L. ed. 888; *State v. Carr*, 5 N. H. 367.

13. *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042.

Evidence of user, under a defective certificate of incorporation is sufficient to prove plaintiff a corporation *de facto*. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. ed. 784.

14. *Baltimore, etc. R. Co. v. Fifth Bapt. Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. ed. 784.

15. *Cozzens v. Chicago, etc. Co.*, 166 Ill. 213, 46 N. E. 788.

16. *Bates v. State Bank*, 2 Ala. 451; *Bank of Kentucky v. Schuylkill Bk.*, 1 Pars. Eq. Cas. (Pa.) 180.

17. *Jones v. Hilldale Cem. Soc.*, 23 Ky. L. Rep. 1486, 65 S. W. 838.

18. *Willow Springs Irr. Dist. v. Wilson*, 74 Neb. 269, 104 N. W. 165.

Possession of Shares of Stock.—A person, declaring that a corporation holds certain stocks unlawfully, has the burden of proof to show the stocks

were illegally held, and in the absence of such proof the court will assume the action of the corporation is legal. *Southern Exp. Co. v. Western N. C. R. Co.*, 99 U. S. 191, 25 L. ed. 319; *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17; *Yates v. Van De Bogert*, 56 N. Y. 530.

19. Ill.—*Consolidated Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937; *Sawyer v. Cox*, 63 Ill. 130. Ia.—*Chicago, B. & Q. R. v. Lewis*, 53 Iowa 101, 4 N. W. 842. S. C.—*Josey v. Wil. & Man. R. Co.*, 12 Rich. 134.

20. N. J.—*Raub v. Blairstown Creamery Assn.*, 56 N. J. L. 262, 28 Atl. 384. Pa.—*Foster v. Shaw*, 7 Serg. & R. 156. Eng.—*Moises v. Thornton*, 8 T. R. 303, 101 Eng. Reprint 1402; *Chadwick v. Bruning, Ry. & Moody* 306, 21 E. C. L. 447.

21. Ala.—*Robinson v. Cahalan*, 91 Ala. 479, 8 So. 415. Cal.—*Gutzeit v. Pennie*, 95 Cal. 598, 30 Pac. 836. Ill.—*Consolidated Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937. Ind.—*Ellison v. Branstrator*, 153 Ind. 146, 54 N. E. 433. Ia.—*Chicago, B. & Q. R. Co. v. Lewis*, 53 Iowa 101, 4 N. W. 842. Neb.—*Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548, 54 N. W. 830. N. J.—*In re West Jersey T. Co.*, 59 N. J. Eq. 63, 45 Atl. 282. N. Y.—*Trustees, etc. Academy v. McKechnie*, 90 N. Y. 618. Ohio.—*Sheehan v. Davis*, 17 Ohio St. 571.

Presumed To Be Lawfully Affixed. Where there is a common seal put to a deed, that is title enough of itself,

is authority that no presumption that the corporation authorized its use will be indulged in.²²

E. COMPETENCY.—Under the common law rule of disqualification because of interest, the member or stockholder of a private corporation are not competent witnesses in matters in which the corporation is concerned.²³ This disqualification has now, however, been removed by statute in all jurisdictions.²⁴

F. ADMISSIONS.—The conduct and correspondence of the officers of a corporation are proper evidence tending to show an agreement,²⁵ and the minutes of a corporation relating to the making of a contract are admissible to show the intent of the parties thereto.²⁶ Since, however, the corporation is a party to the suit, and not the individual corporate members, the declaration of a member or officer, as such, is not admissible in evidence on the ground that it is the declaration of a party,²⁷ or that such persons are necessarily agents.²⁸ Where, however, a member or an officer is the authorized agent of the corporation for any transaction, the general rule governing the admissibility of the declarations of agents applies, also, to the agents of corporations.²⁹

without witness to prove it; and if it be said that it was put to it by the hand of a stranger, that shall be proved on the side that says so. *Brounker v. Atkyns, Skinner (K. B.)* 2, 90 Eng. Reprint 1.

Presumed from Genuineness.—The genuineness of a corporate seal presumes that it was affixed with due authority. *Foster v. Shaw*, 7 Serg. & R. (Pa.) 156.

22. See *Raub v. B. C. Assn.*, 56 N. J. L. 262, 28 Atl. 384, holding that where the seal is not shown to be the corporate seal, no presumption arises that it was affixed with due authority. Compare, however, *In re West Jersey T. Co.*, 59 N. J. Eq. 63, 45 Atl. 282.

23. **Conn.**—*Hartford Bank v. Hart*, 3 Day 491. **Md.**—*Union Bank of Md. v. Ridgely*, 1 Har. & G. 324, 408. **N. Y.** In the Matter of Kip, 1 Paige 601, 613. **Pa.**—*Philadelphia, etc. R. Co. v. Hickman*, 28 Pa. 318. **S. C.**—*City Council v. King*, 4 McCord 487. **Eng.**—*Doe & Mayor, etc. of Stafford v. Tooth*, 3 Younge & J. 19; *Davies v. Morgan*, 1 Tyr. 457.

24. Consult the various statutes.

Federal Courts.—The disqualification has been likewise removed from the federal courts. See U. S. Rev. St., §858.

25. *Mobile, J. & K. C. R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37; *Chicago, G. W. R. Co. v. People*, 79 Ill. App. 529, affirmed, 179 Ill. 441, 53 N. E. 986.

26. *Somers v. Fla. Pebble Phosphate Co.*, 50 Fla. 275, 39 So. 61.

27. **U. S.**—*Atlantic Ins. Co. v. Conard*, 4 Wash. C. C. 662, 2 Fed. Cas. No. 627. **Conn.**—*Fairfield County Tpk. Comp. v. Tcorp*, 13 Conn. 173; *Hartford Bank v. Hart*, 3 Day 491. **Md.** *City Bank v. Bateman*, 7 Har. & J. 104. **Pa.**—*Stewart v. Huntington Bank*, 11 Serg. & R. 267; *Magill v. Kaufman*, 4 Serg. & R. 317.

28. The officers or stockholders of corporations are not, merely by the fact of such relationship, the agents of the corporation for the purpose of making admissions. *Truesdell v. Chummar*, 75 Hun 416, 27 N. Y. Supp. 87; *Soper v. Buffalo, etc. R. Co.*, 19 Barb. (N. Y.) 310.

29. *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297, 68 Am. Dec. 544.

Officers.—Any declarations or admissions made by the officers of a corporation, relating to the subject-matter of the controversy, and within the scope of their duty, are binding on the corporation. **Ala.**—*Home Ice Factory v. Howells Min. Co.*, 157 Ala. 603, 48 So. 117; *Stanton v. Baird Lumber Co.*, 132 Ala. 635, 32 So. 299. **Cal.** *Lowe v. Yolo County Water Co.*, 157 Cal. 503, 108 Pac. 297. **Ill.**—*Vincent v. Soper Lumb. Co.*, 113 Ill. App. 463. **Ind.**—*Blanchard Carlisle Co. v. Garritson*, 43 Ind. App. 303, 87 N. E. 151. **Ia.**—*Peck v. Parchen*, 52 Iowa 46, 2 N. W. 597. **Ky.**—*Louisville Gas Co. v. Heating Co.*, 142 Ky. 253, 134 S. W.

Such admissions, however, must have been made in connection with the duties of their agency.³⁰

Production of Books.—It is provided by some of the statutes that a corporation, when a party to a suit, may be compelled to produce, upon a trial, any book or paper under its control, in the same way as a natural person may be required to produce such documents.³¹ To avoid the inconvenience of presenting the original books, it is further provided, that certified copies of the contents may be admitted.³²

The party offering the book in evidence may read only what he

205. **Mass.**—Garfield, etc. Coal Co. v. Pennsylvania Coal, etc. Co., 199 Mass. 22, 84 N. E. 1020. **Mo.**—Bangs Milling Co. v. Burns, 152 Mo. 350, 53 S. W. 923. **N. Y.**—Statler v. George A. Ray Mfg. Co., 195 N. Y. 478, 88 N. E. 1063. **Pa.**—Huntingdon, etc. R. Co. v. Decker, 82 Pa. 119. **Va.**—Lynchburg Tel. Co. v. Booker, 103 Va. 594, 50 S. E. 148. **Wash.**—Chilcott v. Colonization Co., 45 Wash. 148, 88 Pac. 113.

30. **Ginsburg v. Union Cloak and Suit Co.**, 35 Misc. 389, 71 N. Y. Supp. 1030; **Goetz v. Metropolitan St. R. Co.**, 54 App. Div. 365, 66 N. Y. Supp. 666.

President; Authority.—The authority of the president to speak for the corporation must be shown before his admission is competent evidence. **Johnson v. Buffalo Homeopathic Hospital**, 53 App. Div. 513, 65 N. Y. Supp. 1087.

Scope of Duty.—If objection is made, it must be shown that the admissions of corporate officers were made within the scope of their duties before they become admissible. **Stillwater Turnpike Co. v. Coover**, 25 Ohio St. 558, 566.

31. The statutes should be consulted. See, for example, in New York state, Code Civ. Proc., §868. And see **Wertheim v. Continental R. & T. Co.**, 15 Fed. 716; **Justice v. National Bank**, 83 N. C. 8.

Subpoena Duces Tecum.—The production of the books of a corporation can be compelled, if necessary, by a subpoena duces tecum served upon such officer of the corporation as is in charge of the books. Such a service cannot be made, however, upon a mere employe in custody of the books. **Wainright v. Tiffany**, 13 Civ. Proc. (N. Y.) 222.

Telegrams.—A subpoena duces tecum has, however, been granted directed to

the local manager of a telegraph company for the production of the original telegraphic dispatches on file. **Juce's Case**, 20 L. T. N. S. 421. See also, **National Bank v. National Bank**, 7 W. Va. 544.

32. See the statutes. See also, the following cases: **Crawford v. Branch Bank**, 8 Ala. 79 (holding that a clerk of a bank cannot testify to facts of which he has no knowledge, from notes, or memoranda, taken from the books of the bank); **People v. Hurst**, 41 Mich. 328, 1 N. W. 1027 (holding that the contents of the books of a bank may be proved by secondary evidence).

In England it has been held that the books of the East India Company, and of the Bank of England, are, for some purposes public records, and that, consequently, sworn copies may be admitted in evidence. **Man v. Carey**, 3 Salk. 155, 91 Eng. Reprint 748; **Mortimer v. McCallan**, 6 M. & W. 58; **Geery v. Hopkins**, 2 Ld. Raym. 851, 92 Eng. Reprint 69.

Georgia.—The entries in the books of a domestic corporation are provable by copy certified by the chief officer in charge. Code, 1895, §5236.

Illinois.—Papers and records of "any corporation or incorporated association" provable by certified copy by the "secretary, clerk, cashier, or other keeper," under corporate seal, if any. Rev. St. 1874, c. 51, §15.

Louisiana.—Copies from the books of a railroad company admissible if certified, under corporate seal, by the secretary of the company. Rev. L. 1897, §694.

Missouri.—Records and papers of domestic corporations provable by certified copy, under corporate seal, by the president or secretary. Rev. St. 1899, §3101.

desires, although the adverse party may read any omitted parts relating to the transaction at issue.³³

Incrimination.—The rule that no one shall be compelled to incriminate himself applies to corporations in connection with corporate crimes, when discovery is sought from the corporation as such.³⁴ An officer or employe, however, of a corporation cannot refuse to produce the corporate books merely on the ground that the evidence therein disclosed would tend to incriminate the corporation.³⁵ If, however, the production of the books would incriminate himself as well as the corporation, he may stand upon his rights.³⁶

XIII. TRIAL.—A. RIGHT OF TRIAL BY JURY.—Where the remedy is at law, the right of a corporate person to a trial by jury is the same as that of a natural person. In case, however, a stockholder seeks redress against the officers of a corporation for fraud, negligence, or *ultra vires*, such suits are generally brought in equity.³⁷ and the defendants are not entitled, as a matter of right, to a trial by jury.³⁸

B. COMPETENCY OF JURORS.—A stockholder is disqualified to sit as a juror in a case in which the corporation is financially interested.³⁹

33. *Banks v. Darden*, 18 Ga. 318, 341.

34. *Logan v. Pennsylvania R. Co.*, 132 Pa. 403, 408, 19 Atl. 137.

Prosecution for Destroying Books. Where one is on trial for destroying the books of a corporation with intent to defraud the corporation, the alleged motive being a purpose to conceal a misappropriation by the accused, evidence tending to show that there has been no misappropriation of the corporate funds, but that its losses have been sustained in the due course of its business is admissible. *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501.

35. *United States Express Co. v. Henderson*, 69 Iowa 40, 28 N. W. 426; *Gibbons v. Props. of Waterloo Bridge*, 5 Price (Exch.) 491.

36. *Rex v. Purnell*; 1 W. Bl. 37, 45, 96 Eng. Reprint 20, cited in *King v. Watson*, 2 T. R. 199, 100 Eng. Reprint 108; *Rex v. Cornelius*, 2 Str. 1210, 93 Eng. Reprint 1133.

Pennsylvania.—In Pennsylvania, however, it has been held, upon the prosecution of the president of a corporation for embezzlement, that "the books and papers of the corporation are not the property of the officers or employes, nor are they intended to protect them against the consequences of the frauds they have perpetrated in their respective spheres of labor or

duty. An officer or employe of a corporation who is under indictment for embezzlement of its funds may not require of his employer a suppression or concealment of his own entries in its books, although the entries may furnish the material clue to his crime, and possibly afford satisfactory evidence of it. The cases of *Logan v. Pennsylvania Railroad Co.*, 132 Pa. 403, 19 Atl. 137, and *Boyle v. Smithman*, 146 Pa. 255, 23 Atl. 397, are distinguished, since the books in each of those cases were the property and in possession of the defendant. *McElree v. Darlington*, 187 Pa. 593, 41 Atl. 456.

37. See following page, XVIII, E.

38. *Brinekerhoff v. Bostwick*, 105 N. Y. 567, 12 N. E. 58.

39. *Nev.*—*Fleeson v. Savage Silver Min. Co.*, 3 Nev. 157. N. H.—*Page v. Contoocook*, Val. B. Co., 21 N. H. 438. *Tenn.*—*Cleage v. Hyden*, 6 Heisk. 73.

Charitable Society.—It is certainly a good and wholesome rule, that any pecuniary interest, even in the smallest, in the event of a suit, will disqualify a person from serving on the jury charged with its trial. If, however, a society is, in its financial policy, purely eleemosynary or charitable, then the members cannot be said to have any pecuniary interest in the result and such members are competent jurors. *Burdine v. Grand Lodge of Alabama*,

The son,⁴⁰ and the nephew⁴¹ of a stockholder have also been held incompetent jurors, on the ground of relationship, in cases where the corporation is a party. That, however, a juror and one of the parties are members of the same corporation, not interested in the suit, is no ground for challenge.⁴²

C. **QUALIFICATION OF JUROR.** — In an action against a corporation, a juror cannot be asked on his *voir dire* whether he is prejudiced against corporations.⁴³

D. **QUESTIONS OF LAW OR FACT.** — It is a question of fact and consequently, for the jury whether or not the agents of a corporation were negligent,⁴⁴ and the same rule is applicable to the question of contributory negligence by plaintiff in an action against a corporation.⁴⁵

E. **INSTRUCTIONS.** — In a case in which a corporation is a party, it is a proper instruction that it is the duty of the jury to consider the case in all its bearings, in the same way as they would consider a case between two private citizens.⁴⁶ It is objectionable, however, in a charge, to make frequent repetition of, and to ring changes upon, the expressions, "corporation *de jure*" and "corporation *de facto*," such terms being well calculated to mystify and mislead the jury. Such expressions should not be so used without fully explaining their significance to the jury.⁴⁷

F. **VERDICT.** — In an action for tort against a corporation and its managing agents, the jury has authority to render a verdict against all or any of the defendants.⁴⁸

XIV. JUDGMENT OR DECREE. — A. **VALIDITY OF.** — A judgment against a corporation founded upon service made upon a person unauthorized to receive it, is void,⁴⁹ and error in the name under which the corporation is sued, where the service is by publication, may render a judgment by default invalid.⁵⁰ As a rule, however, a judgment against a corporation where no timely objection is made to its nomenclature will be upheld.⁵¹

37 Ala. 478; *M. E. Church v. Wood*, 5 Ohio 233.

40. *Georgia R. Co. v. Hart*, 60 Ga. 550.

41. *Young v. Marine Ins. Co.*, 1 Cranch 452, 30 Fed. Cas. No. 18,163.

42. *Brittain v. Allen*, 13 N. C. 120.

43. *Atlantic, etc. R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590.

44. *Weymouth v. Penobscot Log. Driving Co.*, 71 Me. 29.

45. *Berg v. City of Milwaukee*, 83 Wis. 599, 53 N. W. 890.

46. *Chicago & E. I. R. Co. v. Burridge*, 211 Ill. 9, 71 N. E. 838.

47. *Aultman & Co. v. Connor*, 25 Ill. App. 654, 656.

48. *Bingham v. Lipman, Wolfe & Co.*, 40 Ore. 363, 67 Pac. 98.

49. Cal.—*King v. Randlett*, 33 Cal.

318. Mo.—*Brown v. The Terre Haute, etc. R. Co.*, 72 Mo. 567. Neb.—*Campbell, etc. Mfg. Co. v. Marder, Luse & Co.*, 50 Neb. 283, 69 N. W. 774, 81 Am. St. Rep. 573, holding that such a service cannot support collateral attack upon a judgment based thereon. Ohio.—*Miami Exporting Co. v. Brown*, 6 Ohio 535.

Judgment Without Service.—A judgment pronounced by a justice, without service of process upon, or notice to, the defendant, is void. *Kanawha & O. R. Co. v. Ryan*, 31 W. Va. 364, 6 S. E. 924.

50. *City of Detroit v. Detroit City R. Co.*, 54 Fed. 1.

51. Ia.—*Griffith v. Milwaukee Harv.*

B. CONFESSION OF JUDGMENT.—A corporation may confess judgment by its duly authorized attorney in fact, acting under the authority of the directors.⁵² A judgment confessed, however, by an officer or even by the president, of a corporation, without authority to act, will be set aside,⁵³ as will a confessed judgment approved by a ma-

Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; *Wilson v. Baker*, 52 Iowa 423, 3 N. W. 481. **Kan.**—*Hofield v. Board of Education of Newton*, 33 Kan. 644, 7 Pac. 216. **W. Va.** *First Nat. Bk. v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878.

California; Complaint Must Be Amended.—In California, however, a judgment against a misnamed defendant will not be upheld, unless, as required by the code, the complaint is amended by inserting the correct name. *Alameda County v. Crocker*, 125 Cal. 101, 57 Pac. 766. Where, moreover, judgment was rendered against the "San Rafael Turnpike Road Company," the true name of a corporation, but the company was sued by a wrong name, namely, "The San Rafael and San Quentin Turnpike Road Company," the judgment was held not void, and the supreme court, in affirming the judgment, directed the trial court to amend the complaint (as of a date prior to the judgment) by substituting the true name of the corporation as the party defendant. *Mahon v. San Rafael T. R. Co.*, 49 Cal. 269.

Missouri; No Amendment of Void Judgment.—Where a defendant corporation was sued and served with process under a wrong name, and judgment rendered thereon, plaintiff cannot have the judgment corrected *nunc pro tunc* by striking out the name under which defendant was sued and served, and substituting another name. Such an order would be a nullity, and the court cannot make valid what was entirely nugatory originally. *Brown v. The Terre Haute, etc., R. Co.*, 72 Mo. 567.

Failing To Allege Incorporation.—If the declaration alleges that defendant is a corporation, a judgment against it is good, although it omits this allegation. *C. M. Carrier & Son v. Poulas*, 87 Miss. 595, 40 So. 164.

52. Ala.—*Southern Home Bldg. & Loan Assn. v. Gillespie*, 121 Ala. 295, 25 So. 564. **Ariz.**—*Shute v. Keyser*, 29 Pac. 386. **Ill.**—*Millard v. St. Francis,*

etc., Academy, 8 Ill. App. 341. **Kan.** See *Manley v. Mayer*, 68 Kan. 377, 75 Pac. 550. **Neb.**—*Solomon v. Schneider & Co.*, 56 Neb. 680, 77 N. W. 65. **N. C.**—*Sharp v. Danville, etc., R. Co.*, 106 N. C. 308, 11 S. E. 530, 19 Am. St. Rep. 533. **Ore.**—See *Miller v. Bank of British Columbia*, 2 Ore. 291.

53. Kan.—*Babcock Hdw. Co. v. Farmers' & Drovers' Bank*, 54 Kan. 273, 38 Pac. 256. **Mo.**—See *McMurray v. St. Louis Oil Mfg. Co.*, 33 Mo. 377. **N. J.**—*Raub v. Blairstown Creamery Asso.*, 56 N. J. L. 262, 28 Atl. 384; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237. **N. C.**—*Nimocks v. Cape Fear Shingle Co.*, 110 N. C. 20, 14 S. E. 622.

Illinois.—In this state it is held that the president of a corporation has no authority, without the consent of the board of directors, to execute a judgment note, with power of attorney to confess judgment, and a judgment confessed under such a note is wholly void. *Lemars Shoe Co. v. Lemars Shoe Mfg. Co.*, 89 Ill. App. 245. And see *Chicago Tip & Tire Co. v. Chicago Nat. Bank*, 176 Ill. 224, 52 N. E. 52; *Snyder Bros. v. Bailey*, 165 Ill. 447, 46 N. E. 452.

Nebraska.—A judgment confessed by the "general manager" of a corporation without a warrant of attorney is absolutely void. *Howell v. Gilt-Edge Mfg. Co.*, 32 Neb. 627, 49 N. W. 704.

Wisconsin.—In Wisconsin, however, it has been held that where a judgment is equitable and just, a confession of judgment by a corporation's president who acted without authority, will, nevertheless, not be interfered with by a court of equity. *Ford v. Hill*, 92 Wis. 188, 66 N. W. 115.

Subsequent Ratification.—The action of the officer who confesses a judgment may, however, be subsequently ratified by the directors. *Smead Foundry Co. v. Chesbrough*, 18 Ohio C. C. 783.

Authority Inferred.—The authority of an officer need not be express, but may be inferred, under special circumstances, from the conduct of the direc-

jority of the stockholders at an irregular meeting, but not sanctioned by the board of directors.⁵⁴ The court, however, in which the action is pending must of necessity judge of the authority of any natural person who may appear for the corporation for the purpose of confessing judgment.⁵⁵

The judgment as confessed must be against the corporation, since a judgment confessed against an officer individually does not bind the corporation.⁵⁶

C. JUDGMENT BY DEFAULT. — A judgment by default may be taken against a corporation,⁵⁷ but the record must show, in such a case, that process was duly served upon some lawfully authorized person.⁵⁸

A default judgment against an absent corporation, served by publication, may be rendered invalid by an error in the corporate name,⁵⁹ as, likewise, in the case of a misnomer of the corporate name in the summons.⁶⁰

tors. *Chicago Tip & Tire Co v. Chicago Nat. Bank*, 74 Ill. App. 439; *Ford v. Hill*, 92 Wis. 188, 66 N. W. 115.

54. *Nimocks v. Cape Fear Shingle Co.*, 110 N. C. 20, 14 S. E. 622.

55. *U. S.*—*White v. Crow*, 17 Fed. 98. *Ill.*—*Iglehart v. Chicago Ins. Co.*, 35 Ill. 514. *Ind.*—*Gambia v. Howe*, 8 Blackf. 133. *Pa.*—*Chambers v. Danie*, 2 Pa. 421.

56. *Davidson v. Alexander*, 84 N. C. 621.

57. *Ala.*—*Ex parte Nat. Lumb. Mfg. Co.*, 146 Ala. 600, 41 So. 10; *Wetumpka & C. R. Co. v. Cole*, 6 Ala. 655; *McWalker v. Branch of Bank of the State*, 3 Ala. 153. *Ill.*—*Union Hide & Leather Co. v. Woodley*, 75 Ill. 435. *Mo.*—*Cloud v. Pierce City*, 86 Mo. 357. *N. Y.*—*Shorer v. Times Printing, etc., Co.*, 119 N. Y. 483, 23 N. E. 979; *Tautphoeus v. Harbor, etc., Assn.*, 96 App. Div. 23, 88 N. Y. Supp. 709.

Actions on Promissory Notes.—In New York, a corporation sued on a promissory note is required to serve upon the plaintiff a copy of its answer or demurrer, and also a judicial order for a trial of the issues thus made, or else the plaintiff will be entitled to judgment as if by default. *N. Y. Code Civ. Proc.*, §1778. See, *Shorer v. Times Printing, etc., Co.*, 119 N. Y. 483, 23 N. E. 979; *Watertown Nat. Bank v. Waterworks Co.*, 19 Misc. 685, 44 N. Y. Supp. 1101.

58. *Ala.*—*Roman v. Morgan*, 162 Ala. 133, 50 So. 273; *Southern, etc., Loan Assn. v. Gillespie*, 121 Ala. 295, 25 So. 564; *Ex parte Nat. Lumb. Mfg. Co.*, 146

Ala. 600, 41 So. 10. *Cal.*—*King v. Randlett*, 33 Cal. 318. *Mo.*—*Cloud v. Pierce City*, 86 Mo. 357.

Presumption in Favor of Proper Service.—Where in a sheriff's return, it is recited that he served the president (naming him) of the defendant corporation, and the judgment recites that it was made to appear to the trial court that due service of summons was made, every intendment must be in favor of the judgment of the trial court, and if the recital in the sheriff's return is not sufficient evidence of the fact that the person named was president of the corporation, the presumption will be indulged that sufficient evidence of that fact was produced before judgment was rendered. *Cal.*—*Rowe v. Table Mountain Water Co.*, 10 Cal. 441. *Mont.*—*Vadnais v. East Butte Extension Copper Min. Co.*, 42 Mont. 543, 113 Pac. 747. *Pa.*—*Hagerman v. Empire Slate Co.*, 97 Pa. 534.

59. *City of Detroit v. Detroit City R. Co.*, 54 Fed. 1.

60. *Southern Pac. Co. v. Block*, 84 Tex. 21, 19 S. W. 300.

Misnomer; Failing To Appear.—Where the declaration and summons were against "A. & V. Railroad Company," but the summons was served on the agent of the "A. & V. Railway Company," the correct name, and the judgment by default was against the "A. & V. Railroad Company," "the true view is that one summoned by a wrong name, being thus informed that he is sued, . . . not availing of his opportunity to appear and object,

Judgment taken by default may be opened or set aside upon a proper showing of fraud,⁶¹ but not for official neglect, especially when the complainant is chargeable with laches.⁶²

D. MEASURE OF DAMAGES.—The fact that a guilty party is a corporation neither enlarges nor curtails the scope of damage likely to arise from a breach of contract. The same general rules governing measures of damages apply whether the breach be committed by natural or artificial persons.⁶³

E. FORM AND ENTRY.—A judgment against a corporation is good, although not specifying that it is a corporation, where, however, such fact appears in the declaration.⁶⁴ A judgment, however, should be rendered against the corporation and not against its president,⁶⁵ nor against individual members.⁶⁶

A judgment against a corporation incorrectly named may be valid,⁶⁷ and a judgment that that is technically incorrect may, under the provisions of the statutes, be amended.⁶⁸

The use in the caption of the judgment entry of the initials, instead

whereby the true name would be inserted in the proceedings (Code, §1581), should be precluded from afterwards objecting." By failing to appear, the misnomer is consequently waived. *Alabama & Vicksburg Railway Co. v. Bolding*, 69 Miss. 255, 13 So. 844. And see, *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. ed. 451.

61. *Duncan v. Western Union Min. Co.*, 2 City Ct. (N. Y.) 405.

62. *Clark v. Porcelain Mfg. Co.*, 8 S. C. 22.

63. *Murrell v. Pac. Exp. Co.*, 54 Ark. 22, 14 S. W. 1098, 20 Am. St. Rep. 17.

64. *C. M. Carrier & Son v. Poulas*, 87 Miss. 595, 40 So. 164.

65. *Davidson v. Alexander*, 84 N. C. 621.

Statutory Provision as to Actions. Where, however, by statute, all suits against a banking association are authorized to be brought "against the president thereof," a judgment rendered against "B, president of the Central Bank," is not a judgment against B in his private capacity. Even if the judgment should have been in form against "B, as president," instead of "B, president," the mistake must be treated as a clerical error which would not invalidate the judgment. *Sturgis v. Rogers*, 26 Ind. 1.

66. *Campbell v. Brunk*, 25 Ill. 225.

Judgment Against Individuals; Firm Name.—Where, however, in distinction

from a corporation, the statute permits an action against a partnership under its firm name, and subsequently, on trial, it is proved what individuals compose that company, judgment may go not only against the company property, but against individuals composing that company. *Gillig, Mott & Co. v. The Lake Bigler Road Co.*, 2 Nev. 214.

67. **Ia.**—See *Griffith v. Milwaukee Harv. Co.*, 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573, where it is held that a judgment is not invalid by reason of a mistake in stating the name of a corporation plaintiff in the title in the complaint, where the correct name is stated in the body of the complaint, also in the writ of attachment.

West Virginia.—Where a corporation fails to take advantage, by a plea in abatement, of the fact that it is incorrectly named as a party defendant, a judgment against it under such incorrect name cannot be considered as void. *First Nat. Bank v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 873.

68. **Mississippi.**—Where in a declaration brought by *C. M. Carrier & Son*, a corporation, a judgment "that defendants do have and recover of *R. M. Carrier and W. B. Burk*, composing the firm of *C. M. Carrier & Son*," is technically incorrect, but is susceptible of amendment at any time under the statutes. *C. M. Carrier & Son v. Paulas*, 87 Miss. 595, 40 So. 164.

of the full name, of the corporation, will not invalidate the judgment.⁶⁹

F. CORPORATION DISSOLVED OR EXPIRED.—There can be no valid judgment against a dissolved corporation,⁷⁰ unless founded on a pending suit which the order of dissolution preserves from abatement.⁷¹

Where an action has been tried and submitted, and taken under advisement, and, pending the decision, a corporation is dissolved, the court will enter judgment as of the time when the action was submitted.⁷²

At common law, the dissolution of a corporation extinguishes a judgment in its favor,⁷³ yet if assigned before dissolution, it may be enforced by the assignee even after the corporation is dissolved.⁷⁴

A corporation, however, as previously shown, may be continued, by statute, for a limited period for the purpose of winding up its affairs.⁷⁵

G. ASSIGNMENT OF JUDGMENT.—A judgment may be assigned by a corporation,⁷⁶ and may also be assigned to it.⁷⁷

H. STOCKHOLDERS ESTOPPED BY JUDGMENT.—A judgment against a corporation is, in most jurisdictions, conclusive against stockholders in suits to enforce their liability as stockholders.⁷⁸ In some jurisdic-

69. *Lampkin v. Louisville & N. R. Co.*, 106 Ala. 287, 17 So. 448.

70. **U. S.**—*Pendleton v. Russell*, 144 U. S. 640, 12 Sup. Ct. 743, 36 L. ed. 574; *First Nat. Bank v. Colby*, 21 Wall. 609, 22 L. ed. 687. **Ga.**—*Terry v. Merchants', etc., Bank*, 66 Ga. 177. **Kan.**—*Eagle Chair Co. v. Kelsey*, 23 Kan. 632. **La.**—*Musson v. Richardson*, 11 Rob. 37. **Me.**—*Merrill v. Bank*, 31 Me. 57, 50 Am. Dec. 649. **N. Y.**—*Sturges v. Vanderbilt*, 73 N. Y. 384; *McCulloch v. Norwood*, 58 N. Y. 562. **Va.**—*Rider v. Nelson, etc., Fac.*, 7 Leigh 154, 30 Am. Dec. 495. **Wis.**—*Combes v. Keyes*, 89 Wis. 297, 62 N. W. 89, 46 Am. St. Rep. 839.

Insolvent Corporation.—However, a judgment against an insolvent corporation will not be annulled. *Killgore v. Nicholson*, 26 La. Ann. 633.

71. *Rodgers v. Adriatic Fire Ins. Co.*, 148 N. Y. 34, 42 N. E. 515; *Sturges v. Vanderbilt*, 73 N. Y. 384.

72. *Mitchell v. Overman*, 103 U. S. 62, 26 L. ed. 369; *Shakman v. United States Credit System Co.*, 92 Wis. 366, 66 N. W. 528.

73. *May v. State Bk.*, 2 Rob. (Va.) 60, 40 Am. Dec. 726.

74. *DeVendell v. Hamilton*, 27 Ala. 156; *Leach v. Thomas*, 27 Ill. 457.

75. See *supra* p. 553.

Dissolved in One State, Alive in An-

other.—A foreign corporation may be dissolved and dead in the domicile of its origin, and yet may be deemed alive in a foreign state, by force of statute there providing for its continuance for the purpose of winding up its affairs. A judgment obtained in such foreign state against such a corporation would be valid in the state where found, but would be of no validity in the original domicile of the corporation. *Rodgers v. Adriatic Fire Ins. Co.*, 148 N. Y. 34, 42 N. E. 515.

76. *Emory v. Joice*, 70 Mo. 537; *Noble v. Thompson Oil Co.*, 79 Pa. 354, 21 Am. Rep. 66.

77. *Capital Lumbering Co. v. Learned*, 36 Ore. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

78. **U. S.**—*Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. ed. 184; *Hendrickson v. Bradley*, 85 Fed. 508, 29 C. C. A. 303; *Wilson v. Seymour*, 76 Fed. 678, 22 C. C. A. 477; *Nat., etc. Works v. Water Co.*, 68 Fed. 1006. **Cal.**—*Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319. **Ga.**—*Howard v. Glenn*, 85 Ga. 238, 11 S. E. 610. **Ill.**—*Singer v. Hutchinson*, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133; *Schertz v. First Nat. Bank*, 47 Ill. App. 124. **Ind.**—*Hatfield v. Cummins*, 152 Ind. 537, 53 N. E. 761. **Ia.**—*Clark v. Wolf*, 29 Iowa 197; *Donworth v. Coolbaugh*, 5 Iowa

tions, however, it is held that a judgment is but *prima facie* evidence of the validity of the claim, or "strong evidence of the indebtedness," which may, nevertheless, be questioned on the ground of mistake or fraud.⁷⁹ In all jurisdictions, however, a stockholder may impugn a judgment for collusion or fraud.⁸⁰

XV. EXECUTION.—A. NO EXECUTION AGAINST THE PERSON. Owing to its incorporeal nature, there can be no execution against the body of a corporation for the purpose of enforcing a judgment against it.⁸¹ Neither does *capias* lie against the individual members of a corporation in execution of the corporate debts.⁸²

B. EXECUTION LIES AGAINST CORPORATE PROPERTY.—The remedy of a judgment creditor of a private corporation must be directed towards the franchises, lands, goods, and effects of the corporate body.⁸³

300. **Kan.**—*Ball v. Reese*, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638. **Ky.** *Calloway v. Glenn*, 105 Ky. 648, 49 S. W. 440. **Mass.**—*Thayer v. New England, etc. Co.*, 108 Mass. 523; *Gaskill v. Dudley*, 6 Metc. 546, 39 Am. Dec. 750; *Inhabitants of Brewer v. Inhabitants, etc. New Gloucester*, 14 Mass. 216. **Me.**—*Barron v. Paine*, 83 Me. 312, 22 Atl. 218; *Came v. Brigham*, 39 Me. 35; *Merrill v. Pres., etc. of Bank*, 31 Me. 57, 1 Am. Rep. 649. **Md.**—*Castleman v. Templeman*, 87 Md. 546, 40 Atl. 275, 67 Am. St. Rep. 363, 41 L. R. A. 367. **Minn.**—*Holland v. Duluth Iron Co.*, 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480. **Mo.**—*Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 573, 27 S. W. 613, 45 Am. St. Rep. 514. **N. J.**—*Willoughby v. Chicago Junction R. & N. S. Co.*, 50 N. J. Eq. 656, 25 Atl. 277. **N. C.**—*Heggie v. People's, etc. Assn.*, 107 N. C. 581, 12 S. E. 275. **Pa.**—*Wilson, McElroys & Co. v. Stockholders of etc., Coal Co.*, 43 Pa. 424. **Tex.**—*Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052. **Va.**—*Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 129. **Eng.**—*Bank of Australasia v. Nias*, 16 Q. B. 717, 71 E. C. L. 717.

Privity of Interest.—Every member of a corporation is so far privy in interest in a suit against the corporation that he is bound by a judgment against it. *Gaskill v. Dudley*, 6 Met. (Mass.) 546, 39 Am. Dec. 750.

79. **U. S.**—*Berger v. Williams*, 4 McLean 577, 3 Fed. Cas. No. 1,341. **Kan.** *Grund v. Tucker*, 5 Kan. 70. **Wis.**—*Merchants Bank v. Chandler*, 19 Wis. 434.

New York.—In an action by a creditor of a railroad corporation against a stockholder to enforce his statutory

liability, proof of a judgment against the company is neither conclusive nor *prima facie* evidence of the existence of the debt against the company. The only purpose for which the judgment could be used as evidence would be after the existence of the debt had been established to prove that it had been prosecuted to judgment against the company as one step requisite to establish the defendant's liability. *McMahon v. Macy*, 51 N. Y. 155. In this case the New York decisions upon this question are collated and discussed in the opinion of Gray, C. There is, moreover, a dissenting opinion by Hunt, C., who held that the judgment against the corporation was *prima facie* evidence against the stockholder.

80. **U. S.**—*James v. Central Trust Co.*, 98 Fed. 489, 39 C. C. A. 126. **Ill.**—*Schertz v. First Nat. Bank*, 47 Ill. App. 124. **Kan.**—*Ball v. Reese*, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638. **Me.**—*Barron v. Paine*, 83 Me. 312, 22 Atl. 218. **N. C.**—*Heggie v. People's, etc. Assn.*, 107 N. C. 581, 12 S. E. 275. **Utah.**—*Wilson v. Kiesel*, 9 Utah 397, 35 Pac. 488.

81. *McKim v. Odom*, 3 Bland (Md.) 407; *Lindell v. Wash*, 3 Mo. 512.

82. *McKim v. Odom*, 3 Bland (Md.) 407; *Ex parte Penniman*, 11 R. I. 333.

Fraud of President of Corporation.

Where a person brought an action for damages because of the false and fraudulent representations of the president of a corporation in regard to its solvency, execution may be levied against the person of the president. *Phillips v. Wortendyke*, 31 Hun (N. Y.) 192.

83. **Mo.**—*Lindell v. Wash*, 3 Mo. 512. **Ore.**—*Hughes v. Oregonian B. Co.*, 11

Moreover, corporate property in the possession of a stockholder may be seized.⁸⁴

C. EXECUTION HOW ENFORCED.—At common law, the method of enforcing a judgment against a corporation was by distringas and sequestration of its property.⁸⁵ Likewise, in chancery, if a decree or order was sought to be enforced against a corporation aggregate, the same process might be adopted as in the case of default in appearing or answering, namely, by distringas and sequestration.⁸⁶

Under modern practice, however, the property of a private corporation, whether real or personal, may be levied upon and sold.⁸⁷ In some

Ore. 158, 2 Pac. 94. **Pa.**—*Reynolds v. Reynolds Lumb. Co.*, 169 Pa. 626, 32 Atl. 537, 47 Am. St. Rep. 935.

84. *Hughes v. Oregonian R. Co.*, 11 Ore. 158, 2 Pac. 94.

Stockholder's Private Property.—The private property, however, of a stockholder cannot be levied upon to satisfy a judgment against the corporation. *Adams v. Wiscasset Bank*, 1 Me. 361, 10 Am. Dec. 88.

Unpaid Subscriptions.—In some jurisdictions, however, subscriptions to stock, called for and due, may be garnished by plaintiff in an action against the corporation. *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348. And see *infra*, XVIII.

No Call Made.—Where, however, no call has been made garnishment will not lie against unpaid subscriptions. *Teague v. Le Grand*, 85 Ala. 493, 5 So. 287, 7 Am. St. Rep. 64.

85. *Tidd's Pr.* 116.

86. *Dan. Ch. Pl. & Pr.* 1067. See *McKim v. Odom*, 3 Bland (Md.), 407 422; *Hide v. Petit*, 2 Freem. 125, 22 Eng. Reprint 1101, 1 Ch. Cas. 91, 22 Eng. Reprint 709.

Commission or Sequestration.—The commission was usually directed to four or more persons, named by the plaintiff, directing them, or any three or two of them, to sequester the rents and profits of the real estate, and the goods and chattels and personal estate of the corporation, until they shall comply with the court's order or decree. See *Dan. Ch. Pl. & Pr.* 478.

87. **U. S.**—*Iron City Nat. Bank v. Steel Co.*, 14 Fed. 150. **Mass.**—*Pierce v. Partridge*, 3 Met. 44. **Miss.**—*Arthur v. Commercial & R. Bank*, 9 Smed. & M. 394. **N. Y.**—*Slee v. Bloom*, 19 Johns. 456, 475. **N. C.**—*State v. Rives*, 27 N. C. 297, 307. **Eng.**—*Regina v.*

Victoria Park Co., 1 Q. B. 289, 41 E. C. L. 544.

Decree in Equity.—Where, in a decree in equity, there is an order for the payment of money, or for an award of damages, or for a deficiency in connection with the sale of mortgaged property, it is, at the present time, generally provided by statute that a writ of execution may issue, the same as in suits at law. The practice is regulated by the statutes which should be consulted. It is provided by the Rules of Practice for the Courts of Equity of the United States, that final process to execute any decree may, if the decree be solely for the payment of money, be by writ of execution, in the form used in the federal courts in suits at common law in action of *assumpsit*. See Rules 8 and 92.

As in Case of Individuals.—The property of a corporation may be seized and sold under an execution, for the payment of its debts, as in the case of an individual; and a corporation is bound to provide for its just debts, whether the payment is made by sale of property for that purpose, or with money from its vaults. *Buchanan, C. J.*, in *State of Maryland v. Bank of Maryland*, 8 Gill & J. (Md.) 205, 219; *Ang. & Ames, Corp.*, §640. See also, *infra*.

Stockholder as Creditor.—A stockholder of a corporation, who is also a creditor, may like any other judgment creditor levy upon the property of the corporation. *Pierce v. Partridge*, 3 Met. (Mass.) 44.

As to Demand.—By some of the early statutes, a demand upon the corporation was necessary before a levy of execution on the corporate property could be made. *Fox v. Hempfield R. Co.*, 9 Fed. Cas. No. 5,011; *Stone v. Wiggin*, 5 Met. (Mass.) 316.

jurisdictions, moreover, a judgment debtor of a corporation may maintain a creditor's bill to compel its stockholders to pay called for subscriptions upon their unpaid stock.⁸⁸

D. WHAT PROPERTY LIABLE TO EXECUTION. — 1. Same as Natural Person. — The general property of a corporation may be levied upon and sold on execution sale the same as the property of a natural person.⁸⁹

2. Franchises. — At common law, the franchises of a corporation, being mere incorporeal hereditaments, are not subject to seizure and sale upon execution.⁹⁰ The statutes may, however, provide that a franchise may be taken on execution.⁹¹

Enforced in Equity. — Where a judgment has been rendered against a bridge corporation, and, execution returned *nulla bona*, a court of equity can take possession of the bridge, appoint a man to collect the tolls and pay them into court, to answer the demand of the judgment creditor. *Covington Drawbridge Co. v. Shepherd*, 21 How. (U. S.) 112, 16 L. ed. 38. See also, *Gleaves v. Davidson & Wilson County Turnpike Co.*, 4 Baxt. (Tenn.) 83.

88. U. S. — *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885. **Ala.** — *Pickering v. Townsend*, 118 Ala. 351, 23 So. 703. **Cal.** — *Harmon v. Page*, 62 Cal. 448. **Ill.** — *Tunesma v. Schuttler*, 114 Ill. 156, 28 N. E. 605. **Minn.** — *McKusick v. Seymour*, 48 Minn. 172. **Nev.** — *Thompson v. Reno S. B.*, 19 Nev. 242, 9 Pac. 121, 3 Am. St. Rep. 883. **N. Y.** — *Briggs v. Penniman*, 8 Cow. 387, 18 Am. Dec. 454. **Pa.** — *Lane's Appeal*, 105 Pa. 49, 51 Am. Rep. 166; *Germantown, etc. Co. v. Fitler*, 60 Pa. 124, 100 Am. Dec. 546. **Wis.** — *Ballin v. Loeb*, 78 Wis. 404, 47 N. W. 516.

89. Mass. — *Perry v. Adams*, 3 Metc. 51; *Pierce v. Partridge*, 3 Metc. 44. **Md.** — *Boyd v. Chesapeake & O. Co.*, 17 Md. 195, 79 Am. Dec. 646; *State v. Bank of Maryland*, 6 Gill & J. 205, 219, 26 Am. Dec. 561. **Miss.** — *Arthur v. C. & R. Bank*, 9 Smeds & M. 394, 48 Am. Dec. 719. **N. Y.** — *Slee v. Bloom*, 19 Johns. 456, 475, 10 Am. Dec. 273. **Tenn.** — *F. & C. Turnpike Co. v. Young*, 8 Humph. 104.

90. U. S. — *Gue v. Tide Water Canal Co.*, 24 How. 257, 16 L. ed. 635. **Cal.** — *Risdon Iron Works v. Traction Co.*, 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25; *Thomas v. Armstrong*, 7 Cal. 286. **Ill.** — *Hatcher v. T. W. & W. R. R. Co.*, 62 Ill. 477. **Ind.** — *Louisville, etc. R. Co.*

v. Boney, 117 Ind. 501, 20 N. E. 432. **Ky.** — *Winchester, etc. Turnpike Co. v. Vimont*, 5 B. Mon. 1. **Mich.** — *James v. Pontiac R. R. Co.*, 8 Mich. 91. **Miss.** — *Arthur v. Commercial & R. Bank*, 9 Smed. & M. 394, 431. **Mo.** — *Stewart v. Jones*, 40 Mo. 140. **Ohio.** — *Seymour v. Milford & C. Tpk. Co.*, 10 Ohio 476. **Pa.** — *Mausel v. N. Y., etc. R. Co.* 171 Pa. 606, 33 Atl. 377; *Susquehanna C. Co. v. Bonham*, 9 Watts & S. 27, 42 Am. Dec. 315; *Ammant v. The Pres., etc.*, 13 Serg. & R. 210, 15 Am. Dec. 593. **Tenn.** — *Baxter v. Turnpike Co.*, 10 Lea 488.

Court of Equity. — A court of equity may, however, take possession of the franchise of a corporation if there is no other property, appoint a receiver to collect tolls, and pay them into court, to the end of discharging the judgments at law. *Covington Drawbridge Co. v. Shepherd*, 21 How. (U. S.) 112, 16 L. ed. 38.

Corporate Existence Not Subject To Sale Under Mortgage Lien. — When a railroad company mortgages its road and appurtenances as a security for debt and also its franchise, it is not to be understood as conveying its corporate existence or its general corporate powers, but only the franchise necessary to make the conveyance productive and beneficial to the grantees, to maintain and support, manage and operate, the railroad, and receive the tolls and profits thereof for their own benefit. *Eldridge v. Smith*, 34 Vt. 484, 490.

91. U. S. — *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860. **Ga.** — *Atlanta v. Grant*, 57 Ga. 340. **Ind.** — *State v. Hare*, 121 Ind. 308, 23 N. E. 145. **Mass.** — *Simmons v. Worthington*, 170 Mass. 203, 49 N. E. 114. **Mich.** — *Ripley v. Evans*, 87 Mich. 217, 49 N. W. 504;

The sale, however, of the corporeal property of a corporation does not carry with it the franchise.⁹²

3. Property Essential to Exercise of Franchise.—Lands, easements, or things essential to the existence of a public, or quasi-public, corporation, and without which its franchises would be of no practical use, and its public duties could not be performed, cannot be levied upon without express statutory sanction.⁹³ The sale of such property upon execution may be restrained by injunction.⁹⁴

James v. Pontiac, etc. Co., 8 Mich. 91. **Pa.**—Greensburg, etc. Co. v. Irwin, etc. Co., 162 Pa. 78, 29 Atl. 274; Willsborough, etc. R. Co. v. Griffin, 57 Pa. 417.

Return of "Nulla Bona."—Some states allow a special fl. fa. to sell the franchise and all the property of a private corporation after the return of an ordinary fl. fa. "nulla bona." **Appeal of Philadelphia, etc. Co.,** 70 Pa. 355; **Valle v. Arnold Electric Mfg. Co.,** 17 Pa. Co. Ct. 33.

Shortest Period of Time.—A statute may provide that in case of a sale of the franchise of any corporation, the person who shall satisfy the execution, with all the costs thereon, shall be considered the highest bidder, that is the person who, upon paying such execution and costs, shall agree to take such franchise for the shortest period of time, and to receive during the time all such fare and tolls as the said corporation would by law be entitled to demand, shall be considered the highest bidder. **Taylor v. Jerkins,** 51 N. C. 316, 320.

No Fractional Parts.—A canal company, incorporated in Ohio and Pennsylvania, was used as an interstate highway. That part of the franchise located in Pennsylvania could not be sold on execution since the franchises are not held in fractional parts. **Graham v. Pennsylvania & Ohio Canal Co.,** 3 Pittsb. (Pa.) 341.

92. City Water Co. v. State, 88 Tex. 600, 32 S. W. 1033; **Palestine v. Barnes,** 50 Tex. 538.

93. U. S.—**Gue v. Tide Water Canal Co.,** 24 How. 257, 16 L. ed. 635; **Covington Drawbridge Co. v. Shepherd,** 21 How. 112, 16 L. ed. 38. **Ind.**—**Louisville, etc. R. Co. v. Boney,** 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; **Indianapolis, etc. R. Co. v. State,** 105 Ind. 37, 4 N. E. 316. **Mich.**—**Hackley v. Mack,** 60 Mich. 591, 27 N. W. 871.

Neb.—**Overton Bridge Co. v. Means,** 33 Neb. 857, 51 N. W. 240. **N. C.**—**Gooch v. McGee,** 83 N. C. 59, 35 Am. Rep. 558. **Pa.**—**Margo v. Pennsylvania R. Co.,** 213 Pa. 468, 62 Atl. 1081, 110 Am. St. Rep. 559; **Bank v. Columbus Tanning Co.,** 170 Pa. 1, 32 Atl. 539; **Ammant v. Pres., etc.,** 13 Serg. & R. 210. **Tenn.** **Baxter v. Turnpike Co.,** 10 Lea 488.

Railroad Property.—The statutes frequently exempt the property of railroads from levy and sale under ordinary process of execution. This is due to public policy in order that they may be enabled to perform their duties to the public. **Bell v. Wood,** 181 Pa. 175, 37 Atl. 201; **Mausel v. New York, etc. R. Co.,** 171 Pa. 606, 33 Atl. 377. See also, **Randolph v. Larned,** 27 N. J. Eq. 557; **Connor v. Tennessee, etc. R.,** 109 Fed. 931.

Contrary View.—Opposed to the statement made in the text which is supported also by the great weight of authority, some cases hold that property although necessary to the operation of a franchise is not exempt from execution. See **Cal.**—**Risdon Iron Works v. Traction Co.,** 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25. **N. H.**—**Boston, etc. R. Co. v. Gilmore,** 37 N. H. 410, 72 Am. Dec. 336. **Va.**—**Winchester, etc. R. Co. v. Colfelt,** 27 Gratt. 777.

94. Brown v. Maryland, 114 U. S. 598, 5 Sup. Ct. 1065, 29 L. ed. 233; **Gue v. Tide Water Canal Co.,** 24 How. 257, 16 L. ed. 635; **Covington Drawbridge Co. v. Shepherd,** 21 How. 112, 16 L. ed. 38; **Louisville, etc. R. Co. v. Boney,** 117 Ind. 501, 20 N. E. 432.

No Advantage from Stay.—Where a debt is payable in installments and an installment has fallen due, an execution sale of the franchise of the corporation will not be enjoined, where no fraud or collusion is shown and the corporation could gain no advantage from a stay of proceedings. **Ward v. Salem St. R. Co.,** 108 Mass. 332.

In such a case, the proper remedy would be the appointment of a receiver, and a sequestration of the earnings for the purpose of paying the judgment.⁹⁵

4. Right of Way.—The right of way of a railroad corporation cannot be sold on execution.⁹⁶

5. Effect of Statutes.—Statutes, however, have been passed in many states, empowering quasi-public corporations to mortgage their property, including their franchises, and upon the foreclosure and sale of such mortgaged property, the purchasers are permitted, under the law, to reorganize the old corporation and to continue its operations.⁹⁷

6. Shares of Stock.—Shares of stock are not at common law, the subject of attachment,⁹⁸ although they are generally made so by statute.⁹⁹ The statutes sometimes, however, distinguish between the at-

95. *Covington Drawbridge Co. v. Shepherd*, 21 How. (U. S.) 112, 16 L. ed. 38; *Overton Bridge Co. v. Means*, 33 Neb. 857, 51 N. W. 240.

96. *Buncombe County v. Tommey*, 115 U. S. 122, 5 Sup. Ct. 626, 29 L. ed. 305; *East Alabama R. v. Doe*, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. ed. 136; *Youngman v. Elmira*, etc. R. Co., 65 Pa. 278. See however, *State v. Rives*, 27 N. C. 297; *Lawrence v. Morgan's*, etc. Co., 39 La. Ann. 427, 2 So. 69.

Purchaser Acquires No Title.—Where a railroad corporation has a mere right of way through certain lands to run a railroad under a franchise, an execution purchaser of such right of way, not having the franchise, can acquire no title therein. *East Alabama R. v. Doe*, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. ed. 136.

97. The statutes should be consulted. See also, the following cases: *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185; *Trask v. Maguire*, 18 Wall. (U. S.) 391, 21 L. ed. 938; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

98. *Ala.*—*Nabring v. Mobile Bank*, 58 Ala. 204. *D. C.*—*Barnard v. Life Ins. Co.*, 4 Mackey 63. *Ga.*—*Haley v. Reid*, 16 Ga. 437. *Ill.*—*Rhea v. Powell*, 24 Ill. App. 77. *Mo.*—*Foster v. Potter*, 37 Mo. 525; *Caffery v. Choctaw Coal*, etc. Co., 95 Mo. App. 174, 68 S. W. 1049. *N. Y.*—*Denton v. Livingston*, 9 Johns. 96. *N. C.*—*Evans v. Monot*, 57 N. C. 227. *Tenn.*—*Nashville Bank v. Ragsdale*, Peck. 296. *Tex.*—*Merchants*, etc. Co. v. *Brower & Co.*, 38 Tex. 230.

99. *Ala.*—*Oldacre v. Butler*, 116 Ala.

652, 23 So. 3; *Ditney v. First Nat. Bank*, 112 Ala. 391, 20 So. 476. *Ill.*—*Union Nat. Bank v. Byram*, 131 Ill. 92, 22 N. E. 842. *Mass.*—*Hussey v. Mfg.*, etc. Bank, 10 Pick. 415. *Mo.*—*Tufts v. Volkening*, 122 Mo. 631, 27 S. W. 522. *N. J.*—*Castle v. Carr*, 16 N. J. L. 394. *Pa.*—*Braden's Estate*, 165 Pa. 184, 30 Atl. 746. *Va.*—*Shenandoah Val. R. Co. v. Griffith*, 76 Va. 913.

Situs of Stock.—The general rule is unquestioned that the situs of stock for the purpose of attachment is in the domicile of the corporation issuing the shares. They are, therefore, not subject to the process of another state, and (in the absence of legislation attempting to reach the foreign stock) it can make no difference whether the owner of the share is a resident of the domestic, or of the foreign state. Consequently, a statute in Pennsylvania authorizing the attachment of the shares of a stockholder will not apply to the stock owned by one in a New Jersey corporation, although such corporation is doing business in Pennsylvania. *Gundry v. Reakirt*, 173 Fed. 167. And see *Pinney v. Nevills*, 86 Fed. 97.

California.—It is held, however, in California, that although a corporation was organized in Arizona, yet where all its property is in California and all its business is carried on in such state, it is to all practical purposes a California corporation. Under such circumstances its residence in Arizona is the merest fiction, and the fiction as to the situs of the corporation entity ought not to yield in the interest of justice to the actual facts. *Wait v. Kern River Mining*, etc. Co., 157 Cal. 13, 106 Pac.

tachment of the legal title,¹ and of the equitable² interests in stock.³

7. Rolling Stock.—Statutes have been passed in some states providing for the attachment of rolling stock, and even in the absence of a statute it has been held that such property of a railway company is subject to execution.⁴ Generally, however, such property is protected by prior lien.⁵

E. PROCEEDINGS SUPPLEMENTAL TO EXECUTION.—Proceedings supplemental to execution are generally held to apply to corporations,⁶

98; See also, *Young v. South Tredeger Co.*, 85 Tenn. 183, 2 S. W. 202, 4 Am. St. Rep. 752.

Procedure.—All the states which prescribe the manner of levying upon shares of corporate stock by execution or attachment prescribe that it shall be done by giving notice to the corporation, or to its secretary, or to the officer having charge of its books; this notice to the officer in charge of the corporate books being essential to the validity of the seizure. *Gundry v. Reakirt*, 173 Fed. 167, 170, quoting from *Thomp. Corp.*, §2786.

1. *Gypsum, etc. Co. v. Kent*, 97 Mich. 631, 57 N. W. 191; *Van Norman v. Jackson*, 45 Mich. 204, 7 N. W. 796; *Weller v. Pace Tobacco Co.*, 2 N. Y. Supp. 292.

2. **Ala.**—*Bank of St. Mary's v. St. John*, 25 Ala. 566. **Conn.**—*Middletown Sav. Bank v. Jarvis*, 33 Conn. 372. **Mo.** *Tufts v. Volkening*, 122 Mo. 631, 27 S. W. 522.

3. **Pledged Stock.**—Where stock has been pledged and the stock has been transferred on the books to the pledgee, a creditor of the pledgor cannot levy on such stock. A purchaser at such an execution sale acquires no title. *Nabring v. Bank of Mobile*, 58 Ala. 204.

California; Buying in Delinquent Stock.—Where a statute allows a corporation to buy in stock at a sale for delinquent assessments, even though, under the statute, the legal title vests in the corporation, nevertheless such stock cannot be sold on execution against the corporation. *Robinson v. Spalding Gold & Silver Min. Co.*, 72 Cal. 32, 13 Pac. 65.

4. *Risdon Iron Works v. Citizens Tr. Co.*, 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25; *Boston & C. R. Co. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 336.

5. As said by former Chief Justice

Baldwin, of Connecticut, in his treatise on American Railroad Law, "This question is seldom one of any practical importance. Railroads are almost universally subject to general mortgages covering all their personal property used in their business. Such mortgages run with the rolling-stock which they include wherever it may be found. A mortgage creating a valid lien upon a car in the state in which it was when the conveyance was executed, and to which the mortgagor belonged, is not displaced by sending it temporarily into another state; and it can no more be attached there than in the state from which it went." Baldwin, Am. R. Law, p. 497, citing *Nichols v. Mase*, 94 N. Y. 160, 17 Am. & Eng. R. Cas. 230.

6. **U. S.**—*Sage v. St. Paul, etc. Co.*, 47 Fed. 3. **Ind.**—*American, etc. Co. v. Clark*, 123 Ind. 230, 23 N. E. 855; *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661; *Tompkins v. Floyd County Ag., etc. Assn.*, 19 Ind. 197. **Ia.**—*Estey v. Fuller I. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025. **N. O.** *La Fountain v. Southern Underwriters' Assn.*, 79 N. C. 514. **S. D.**—*South Bend, etc. Co. v. Pierre, etc. Co.*, 4 S. D. 173, 56 N. W. 98.

Nature of Supplemental Proceedings. Under some of the codes, a corporation or any officer or member thereof may be compelled in supplemental proceedings to answer whether such corporation, officer or member thereof has any property of, or is indebted to, a judgment debtor. Supplemental proceedings are analogous to, and in fact in most aspects, a substitute for the process of garnishment. *La Fountain v. Southern Underwriters Assn.*, 79 N. C. 514.

Where a statute allows supplementary proceedings in execution against any "person" or "corporation," municipal corporations are not included but only

although the statute may expressly or impliedly exclude such an application.⁷

F. EXECUTION SALE.—A mere stockholder may buy at an execution sale of corporate property,⁸ although it is held that a director cannot be such a purchaser.⁹ These latter decisions are based, however, upon the assumed constructive fraud of such purchasers, and, on the other hand, it is held that an officer of a corporation who buys in good faith and for full value may be a purchaser at an execution sale.¹⁰

XVI. APPEALS.—**A. CORPORATIONS MAY APPEAL.**—A corporation may appeal from a judgment or order the same as a private person.¹¹ An appeal is taken, however, by the authority of the corporation, and a mere stockholder without its authority cannot prosecute appellate proceedings in behalf of the corporation.¹² Neither can stockholders, without sufficient evidence of authority, have an appeal dismissed.¹³

B. APPEAL BOND.—In connection with an appeal, a corporation may execute an appeal bond,¹⁴ and may, as a "party" under a statute regulating such proceedings, obtain a supersedeas *in forma pauperis*.¹⁵

private or ordinary business corporations. *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 561.

7. **N. J.**—*Conner v. Todd*, 48 N. J. L. 361, 7 Atl. 777. **N. Y.**—*Sherwood v. Buffalo, etc. R. Co.*, 12 How. Pr. 136; *Hinds v. Canandaigua, etc. R. Co.*, 10 How. Pr. 487; *Levy v. Swick P. Co.*, 17 Misc. 145, 39 N. Y. Supp. 409. **Wis.** *Ballston, etc. Bank v. Marine Bank*, 13 Wis. 490.

8. *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118.

9. **Cal.**—*Bradbury v. Barnes*, 19 Cal. 120. **Mo.**—*McAllen v. Woodcock*, 60 Mo. 174. **N. J.**—*Raleigh v. Fitzpatrick*, 43 N. J. Eq. 501, 11 Atl. 1. **N. Y.** *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595. **Tex.** *Tobin Canning Co. v. Fraser*, 81 Tex. 407, 17 S. W. 25.

Treasurer of Corporation.—*McAllen v. Woodcock*, 60 Mo. 174, holding that the treasurer of a corporation who buys corporate property at an execution sale, buys it under a trust for the benefit of the corporation. See also, *First Nat. Bank v. Drake*, 29 Kan. 311, as to the cashier of a bank.

10. *Horbach v. Marsh*, 37 Neb. 22, 55 N. W. 286. And see *Weeks v. Parsons*, 176 Mass. 570, 58 N. E. 157.

11. *St. Louis, etc. Co. v. Edwards*, 103 Ill. 472; *Bowles v. Rouse*, 8 Ill. 408; *Savings Inst. v. Smith*, 7 Pa. 291.

A defunct corporation cannot institute an appeal, the receiver being the proper appellant. *Life Assn. of America v. Fassett*, 102 Ill. 315.

Where, however, a corporation is kept alive, by statute, after the expiration of its charter, for the purpose of suing or being sued, it may appeal after its charter has expired from a judgment in connection with such statutory provision. *Singer & Talcott Stone Co. v. Hutchinson*, 176 Ill. 48, 51 N. E. 622.

12. *Wells v. Northern Trust Co.*, 195 Ill. 288, 63 N. E. 136; *Dunbar v. Am. Casket Co.*, 19 Ohio C. C. 585, 10 Ohio Cir. Dec. 684.

Stockholder May Appeal When. Where a judgment has been obtained against a corporation after the revocation of its charter and execution is levied on the property of a stockholder, such stockholder may reverse the judgment by means of a writ of error. *Rankin v. Sherwood*, 33 Me. 509.

13. *Woodbury v. Nevada So. R. Co.*, 115 Cal. 85, 46 Pac. 862.

14. **Ala.**—*Collins v. Hammock*, 59 Ala. 448. **Colo.**—*Union Gold-Min. Co. v. Bank*, 2 Colo. 226. **Pa.**—*German-town, etc. Co. v. Naglee*, 9 Serg. & R. 227.

15. *Collins, etc. R. Co. v. Short, etc. R. Co.*, 98 Ga. 62, 25 S. E. 929.

C. RULES GOVERNING APPEALS. — The rule that requires a question to be raised in the court below in order that it may be considered on appeal, likewise applies to corporations,¹⁶ and, in general, the same principles govern appeals where a corporation is a party as in the case of individual litigants.

XVII. CRIMINAL LIABILITY. — A. OF CORPORATIONS. — 1. Criminal Capacity in General. — That a corporation can be guilty of crime is comparatively modern doctrine, it being formerly contended that while the members of corporations might commit crimes, either individually or collectively, yet the corporation in its corporate capacity could not.¹⁷ It is now, however, well settled, that corporations may be indicted not only for misdemeanors of nonfeasance,¹⁸ but also for those of malfeasance.¹⁹ The fact that a corporation is an

16. *Ala.*—*Ginn v. New England Mortg. Sec. Co.*, 92 *Ala.* 135, 8 *So.* 338; *Henley v. Branch Bank*, 16 *Ala.* 552. *Ind.*—*Richwine v. Presbyterian Church*, 135 *Ind.* 80, 34 *N. E.* 737. *Md.*—*Reilly v. Union Protestant Infirmary*, 87 *Md.* 664, 40 *Atl.* 894. *Mo.*—*Knapp, etc. Co. v. Joy*, 9 *Mo. App.* 575. *N. C.*—*Aycock, v. W. & W. R. Co.*, 51 *N. C.* 231. *Va.*—*Shenandoah Val. R. Co. v. Griffith*, 76 *Va.* 913.

17. *Ky.*—*Com. v. Pulaski County Assn.*, 92 *Ky.* 197, 17 *S. W.* 442. *Ma.*—*State v. Great Mill Co.*, 20 *Ma.* 41. *Ohio.*—*Orr v. The Bank of United States*, 1 *Ohio* 36. *Eng.*—Anonymous, 12 *Mod.* 559, 88 *Eng. Reprint* 1517.

Blackstone.—A corporation cannot commit treason, felony, or other crime, in its corporate capacity, though its members may, in their distinct individual capacities. *Blk. Com.*, I, 476.

As to Intention.—It has been argued that a corporation being invisible, intangible, without a soul and without a mind (*men's*) apart from its individual members, is unable to entertain a criminal intent. See, *Cumberland & O. Canal Corp. v. Portland*, 56 *Me.* 77. Better reason, however, disposes of this fallacy, since it ought to be clear that where a duty is imposed upon a corporation as a corporate duty, it is not a mere individual duty of any one of its members, but a duty imposed upon the corporation as a legal person existing apart from and independent of any or all of its members. What, therefore, the corporation does, in the range of its corporate capacity, through its controlling agencies, is the act, the voluntary act, and, therefore, the intentional act of the corporation

itself. In such cases, therefore, its violation of law, either by act of omission or commission may amount to a crime. See, *Mass.*—*Com. v. New Bedford Bridge*, 2 *Gray* 339. *Tenn.*—*State v. Atchison*, 3 *Lea* 729, 31 *Am. Rep.* 663. *Eng.*—*Reg v. Birmingham & G. R. Co.*, 3 *Q. B.* 223, 43 *E. C. L.* 708.

18. *N. Y.*—*Susquehannah, etc., Co. v. People*, 15 *Wend.* 267; *People v. Albany*, 11 *Wend.* 539. *Tenn.*—*State v. Murfreesboro'*, 11 *Humph.* 217. *Eng.*—*Regina v. Great North of England R. Co.*, 9 *Q. B.* 315, 58 *E. C. L.* 314; *Regina v. Birmingham & G. R. Co.*, 9 *Car. & P.* 469, 38 *E. C. L.* 187; *Rex v. Henden*, 4 *B. & Ad.* 628, 24 *E. C. L.* 128.

19. *Kan.*—*State v. Belle Springs Creamery Co.*, 83 *Kan.* 389, 111 *Pac.* 474. *Ky.*—*Com. v. Pulaski County Assn.*, 92 *Ky.* 201, 17 *S. W.* 442. *Mass.*—*Telegram Newspaper Co. v. Com.*, 172 *Mass.* 294, 52 *N. E.* 445, 70 *Am. St. Rep.* 280, 44 *L. R. A.* 159; *Com. v. Props. of New Bedford Bridge*, 2 *Gray* 339. *N. J.*—*State v. Morris & E. R. Co.*, 23 *N. J. L.* 360. *N. Y.*—*People v. Rochester Ry. & Light Co.*, 195 *N. Y.* 102, 88 *N. E.* 22. *Vt.*—*State v. Vermont Cent. R. Co.*, 27 *Vt.* 103. *Eng.*—*Queen v. Great North of England R. Co.*, 9 *Q. B.* 315, 326, 58 *E. C. L.* 314.

Chief Justice Denman.—As said by Lord Denman, chief justice of England, in the case of *Regina v. Great North of England R. Co.*, 9 *Q. B.* 315, 58 *E. C. L.* 314, where the question as to the criminal liability of corporations for acts of malfeasance arose, in contrast with a corporation's admitted liability to indictment for acts of negligence or nonfeasance: "The

incorporeal being does not render it immune to prosecution for crimes of omission of public duty.²⁰

2. Acts Through Agents.—While it is true that corporations can act only through their agents, yet they are responsible for the appointment of their agents, and there is no legal objection to making corporations criminally liable for the criminal acts of such agents in connection with corporate business.²¹

A corporation, however, is not liable for misdemeanors committed

law is often entangled in technical embarrassments; but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission."

What Crimes in General.—Of course, there are certain crimes of which a corporation cannot be guilty, as, for instance, bigamy, perjury, rape, murder, and other offenses, which will readily suggest themselves to the mind. Crimes like these just mentioned can only be committed by natural persons, and statutes in relation thereto are for this reason never construed as referring to corporations; but when a statute in general terms prohibits the doing of an act which can be performed by a corporation, and does not expressly exempt corporations from its provisions, there is no reason why such statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted upon a corporation, as, for instance, a fine. *United States v. John Kelso Co.*, 86 Fed. 304, holding that a corporation may violate the eight hour law.

20. Ark.—*Texas & St. L. R. Co. v. State*, 41 Ark. 488. **Ga.**—*Southern R. Co. v. State*, 125 Ga. 287. 54 S. E. 160, 114 Am. St. Rep. 203. **Mass.**—*Com. v. Hancock Free Bridge Corp.*, 2 Gray 58. **N. H.**—*Boston, Concord & Montreal R. v. State*, 32 N. H. 215, 227. **Tenn.**—*Louisville & N. R. Co. v. State*, 3 Head. 523, 75 Am. Dec. 778.

Responsibility Necessary.—The responsibility of corporations for violation of penal laws, though developed by gradual evolution, is well settled and necessary. *Southern Express Co. v. State*, 1 Ga. App. 700, 58 S. E. 67.

21. Grant Bros. Const. Co. v. United States, 13 Ariz. 388, 114 Pac. 955; *Bos-*

ton, Concord & Montreal R. v. State, 32 N. H. 215, 227.

The Principal Liable.—While a corporation has no arm or hands by which itself to commit a penal offense, still it can employ servants and agents whose acts are the acts of the corporation, and who can and do, in its behalf and at its behest, violate the criminal law. It is well known that freight trains are frequently run on the Sabbath day; the physical operation being the charge of the conductor and engineer and their assistants, but the actual running of the train being ordered and directed by those higher in authority and having the company's business directly in charge. The servants who operate the train might greatly prefer to observe the Sabbath as a day of rest, but to retain their situation and the good will of their employers they have no option but to obey their orders. *Southern Express Co. v. State*, 1 Ga. App. 700, 58 S. E. 67, *citing*, *Thompson Corporations*, §6285; *South Carolina R. Co. v. McDonald*, 5 Ga. 531.

Tendency of Modern Decisions.—As said by Chief Justice Holt in a leading Kentucky case: It should be the policy of the law, because it is more likely that it will better protect from wrong, to look rather to the principal than to the agent, and especially should this be so in the case of corporations for whose benefit the act is done, or being connected with its business, is negligently omitted to be done. The object should be to reach and punish the real power in the matter, and thus prevent a repetition of the offense. The decided tendency of modern decisions has been to extend the application of all legal remedies, both civil and criminal, to corporations, and subject them thereto, as in the case of individuals, so far as it is possible. *Com. v. Pulaski County Assn.*, 92 Ky. 201, 17 S. W. 442.

by the agents or servants of a receiver when the affairs of the corporation are entirely in the hands of the latter.²²

3. Corporation a "Person." — A corporation is held to be a person within the statutes punishing "any person" for the commission of crime.²³

4. Joint Defendants. — A corporation and a natural person may be indicted together.²⁴

5. Nature of Corporate Offenses. — Treasons and felonies, meaning common law felonies, are necessarily excluded from the list of corporate crimes.²⁵ It is entirely competent, however, for a legislature to designate a certain act a felony, even though the statute be aimed particularly at corporations,²⁶ and a corporation may commit a statutory felony provided the punishment is that of fine or forfeiture.²⁷

Illustrations. — Corporations have been frequently indicted for maintaining public nuisances,²⁸ as, for example, permitting gambling on their grounds;²⁹ keeping a disorderly house;³⁰ a railroad company for obstructing a street with its cars;³¹ and also a railroad company for neglecting a dangerous crossing.³²

22. Ind.—*State v. Wabash R. Co.*, 115 Ind. 466, 17 N. E. 909. **N. C.**—*State v. Norfolk & S. R. Co.*, 152 N. C. 785, 67 S. E. 42. **Vt.**—*State v. Vermont Cent. R. Co.*, 30 Vt. 108.

23. Mass.—*Com. v. New York C. & H. R. Co.*, 206 Mass. 417, 92 N. E. 766. **N. C.**—*State v. Rowland Lumb. Co.*, 153 N. C. 610, 69 S. E. 58. **Ohio.**—*Norris v. State*, 25 Ohio St. 217, 18 Am. Rep. 291.

"Person" Used in Manslaughter.—The term person, however, as used in a definition of manslaughter, namely, as an act "committed by a person," etc., refers only to a natural person, since a corporation cannot commit such a crime. *People v. Rochester R. & L. Co.*, 59 Misc. 347, 112 N. Y. Supp. 362, *affirmed*, 195 N. Y. 102, 88 N. E. 22.

Whether a Citizen.—A corporation, however, is held not to be a "citizen" in the ordinary sense of the word in an indictment charging a nuisance as being offense to "divers other citizens." *United States Board and Paper Co. v. State (Ind.)*, 91 N. E. 953.

24. State v. Atchison, 3 Lea. (Tenn.) 729, 31 Am. Rep. 663.

25. U. S.—*United States v. John Kelso Co.*, 86 Fed. 304. **Ky.**—*Com. v. Pulaski County Asso.*, 92 Ky. 197, 17 S. W. 442. **Mass.**—*Com. v. New Bedford Bridge*, 2 Gray 339. See, also, *supra*.

26. It is customary, however, to designate the offenses of corporations as misdemeanors. Such is the term usually employed in the various "anti-trust acts" of many of the states, and also in the national "anti-trust act" of 1890. See, 26 St. at L. 209.

Presence During Trial.—Should a statute designate as a felony an act of a corporation, the common law rule requiring a defendant's personal presence during trial in a felony case, could likewise, of course, be changed by statute to cover the case.

27. United States v. Alaska Packers' Assn., 1 Alaska 217.

28. A corporation is liable to indictment where it has the power and neglects to do that which the common good requires. *Wood, Nuisance*, §78, and cases cited. See, also, *Rex v. Medley*, 6 Car. & P. 292, 25 E. C. L. 403. And see, *Del. Div. Canal Co. v. Com.* 60 Pa. 367.

29. Com. v. Pulaski County Assn., 92 Ky. 197, 17 S. W. 442.

30. State v. Passaic Co. Agric. Soc., 54 N. J. L. 260, 23 Atl. 680.

31. State v. Baltimore, O. & C. R. Co., 120 Ind. 298, 22 N. E. 307; *State v. White*, 96 Mo. App. 34, 69 S. W. 684.

32. State v. Roanoke R. & L. Co., 109 N. C. 860, 13 S. E. 719.

Among other indictable offenses may be mentioned obtaining property by false pretenses;³³ violation of the Sunday law;³⁴ violating federal stamp act;³⁵ criminal libel;³⁶ violating the eight hour law;³⁷ peddling without a license;³⁸ failing to have its corporate name painted or printed on its principal place of business;³⁹ usury;⁴⁰ making false statements in the annual reports required by law;⁴¹ fraudulent sale of stock;⁴² and illegal sale of liquors.⁴³

Criminal Contempt.—A corporation may be held liable for criminal contempt in publishing an article, pending a trial, calculated to prejudice the jury and to prevent a fair trial.⁴⁴

6. Public Corporations.—Public corporations, such as towns and counties, are also subject to indictment for neglecting corporate duties such as repairing roads and bridges.⁴⁵ A sovereign corporation, however, such as a state, would be unable to commit a crime. Like the king,

33. *Norris v. State*, 25 Ohio St. 217, 18 Am. Rep. 291.

34. *Powhattan Steamboat Co. v. Appomattox R. Co.*, 19 Fed. Cas. No. 11,363; *State v. Baltimore & O. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803.

35. *United States v. Baltimore & O. R. Co.*, 24 Fed. Cas. No. 14,509.

36. *Mo.*—*Brennan v. Tracy*, 2 Mo. App. 540. *N. Y.*—*People v. Star Co.*, 135 App. Div. 517, 120 N. Y. Supp. 498. *Tenn.*—*State v. Atchison*, 3 Lea 729, 31 Am. Rep. 663. *Eng.*—*Pharmaceutical Soc. v. London & P. Supply Asso.*, L. R. 5 App. Cas. 857, 869.

37. *United States v. John Kelso Co.*, 86 Fed. 304.

38. *Standard Oil Co. v. Com.*, 107 Ky. 606, 55 S. W. 8; *Crall v. Com.*, 103 Va. 855, 49 S. E. 638; *s. c.*, 103 Va. 862, 49 S. E. 1038.

39. Section 576 of the Kentucky statutes of 1903 provides as follows: "Every corporation organized under the laws of this state, and every corporation doing business in this state, shall, in a conspicuous place, on its principal place or places of business, in letters sufficiently large to be easily read, have painted or printed the corporate name of such corporation, and immediately under the same, in like manner, shall be printed or painted the word 'Incorporated.' And immediately under the name of such corporation, upon all printed or advertising matter used by such corporation, except railroad companies, banks, trust companies, insurance companies and building and loan associations, shall appear in letters sufficiently large to be

easily read, the word 'Incorporated.' Any corporation which shall fail or refuse to comply with the provisions of this section shall be subject to a fine of not less than one hundred dollars and not more than five hundred dollars." See, *Jung Brewing Co. v. Commonwealth*, 123 Ky. 389, 96 S. W. 476, holding that the above statute does not, however, require a corporation to place the word "incorporated" under the corporate name printed on the label of goods which it manufactures and sells.

40. *State v. First Nat. Bank*, 2 S. D. 568, 51 N. W. 587.

41. *Bracket v. Griswold*, 13 N. Y. Supp. 192.

42. *People v. Garrahan*, 19 App. Div. 347, 46 N. Y. Supp. 497.

43. *United States v. Ames Mercantile Co.*, 2 Alaska 74; *Stewart v. Waterloo Turn Verein*, 71 Iowa 226, 32 N. W. 275.

Also for Conspiracy.—*U. S.*—*United States v. MacAndrews & Forbes Co.*, 149 Fed. 823. *R. I.*—*State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1. *Tenn.*—*Standard Oil Co. v. State*, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015.

44. *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159; *Mayor, etc., v. New York, etc., Ferry Co.*, 64 N. Y. 622. See the title "Contempt."

45. *Mass.*—*Com. v. Wilmington*, 105 Mass. 599. *Tenn.*—*State v. Barksdale*, 5 Humph. 154. *Vt.*—*State v. Town of Fletcher*, 13 Vt. 124.

the state, in theory, can do no wrong, and it would, moreover, be impossible for the state to indict itself.

7. Process.—Since a corporation is incapable of arrest,⁴⁶ the only process issuable against it in a criminal prosecution is summons,⁴⁷ which must be served in accordance with the provisions of the statute.⁴⁸

Irregularity in the return of the summons is not, however, a ground for setting it aside,⁴⁹ and a voluntary appearance by attorney and demurrer to the indictment, is a waiver of service.⁵⁰

8. Preliminary Hearing.—The preliminary examination of a corporation, a prerequisite, in some jurisdictions, to indictment, is generally unnecessary.⁵¹

9. Indictment or Information.—The indictment or information should correctly set forth the corporate name.⁵²

46. A corporation's existence being ideal, no man can apprehend or arrest it. Blk. Com., I, 447. And see, *supra*, XV. See, also, *State v. Security Bank*, 2 S. D. 538, 51 N. W. 337.

Notice of Hearing.—"Natural persons accused of crime may be arrested on a bench warrant, and brought into court forthwith for trial. The utmost that a corporation charged with a public offense may demand is reasonable notice of the time fixed for a hearing upon the charge." *United States Board & Paper Co. v. State (Ind.)*, 91 N. E. 953.

47. *Mass.*—Com. v. New York C. & H. R. R. Co., 206 Mass. 417, 92 N. E. 766. *N. C.*—*State v. Norfolk & S. R. Co.*, 152 N. C. 785, 67 S. E. 42; *State v. Western, etc., R.*, 89 N. C. 584. *N. H.*—*Boston, C. & M. R. R. v. State*, 32 N. H. 215.

48. *U. S.*—*United States v. John Kelso Co.*, 86 Fed. 304. *Alaska.*—*United States v. Yakutat & Southern R. Co.*, 2 Alaska 628. *Ind.*—*United States Board & Paper Co. v. State*, 91 N. E. 953; *State v. Pres., etc., of Ohio & M. R. Co.*, 23 Ind. 362. *N. C.*—*State v. Western, etc., R. Co.*, 89 N. C. 584.

49. *Illinois Cent. R. Co. v. Com.*, 104 Ky. 362, 47 S. W. 255.

50. *Southern R. Co. v. State*, 125 Ga. 287, 54 S. E. 160, 114 Am. St. Rep. 203.

Failing To Appear.—Upon default of appearance judgment may be rendered. *Boston, C. & M. R. R. v. State*, 32 N. H. 215; *Com. v. Lehigh Val. R. Co.*, 165 Pa. 162, 30 Atl. 836, 27 L. R. A. 231.

Indiana; Steps of Procedure.—

"When an indictment is returned, or an affidavit filed against a corporation, a writ of summons commanding the sheriff to notify the accused thereof and returnable on the tenth day after its date, shall issue. Such summons, together with a copy of the indictment or affidavit, shall be served and returned in the manner provided for the service of summons upon such corporation in civil actions. The corporation, on or before the return day of a summons duly served, may appear by one of its officers, or by counsel, and answer to the indictment or affidavit by motion or plea and, upon its failure to make such appearance and answer, the clerk shall enter a plea of "not guilty;" and, upon such appearance being made or plea entered, the corporation shall be deemed thenceforth continuously present in court until the case is finally disposed of." *Burns' Ann. St.*, 1908, § 1996. See, *United States Board & Paper Co. v. State (Ind.)*, 91 N. E. 953.

51. *United States v. Correspondence Institute*, 125 Fed. 94. See, *State v. Security Bank*, 2 S. D. 538, 51 N. W. 337.

52. *Regina v. Birmingham, etc., R. Co.*, 3 Q. B. 223, 43 E. C. L. 708, 9 Car. & P. 469, 38 E. C. L. 187. See, *State v. Vermont Central R. Co.*, 28 Vt. 583, holding good the following: "The Vermont Central Railroad Company, a corporation existing under and by force of the laws of this state, duly organized and doing business." And see, *Thurmond v. State*, 30 Tex. App. 539, 17 S. W. 1098; *Stallings v. State*, 29 Tex. App. 220, 15 S. W. 716.

Abbreviated Form of Name.—That a

In some jurisdictions it is not necessary to allege the fact of incorporation,⁵³ although according to other decisions it is necessary.⁵⁴ In prosecutions for nonfeasance, the indictment must set forth the duty owed by the corporation,⁵⁵ and in an indictment for maintaining a public nuisance the circumstances constituting the offense must be sufficiently particularized.⁵⁶ Where, moreover, a scienter is of the gist of

corporation may be indicted under an abbreviated form of name by which it does business, see, *Com. v. Jacobs*, 152 Mass. 276, 25 N. E. 463; *Com. v. Dedham*, 16 Mass. 141. See, also, *White v. State*, 69 Ind. 273; *Rex v. Atkinson*, 2 Moody (Crown Cases Reserved) 278.

Fatal Variance; Illustrations.—In illustration of some fatally defective indictments for failure to set forth the correct corporate name, see, *Com. v. Pope*, 12 Cush. (Mass.) 272, where the "Boston and Worcester Railroad Corporation" was indicted as the "Boston and Worcester Railroad Company;" *McGary v. People*, 45 N. Y. 153, where the incorrect name "Phoenix Mills Co." was used for the correct name "The Phoenix Mills of Seneca Falls."

"Company" for "Corporation."—It has been held that the use of the word "company" in designating the corporation does not render the indictment uncertain. *Lee Mut. Fire Ins. Co. v. State*, 60 Miss. 395. Compare, *Com. v. Pope*, *supra*.

Change of Name.—Where after an indictment found, and pending trial, the name of a corporation (a town) was changed, it was held that the indictment would stand against the town as originally and correctly named at the time. *Com. v. Phillipsburg*, 10 Mass. 78.

53. *Cal.*—*People v. McDonnell*, 30 Cal. 285, 22 Pac. 190, 13 Am. St. Rep. 159. *N. C.*—*State v. Rowland Lumb Co.*, 153 N. C. 610, 69 S. E. 58; *Stanly v. Richmond*, etc., R. Co., 89 N. C. 331. *W. Va.*—*State v. Dry Fork R. Co.*, 50 W. Va. 235, 40 S. E. 447.

Judicial Notice.—When the act creating the corporation is a matter of judicial knowledge, an indictment against the defendant in its corporate name is held sufficient, in some jurisdictions, without further need of any allegation of incorporation. *Louisville & N. R. Co. v. Com.*, 11 Ky. L. Rep. 442, 12 S. W. 1064. And see, *Jackson v. State*, 72 Ga. 28; *Butler v. Robinson*, 75 Mo. 192.

54. *Cal.*—See, *People v. Schwartz*, 32 Cal. 160. *Ill.*—See, *Wallace v. People*, 63 Ill. 451. *Ky.*—*Madisonville, H. & E. R. Co. v. Com.*, 140 Ky. 255, 130 S. W. 1084; *Standard Oil Co. v. Com.*, 122 Ky. 440, 91 S. W. 1128. *Vt.*—*State v. Vermont Cent. R. Co.*, 28 Vt. 583.

Appearance and Plea.—An appearance and plea by a corporation is a waiver of any failure to allege incorporation, and the fact of incorporation need not, moreover, be proved. *State v. Glucose Sugar Refining Co.*, 117 Iowa 524, 91 N. W. 794; *State v. Western N. C. R. Co.*, 95 N. C. 602.

Corporations as Third Persons; Sufficient Averment.—Where in an indictment, the alleged wrong has been committed against a corporation, it has been held that "the names 'Southern Express Company' and 'Western Express Company' so clearly import corporate bodies as to preclude the necessity for an allegation of their corporate existence." The corporate character is held to be "so necessarily implied that, if the evidence had disclosed that they were not corporations, the defendant could have relied upon the variance between the allegation and the proof." *Gray v. State*, 6 Ga. App. 428, 65 S. E. 191.

55. *State v. Patton*, 26 N. C. 16.

56. *Louisville & N. R. Co. v. Com.*, 11 Ky. L. Rep. 442, 12 S. W. 1064; *Com. v. Newburyport Bridge*, 9 Pick. (Mass.) 142.

Statutory Offenses; Monopolies; Indictment.—The federal act of July 2, 1890, relating to monopolies does not undertake to define what constitutes a contract, combination, or conspiracy in restraint of trade, and recourse must, therefore, be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute. An indictment, following simply the language of the act, would be wholly insufficient, for the reason that the words of the statute do not of themselves fully, directly, and clearly set

the offense, it must be stated in the indictment.⁵⁷

10. Evidence.—It may be necessary in some jurisdictions to prove the defendant's corporate existence.⁵⁸ This may be done by proof of its charter,⁵⁹ or by reputation.⁶⁰ Proof of a *de facto* corporation is, however, generally sufficient.⁶¹

A plea of not guilty has been held an admission of incorporation,⁶² and, on the other hand, it is held to put in issue the fact of incorporation.⁶³

11. How Punished.—A corporation cannot be committed to prison,⁶⁴ but it may be punished by fine.⁶⁵ If the penalty prescribed for the act be both fine and imprisonment, the latter penalty would be inoperative.⁶⁶

A fine may be enforced by execution against the corporate property.⁶⁷

forth all the elements necessary to constitute the offense intended to be punished. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracies in restraint of trade and commerce among the several states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused "engaged in a combination," or "made contracts in restraint" of such trade or commerce, or "monopolized" or "attempted to monopolize" the same, will avail to sustain the indictment. Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although asserted in the words of the statute. *In re Greene*, 52 Fed. 104, 111.

57. *State v. Runzi*, 105 Mo. App. 319, 80 S. W. 36.

58. *Standard Oil Co. v. Com.*, 122 Ky. 440, 91 S. W. 1128.

West Virginia.—In West Virginia, the fact of incorporation need not be proved unless, as provided by the code, the matter is put in issue by a verified pleading. *State v. Thacker Coal and Coke Co.*, 49 W. Va. 140, 38 S. E. 539.

59. *Jackson v. State*, 76 Ga. 551; *State v. Shaw*, 92 N. C. 763.

Corporation as Third Person.—Where, however, property is stolen from a corporation, it is unnecessary, on the trial of the defendant, to introduce the articles of association or charter of the corporation. It is sufficient to prove that such a corporation in fact was in

existence, and was possessed of the stolen property. *Braithwaite v. State*, 28 Neb. 832, 45 N. W. 247.

60. Evidence that a common carrier had officers, a place of business, a railroad, that it transported persons and freight over its road and held itself out to the world as a corporation by the name specified, is competent to prove incorporation, and sufficient, if believed by the jury. *State v. Western N. C. R. Co.*, 95 N. C. 602. And see, *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121; *People v. Formosa*, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612.

61. *State v. Western N. C. R. Co.*, 95 N. C. 602. And see, *State v. Tucker*, 84 Mo. 23.

62. *State v. Western N. C. R. Co.*, 95 N. C. 602.

63. *Standard Oil Co. v. Com.*, 122 Ky. 440, 91 S. W. 1128.

64. 1 Blk. Com. 477; *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159.

65. **Ky.**—*Com. v. Louisville & N. R. Co.*, 17 Ky. L. Rep. 563, 32 S. W. 164; *Com. v. Pulaski County Assn.*, 92 Ky. 197, 17 S. W. 442. **Mass.**—*Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159. **Tenn.**—*State v. Atchison*, 3 Lea 729, 31 Am. Rep. 663.

66. *Com. v. Pulaski County Assn.*, 92 Ky. 201, 17 S. W. 442.

67. *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159.

B. OF CORPORATE OFFICERS AND AGENTS. — 1. Criminal Liability in General — The criminal liability of the officers and agents of a corporation may arise in two ways; the one from wrongs done by the corporation, the other from purely individual wrongs in connection with official misconduct.⁶⁸

Liability for Corporate Crimes. — As regards corporate crimes, the corporation can act only through its agents,⁶⁹ and it is well established doctrine that any agent or servant who commits crime in connection with his employment is individually responsible therefor. It follows, then, that the agent or the officer of a corporation who actually commits, or who is responsible for, the corporate public wrong, is equally liable with the corporation.⁷⁰ Thus, the agent of a corporation who peddles without a license may be indicted and punished as well as the corporation,⁷¹ and the vice-president of a corporation, who was its general manager, may be guiltily responsible for a similar act.⁷² Likewise, the directors and officers of a corporation who are responsible for the maintenance of a nuisance may be convicted and fined.⁷³

Although the charter of a corporation may authorize an act, nevertheless if such act is made criminal by general statute, an officer doing such act may be punished.⁷⁴

68. Crimes Committed by Corporation.—Where a corporation violates the law, the agent or officer through whose instrumentality the crime was committed is also liable to indictment and punishment. *Hays v. Com.*, 107 Ky. 655, 55 S. W. 425. See also *infra*.

Official Misconduct.—For illustrations of official misconduct, see the following page.

69. City of Wyandotte v. Corrigan, 35 Kan. 21, 10 Pac. 99.

70. Ala.—*Williams v. City of Talladega*, 164 Ala. 633, 51 So. 330. **Mich.** *People v. Detroit White Lead Works, et al.*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722. **N. Y.**—*People v. England*, 27 Hun 139. **Va.**—*Crall v. Commonwealth*, 103 Va. 855, 862, 49 S. E. 638, 1038.

Officer Having No Knowledge of Unlawful Act.—Where two employees of an oil company refilled barrels, previously inspected and branded by the oil inspector, with oil not inspected, and the evidence showed that the president of the company had nothing to do with these details, and there was no evidence from which it could be fairly inferred that he had any knowledge of the doing of this act, no evidence, in short, connecting him with the act, it was held that he was not criminally responsible. *State v. Parsons*, 12 Mo. App. 205.

71. Hays v. Com., 107 Ky. 655, 55 S. W. 425.

72. Crall v. Com., 103 Va. 855, 49 S. E. 638.

73. In a prosecution of a corporation jointly with its officers for a public nuisance, the supreme court of Michigan held that the officers of the company are jointly responsible for the business. It is not necessary to conviction that they should have been actually engaged in work upon the premises. The work is carried on by employees. The directors and officers are the persons primarily responsible, and therefore the proper ones to be prosecuted. People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

Officer Liable If Acting for Himself or for Corporation.—Under a statute or ordinance making it unlawful for "any person or persons, firm or corporation" to operate a street railway without paying a license tax, it is immaterial whether the general manager of a street railway which was operated without paying such tax, acted for himself or for the corporation, since in either case he is liable to prosecution. *City of Wyandotte v. Corrigan*, 35 Kan. 21, 10 Pac. 99.

74. Moore v. State, 48 Miss. 147, 12

2. Defenses.—There must be evidence that the wrong was either actually done by the corporate officer or under his direction or permission,⁷⁵ and an officer is not responsible for a violation of law committed before he became an officer.⁷⁶

3. Liability for Official Misconduct.—Of the statutory offenses for which the officers of corporations may be indicted, in connection with official misconduct, the most important are as follows: embezzling from corporation;⁷⁷ false issues of stock;⁷⁸ the making or publishing of false statements with intent to induce any person to loan or to intrust property to a corporation;⁷⁹ conspiracy;⁸⁰ destroying or mutilating the books of a corporation,⁸¹ or making false entries therein,⁸² with intent to defraud the corporation; exhibiting false and forged books with intent to deceive a public examiner;⁸³ and failure to publish statements or to make returns as required by law.⁸⁴

4. Indictments.—An indictment alleging that defendant "altered and caused to be altered" the book in question can relate to but one act of alteration and does not charge two offenses.⁸⁵

In an indictment for making false entries with intent to defraud, it is not necessary to set forth in what way the entries would actually defraud,⁸⁶ neither is it necessary to allege that the accused was charged with any duty as to the books or that they had access to them.⁸⁷

Am. Rep. 367, charter authorizing a lottery.

75. *State v. Parsons*, 12 Mo. App. 205; *People v. England*, 27 Hun (N. Y.) 139.

76. *Crall v. Com.*, 103 Va. 855, 49 S. E. 638.

77. *Com. v. Cain*, 14 Bush (Ky.) 525. See *Coats v. People*, 22 N. Y. 245.

78. See *State v. Moore*, 69 N. H. 99, 39 Atl. 584.

79. *State v. Ware*, 71 N. J. L. 53, 58 Atl. 595.

80. *People v. Duke*, 19 Misc. 292, 44 N. Y. Supp. 336.

81. *Qualey v. Territory*, 8 Ariz. 45, 68 Pac. 546; *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501.

82. *People v. Leonard*, 103 Cal. 200, 37 Pac. 222; *Ex parte McKenney*, 10 Cal. App. 357, 101 Pac. 927; *Com. v. Dewhirst*, 190 Mass. 293, 76 N. E. 1052.

83. *People v. Helmer*, 85 Hun 530, 33 N. Y. Supp. 524.

84. *Baker v. State*, 57 Ind. 255; *Suburban Electric Co. v. Com.*, 21 Ky. L. Rep. 1556, 55 S. W. 684.

Nevada; Refusing Privilege To Examine Mine.—Under a Nevada statute

making it a misdemeanor for any mining superintendent, foreman, or secretary, of any incorporated mining company, to fail or to refuse to keep posted a notice stating when authorized stockholders may examine a mine, it was held that a superintendent did his full duty when he posted such a notice, and that his refusal to admit to the mine a stockholder who appeared for such examination was not a violation of the statute. *Ex parte Deidesheimer*, 14 Nev. 311.

85. *Qualey v. Territory*, 8 Ariz. 45, 68 Pac. 546.

Form of Indictment.—For a form of indictment held sufficient under a statute punishing the wilful altering, mutilating, and falsifying of the books of a corporation, see, also, the above case.

86. *People v. Leonard*, 103 Cal. 200, 37 Pac. 222; *People v. Nash*, 15 Cal. App. 320, 114 Pac. 784.

87. *Com. v. Dewhirst*, 190 Mass. 293, 76 N. E. 1052.

False Statements to Induce Investments.—Likewise in an indictment for making false statements of the condition of a corporation in order to induce any person to invest property therein, it is held unnecessary to al-

Under a statute, however, punishing a railroad president who fails to file certain statements regarding state bonds for constructing the road, an indictment which does not allege the official position of the accused, is insufficient.⁸⁹

5. Jurors.—Persons related within the prohibited degrees to the stockholders of a corporation are not competent to serve as jurors in a case where an officer is accused of defrauding the corporation.⁹⁰

XVIII. SPECIAL ACTIONS RELATING TO CORPORATIONS AND THEIR MEMBERS.—A. ACTIONS TO ENFORCE SUBSCRIPTIONS.—1. **Nature of Liability.**—The liability of a stockholder to pay for his shares should be distinguished from his additional or

"double liability," as provided by the law of some states, for the security of the corporation's creditors.⁹⁰ The liability for shares is a common law liability;⁹¹ the additional liability is created by the constitution or the statute.⁹²

2. Corporation May Enforce.—The contractual liability of a stockholder to pay for his shares may be enforced by the corporation in any state by proper action.⁹³ Unpaid subscriptions are a part of the assets of the corporation,⁹⁴ and during its solvency the corporation alone has the right to sue.⁹⁵

lege the particular person who was to be thus influenced. *State v. Ware*, 71 N. J. L. 53, 58 Atl. 595.

88. *State v. Sloan*, 67 N. C. 357.

89. *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501.

90. See *infra*, p. 689.

91. *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331.

92. **U. S.**—*Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *Pollard v. Bailey*, 20 Wall. 520, 526, 22 L. ed. 376. **Mass.** *New Haven, etc. Co. v. Linden Spring Co.*, 142 Mass. 349, 352, 7 N. E. 773. **N. H.**—*Crippen v. Loughton*, 69 N. H. 540, 44 Atl. 538. **E. I.**—*Wing v. Slater*, 19 R. I. 597, 35 Atl. 302, 33 L. R. A. 566.

Constitutional Provision Not Self-Executing.—Although the constitution may provide that "dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law," yet such a provision is not self-executing but requires legislative action to give it effect. *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331. And see *Morley v. Thayer*, 3 Fed. 737; *Farmers' Loan & Trust Co. v. Funk*, 49 Neb. 353, 68 N. W. 520.

93. *Mandel v. Swan Land & Cattle*

Co., 154 Ill. 177, 40 N. E. 462; *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194.

94. *People's Home Sav. Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329.

95. **Conn.**—*Hartford & N. H. R. v. Kennedy*, 12 Conn. 499. **Ill.**—*Stoddard v. Lum*, 159 N. Y. 265, 275, 53 N. E. 1108. **Mass.**—*Gillmore v. Pope*, 5 Mass. 491. **Minn.**—See *Carter, etc. Co. v. Hazzard*, 65 Minn. 432, 68 N. W. 74. **Pa.**—*Edinboro's Academy v. Robinson*, 37 Pa. 210. **Wis.**—*Level Land Co. v. Hayward*, 95 Wis. 109, 69 N. W. 567.

Corporation Insolvent.—Upon the insolvency of a corporation, the unpaid subscriptions are assets for the benefit of the creditors, and suit to recover the same may be instituted by the receiver or trustee. See p. 716, XIX.

Recovery by Creditors.—The subscribers to the capital stock of a corporation are liable for their unpaid subscriptions to the corporation in which the shares are held. No recovery can be had by creditors unless two things are made to appear: First, that the corporation is insolvent; and, second, the existence of a debt due by the corporation, which the collection of such subscription is intended to liquidate. *Tichenor v. Williams Block Pavement Co.*, 116 Ga. 303, 42 S. E. 505.

3. Assignee May Sue.—A corporation may, after a call, make an assignment of its right to collect a stock subscription,⁹⁶ unless forbidden by law,⁹⁷ and the assignee may, thereupon, maintain the action.⁹⁸

4. Call May Be Prerequisite.—By the terms of the contract between the corporation and the stockholder, a call may be necessary before an action will lie.⁹⁹ In such a case, the statute of limitation does not begin to run until the call is made.¹ Where, however, a call has been issued, it is generally held that no demand is necessary as a condition precedent to the bringing of the action.²

Statutory Provisions.—The statute may provide that the stockholders shall be individually liable to creditors of the company until the whole amount of the capital stock shall be paid in and certified. Such a right of action may be enforced even in a foreign jurisdiction. See *U. S.*—Fourth Nat. Bank v. Franklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. ed. 825; *Flash v. Conn.*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966. *Mo.*—State Savings Assn. v. Kellogg, 63 Mo. 540. *N. Y.*—Savings Assn. v. O'Brien, 51 Hun 45, 3 N. Y. Supp. 764.

Express Promise To Pay.—In some of the New England states, no action can be maintained upon a subscription to stock unless there has been an express promise to pay. This is sometimes referred to as the "New England Rule." See *Me.*—Belfast, etc. R. Co. v. Cottrell, 66 Me. 185. *Mass.*—Boston, etc. R. Co. v. Wellington, 113 Mass. 79. *Vt.*—Connecticut, etc. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181. And see *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123; *Pittsburgh, etc. R. Co. v. Gazzam*, 32 Pa. 340.

96. *Ill.*—See *Morris v. Cheney*, 51 Ill. 451. *Ky.*—*Miller v. Maloney*, 3 B. Mon. 105. *Mich.*—*Wells v. Rodgers*, 50 Mich. 294, 15 N. W. 462, 60 Mich. 525, 27 N. W. 671. *Mo.*—*Shultz v. Sutter*, 3 Mo. App. 137. *Wis.*—*Downie v. Hoover*, 12 Wis. 174, 78 Am. Dec. 730.

At common law the right to enforce a stock subscription is not assignable, the right being a mere chose in action. See *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. ed. 790. And see *Glenn v. Busey*, 5 Mackey (D. C.) 233.

97. See *Downie v. Hoover*, 12 Wis. 174, 78 Am. Dec. 730. And see *West End R. R. Co. v. Dameron*, 4 Mo. App.

414. Compare *Pittsburgh, etc. R. R. v. Gazzam*, 32 Pa. 340.

98. *Chattanooga, etc. R. R. v. Warthen*, 98 Ga. 599, 25 S. E. 988. See also cases cited in note 7, next preceding.

99. *U. S.*—*Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 835; *Priest v. Glenn*, 51 Fed. 400, 2 C. C. A. 305. *Ga.*—*South Georgia & F. R. Co. v. Ayres*, 56 Ga. 230. *Ill.*—*Lamar Ins. Co. v. Moore*, 84 Ill. 575. *Mich.*—*Halsey Fire Engine Co. v. Donovan*, 57 Mich. 318, 23 N. W. 828. *N. J.*—*Grosse Isle Hotel Co. v. I' Anson's Exrs.*, 43 N. J. L. 442.

1. *U. S.*—*Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. ed. 790; *Scoville v. Thayer*, 105 U. S. 143, 26 L. ed. 968. *Ala.*—*Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894. *Cal.*—*Union Savings Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441. *Md.*—*Taggart v. Western Md. R. R. Co.*, 24 Md. 563, 89 Am. Dec. 760. *Pa.*—*Cook v. Carpenter*, 212 Pa. 165, 61 Atl. 799, 108 Am. St. Rep. 854.

Fixed Time of Payment.—Where, however, the contract of subscription provided that installments on stock were to be paid "every sixty days after the first call," the time of payment is absolute, and the installments became due automatically after the first call was made by the directors. Consequently the statute of limitations began to run at such fixed period. *Williams v. Matthews*, 103 Va. 180, 48 S. E. 861.

From Date of Subscription.—It is held, however, in some jurisdictions that the call must be made within the period of limitations, otherwise the action cannot be maintained. See *Great Western Tel. Co. v. Purdy*, 83 Iowa 430, 50 N. W. 45.

2. *Winters v. Muscogee R. Co.*, 11

5. Forfeiture a Cumulative Remedy.—Statutes providing for the sale or forfeiture of the stock of delinquent stockholders, do not, as a rule, affect the right of the corporation to sue, since the remedy of forfeiture is generally held to be but cumulative.³

6. Corporation To Be Organized.—By weight of authority a preliminary subscription to a corporation to be organized may also be enforced by the corporation.⁴

7. Form of Action.—The remedy to recover an unpaid subscription is an action at law,⁵ and it has been held that assumpsit is the

Ga. 438. **Ill.**—Goodrich v. Reynolds, 31 Ill. 490. **Me.**—Penobscot, etc. R. Co. v. Dummer, 40 Me. 172, 63 Am. Dec. 654.

3. U. S.—Campbell v. American Alkali Co., 125 Fed. 207, 61 C. C. A. 317. **Ala.**—Selma, etc. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344. **Md.**—Hughes v. Antietam, etc. Co., 34 Md. 316. **Mich.**—Dexter, etc. Co. v. Millerd, 3 Mich. 91. **Nev.**—Thompson v. Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797, 881. **Vt.**—Connecticut, etc. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181.

4. Cal.—Auburn, etc. Assn. v. Hill, 32 Pac. 587. **Ill.**—Cross v. Pinckneyville Mill Co., 17 Ill. 54. **Kan.**—McCormick v. Great Bend, etc. Co., 48 Kan. 614, 29 Pac. 1147. **Me.**—Penobscot Co. v. Dummer, 40 Me. 172. **Mass.**—Athol Music Hall Co. v. Carey, 116 Mass. 471. **Mich.**—International, etc. Assn. v. Walker, 83 Mich. 386, 47 N. W. 338. **Minn.**—Minneapolis Threshing Machine Co. v. Davis, 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796, 12 Am. St. Rep. 701. **Mo.**—Haskell v. Sells, 14 Mo. App. 91. **N. Y.**—Buffalo, etc. R. R. Co. v. Gifford, 87 N. Y. 294.

Valid Contract.—A subscription made in contemplation of a charter to construct a railroad or to accomplish any other legitimate object is a valid contract between the parties, and as such may be enforced the same as any other contract. The Tonica & Petersburg R. Co. v. McNeely, 21 Ill. 71.

Georgia.—Where a number of persons sign a written contract, by the terms of which they agree to subscribe to the capital stock of a company to be thereafter incorporated, under a designated name, for the purpose of carrying on a given business—each subscriber to take the number of shares set opposite his name, and pay 50 per

cent of his subscription on demand, "and the balance as the directors may direct," the corporation, after being duly formed and organized, may maintain in its own name an action upon this contract, against a subscriber thereto, for the amount of his subscription thus made to its capital stock. Branch v. Augusta Glass Works, 95 Ga. 573, 23 S. E. 128.

New York.—It is held, however, in some cases that where the corporation is not in existence at the time the subscription was made, no contract is made with it, and that an action cannot be maintained by it. Thus, where defendant signed a subscription paper for the purpose of building "a Presbyterian Church" in a certain village, said subscription to be paid to a treasurer to be appointed by the subscribers, it was held that the treasurer could enforce the subscription, but that a subsequently formed corporation could not in absence of a showing that it was the understanding when the subscription was made that the church building should become the property of such corporation. Presbyterian Society v. Beach, 74 N. Y. 72.

5. Strasburg R. Co. v. Echternacht, 21 Pa. 220. See also, **Colo.**—Colorado Fuel Co. v. Sedalia Smelting Co., 13 Colo. App. 474, 59 Pac. 222. **Id.**—Calumet Paper Co. v. Stotts Inv. Co., 96 Iowa 147, 64 N. W. 782. **Va.**—Shickel v. Berryville Land & Imp. Co., 99 Va. 88, 37 S. E. 813.

Equity a Concurrent Remedy.—See Shields v. Hobart, 172 Mo. 491, 72 S. W. 669, 95 Am. St. Rep. 529.

Action by Creditors.—Where, however, the creditors are permitted to sue, many cases hold, under the theory that the unpaid subscriptions constitute a trust fund for the benefit of creditors, that the proper remedy is a

proper action under the common law procedure⁶ to accomplish this end.

8. Defenses to Action.—That stock has been issued in excess of the authorized amount,⁷ or that a subscription was made conditioned upon the obtaining of a certain subscribed amount,⁸ or that the defendant has received a discharge in bankruptcy,⁹ have been held valid defenses to an action for an unpaid subscription. An alleged agreement between the promoters of a corporation to organize the corporation for the purpose of creating a monopoly cannot, however, be set up as a defense.¹⁰

B. ACTIONS TO ENFORCE STATUTORY LIABILITY.—**1. Origin of the Liability.**—The individual liability of the stockholders of a corporation over and above their liability upon their subscriptions, arises, as before stated, wholly from constitutional or statutory provisions.¹¹

Although such a liability is not often imposed upon most private corporations, nevertheless it is imposed, in some states, upon manufacturing corporations, and is a familiar doctrine in connection with banking associations. It is often referred to as "the double liability" of stockholders, from the statutory provision that the stockholders shall be additionally liable for a sum equal to the par value of the stock owned by them.¹²

2. Who May Sue.—Where the liability exists, the cases generally hold that, owing to the fact that the provision is exclusively for the benefit of creditors of an insolvent corporation, the only proper parties plaintiff are the creditors,¹³ and that unless the statute confers the right, neither a receiver nor an assignee can sue.¹⁴ In a number of states, however, the statutes expressly authorize the receiver or assignee to maintain the action.¹⁵ Yet, even when the right of action is re-

suit in equity brought by one or more creditors for the benefit of all. See **U. S.**—Whitman v. Oxford Nat. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. ed. 587; Hatch v. Dana, 101 U. S. 205, 25 L. ed. 885; Brown v. Fisk, 23 Fed. 228. **Cal.**—Baines v. Babcock, 95 Cal. 531, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158. **Ill.**—Rounds v. McCormick, 114 Ill. 252, 29 N. E. 684. **Md.**—Shiekle v. Watts, 94 Mo. 410, 7 S. W. 274. **N. Y.**—Pfohl v. Simpson, 74 N. Y. 137.

6. U. S.—Campbell v. American Alkali Co., 125 Fed. 207, 61 C. C. A. 317; American Alkali Co. v. Campbell, 113 Fed. 398. **Ala.**—Selma, etc. R. Co. v. Tipton, 5 Ala. 787. **N. Y.**—Stewart v. Trustees of Hamilton College, 2 Denio 403; Harlem Canal Co. v. Spear, 2 Hall. 510. **S. C.**—See Charlotte, etc. R. Co. v. Blakely, 3 Strob. 245. **Tenn.**—Stokes v. Lebanon, etc. Turnpike Co., 6 Humph. 241.

7. Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968.

8. Matthews v. Columbia Nat. Bank, 77 Fed. 372.

9. Carey v. Mayer, 79 Fed. 926, 25 C. C. A. 239.

10. Globe Sewer-Pipe Co. v. Otis, 67 Hun 652, 22 N. Y. Supp. 411. And see **United States Vinegar Co. v. Schlegel**, 143 N. Y. 537, 38 N. E. 729.

11. See supra, p. 686.

12. See Banks and Banking, Vol. IV.

13. U. S.—Terry v. Little, 101 U. S. 216, 25 L. ed. 864; Hornor v. Henning, 93 U. S. 228, 23 L. ed. 879. **Colo.**—Zang v. Wyant, 25 Colo. 551, 56 Pac. 565. **N. Y.**—Farnsworth v. Wood, 91 N. Y. 308. **Ohio.**—Wright v. McCormack, 17 Ohio St. 37.

14. Ala.—Smith v. Huckabee, 53 Ala. 191. **Ind.**—Runner v. Dwiggins, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645. **Utah.**—Steinke v. Loofbourow, 17 Utah 252, 54 Pac. 120.

15. The local statutes should be consulted. See, also, Watterson v. Masterson, 15 Wash. 511, 46 Pac. 1041.

stricted to the creditors, the cases are not all harmonious as to the plaintiff. The question is sometimes affected by the form of action,¹⁶ and it has been held that even one creditor may sue alone,¹⁷ or that two or more creditors may unite as individual plaintiffs.¹⁸ The weight of authority, however, holds that while one or more creditors may sue, yet they sue not independently but for the benefit of all the other creditors.¹⁹

3. Whether Obligation Primary or Secondary.—In some jurisdictions the statutory liability is held to be primary,²⁰ while others regard it as but a secondary liability.²¹

Where the latter view obtains, the plaintiff creditors must first exhaust their remedies against the corporation, the primary debtor, and if the judgment thus obtained cannot be satisfied out of the assets of the corporation, the judgment creditor may thereupon institute his remedy against the stockholder, the secondary debtor.²²

16. See the following page.

17. *U. S.*—Knickerbocker Trust Co. v. Myers, 133 Fed. 764, relating to Maryland statute. *Ga.*—Harrell v. Blount, 112 Ga. 711, 38 S. E. 56. *Kan.* Ball v. Reese, 58 Kan. 614, 50 Pac. 875.

May Sue Concurrently.—Two or more creditors may proceed concurrently against a stockholder, and the pendency of the proceedings by one creditor is no bar to that of another, but the stockholder will not be required to make more than one payment to discharge his liability. *Ruist v. Citizens Savings Bank*, 4 Kan. App. 700, 46 Pac. 718.

Washington.—In Washington, however, it is held that only an express and positive provision of the statute would justify the courts in holding that the liability might be enforced by a single creditor in an action at law for his own benefit. Such a remedy would be unjust to other creditors and might result in much annoyance to the stockholders. *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939. See also, *Elson v. Wright*, 134 Iowa 634, 112 N. W. 105, quoting and approving the Washington case.

18. *Thompson v. Reno Sav. Bank*, 19 Neb. 103, 7 Pac. 68.

19. *Colo.*—*Adams v. Clark*, 36 Colo. 65, 85 Pac. 642. *N. Y.*—*Hagmayer v. Alten*, 41 App. Div. 487, 57 N. Y. Supp. 684. *Wis.*—*Finney v. Guy*, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486.

20. The mode of procedure that should be adopted, to enforce the statutory liability of stockholders has "been in controversy in many of

the courts of last resort, and has been variously decided; some hold that the liability is primary, and enforceable in an action at law by an individual creditor against one or more of the stockholders, while in others, and by far the greater number, it is held that the fund created by the statute is in the nature of a security for the common benefit of all the creditors." *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565.

Liability Primary.—*U. S.*—Knickerbocker Trust Co. v. Myers, 133 Fed. 764, construing Maryland statute. *Ala.* *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 401, 5 So. 120. *Cal.*—*Hyman v. Coleman*, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178. *Ill.*—*Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048, 137 Am. St. Rep. 308. *Mass.* *American Spirits Mfg. Co. v. Eldridge*, 95 N. E. 942, construing Illinois statute. *N. D.*—*Marshall-Wells Hardware Co. v. New Era Co.*, 13 N. D. 396, 100 N. W. 1084.

21. Thus, in a Michigan case, *Campbell, Jr.*, said: "It seems to me that the liability of the individual members of corporations for their debts, under the statute upon which this suit was brought, cannot in any just sense be called a primary liability." *Hanson v. Donkersley*, 37 Mich. 184. See also, *U. S.*—*Goss v. Carter*, 156 Fed. 746, 84 C. C. A. 402. *Neb.*—*German Nat. Bank v. Farmers', etc. Bank*, 54 Neb. 593, 74 N. W. 1086. *W. Va.*—*Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184.

22. *U. S.*—*Swan Land & Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691,

4. Form of Remedy.—Frequently, the statutes specify no method of enforcing the liability, and the question being thus left to the courts, much diversity of opinion is found in the reported cases.²³

While some cases hold that the stockholder may be sued in an action at law,²⁴ yet the prevailing view is that the proper method of enforce-

37 L. ed. 577; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. ed. 825. **Ala.**—*Vaughan v. Alabama Nat. Bank*, 143 Ala. 672, 42 So. 64. **Colo.**—*Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145. **Conn.**—*Barber v. International Co.*, 73 Conn. 587, 48 Atl. 758. **Kan.**—*Steffins v. Gurney*, 61 Kan. 292, 59 Pac. 725. **Me.**—*Baxter v. Moses*, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783. **Mich.**—*Milroy v. Mining Co.*, 43 Mich. 231, 5 N. W. 287. **Mo.**—*Meyer v. Ruby Trust Min., etc. Co.*, 192 Mo. 162, 90 S. W. 821. **Neb.**—*Talmage v. Minton-Woodward Co.*, 83 Neb. 29, 118 N. W. 1099; *Hastings v. Barnd*, 55 Neb. 93, 75 N. W. 49. **N. Y.**—*Handy v. Draper*, 89 N. Y. 334 (statute so expressly providing); *Sturges v. Vanderbilt*, 73 N. Y. 384. **Pa.**—*Appeal of Means*, 85 Pa. 75. **Wash.**—*Wilson v. Book*, 13 Wash. 676, 43 Pac. 939.

Liability Primary.—Even where the liability has been held to be primary, some cases have held that the corporation must first be proceeded against on the theory, it seems, that the corporation assets, like partnership assets, must first be resorted to for the payment of the obligation. See *Marcy v. Clark*, 17 Mass. 330; *Appeal of Means*, 85 Pa. 75. And see *Goss v. Carter*, 156 Fed. 746, 84 C. C. A. 402.

Statute May Govern.—The question of whether the liability of the stockholder can be enforced without first exhausting the corporation assets, may be answered by the express provisions of the statutes. They may regulate the practice by providing for the enforcement independently of whether there are corporate assets or not. *Booth v. Dear*, 96 Wis. 516, 71 N. W. 816.

Judgment Conclusive.—In the absence of fraud, the judgment rendered against the corporation is conclusive of the right of the creditor to recover. *Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; *Stephens v. Fox*, 83 N. Y. 313. Where, however, the stockholder had

no notice of the suit, the judgment is not conclusive against him. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

Corporation Insolvent.—Where, however, the corporation is admittedly insolvent, or has been judicially declared insolvent, it is not necessary to obtain, as a condition precedent, a judgment against it. **U. S.**—*Flash v. Conn.*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966. **Colo.**—*Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565. **Ia.**—*State v. Union Stock Yards State Bank*, 103 Iowa 549, 72 N. W. 1076, 70 N. W. 752.

23. See, Colo.—*Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145. **R. I.**—*Miller v. Smith*, 26 R. I. 146, 58 Atl. 634, 66 L. R. A. 476, 106 Am. St. Rep. 699. **Wash.**—*Wilson v. Book*, 13 Wash. 676, 43 Pac. 939.

24. U. S.—*Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294, *construing*, Georgia statute. *Carroll v. Green*, 92 U. S. 509, 23 L. ed. 738 (South Carolina statute); *Knickerbocker Trust Co. v. Myers*, 133 Fed. 764. **Ark.**—*Lanigan v. North*, 69 Ark. 62, 63 S. W. 62. **Ga.**—*Moore v. Ripley*, 106 Ga. 556, 32 S. E. 647. **Md.**—*Colton v. Mayer*, 90 Md. 711, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456. **Minn.**—*Hencke v. Twomey*, 58 Minn. 550, 60 N. W. 667.

Amount of Liability Fixed.—The form of remedy depends, naturally, upon the character of the liability. Where a stockholder is liable only for his proportion of the debts of the corporation, such proportion can be ascertained only upon an accounting, and, in such case, equity is the only appropriate remedy. If, however, each stockholder is liable, as the statute may provide, for an amount equal to his stock, his liability is fixed, and any creditor may sue at law. *Flash v. Conn.*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966, *construing*, Florida statute.

Assumpsit.—The action of assumpsit has been held a proper form of action. *Chester First Nat. Bank v. Zinser*, 55 Ill. App. 510. See, also, *Carroll v. Green*, 92 U. S. 509, 23 L. ed. 738.

ing the liability is by a bill in equity,²⁵ one or more creditors suing for the benefit of all.²⁶

In case the statute prescribes the remedy, such remedy may be exclusive.²⁷ Thus, some statutes may provide, either expressly or by implication, for an action at law,²⁸ while other statutes may provide for proceedings in equity.²⁹

Foreign Stockholder.—If it is desired to enforce the statutory liability against a stockholder resident in some other state, the remedy of the state in which the suit is brought must be followed.³⁰

Debt.—Where the amount of the liability is fixed and certain, the action of debt has been held appropriate. *Mills v. Scott*, 99 U. S. 25, 25 L. ed. 294; *Simonson v. Spencer*, 15 Wend. (N. Y.) 548.

25. **U. S.**—*Studebaker v. Perry*, 184 U. S. 258, 22 Sup. Ct. 463, 46 L. ed. 528; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *Terry v. Tubman*, 92 U. S. 156, 23 L. ed. 537; *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376; *Andrews v. Beacon*, 38 Fed. 777. **N. Y.**—*Wellington v. Continental & Const. Imp. Co.*, 52 Hun 408, 5 N. Y. Supp. 587. **S. C.**—*Parker v. Carolina Sav. Bank*, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888. **Wis.**—*Gianella v. Bigelow*, 96 Wis. 185, 71 N. W. 111; *Coleman v. White*, 14 Wis. 700.

26. See *supra*, p. 690.

27. *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. ed. 825; *Pollard v. Bailey*, 20 Wall. (U. S.) 520, 527, 22 L. ed. 376.

Enforcing Liability.—In Another State; Remedy.—If an exclusive remedy for the enforcement of the liability has been provided by statute, it must be followed, and such a remedy may not be adapted to the remedial law of a foreign state. If, however, the remedy is not prescribed, the liability may be enforced by any appropriate procedure of the state of the domicile of the stockholder. **U. S.**—*Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. ed. 587; *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966; *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885. **Mass.**—*Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98, and cases cited. **Ore.**—*Aldrich v. Anchor Coal Co.*, 24 Ore. 32, 32 Pac. 756, 41 Am. St. Rep. 831.

28. **Cal.**—*Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622. **Kan.**—*Woodworth v. Bowles*, 61

Kan. 569, 60 Pac. 331. **Mass.**—*Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349.

29. In New Hampshire, proceedings must be by bill in equity. *Crippen v. Leighton*, 69 N. H. 540, 44 Atl. 538. See, also, *State v. Merchants' Bank*, 67 Minn. 506, 70 N. W. 803; *Finney v. Guy*, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486, citing Minnesota statute.

30. **U. S.**—*Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. ed. 587; *Covell v. Fowler*, 144 Fed. 535. **Mass.**—*Clark v. Knowles*, 187 Mass. 35, 72 N. E. 352. **R. I.** *Hazlett v. Woodhead*, 28 R. I. 452, 67 Atl. 736.

Remedy Transitory.—It is held in some courts that the proceedings, when in equity, must be commenced in the state where the corporation is domiciled. See, **Mass.**—*Clark v. Knowles*, 187 Mass. 35, 72 N. E. 352. **N. Y.** *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419, 51 Am. St. Rep. 654. **Pa.** *Bates v. Day*, 198 Pa. 513, 48 Atl. 407, 82 Am. St. Rep. 821. **R. I.**—*Miller v. Smith*, 26 R. I. 146, 58 Atl. 634, 66 L. R. A. 473. See, also, *Crippen v. Loughton*, 69 N. H. 540, 44 Atl. 538, 76 Am. St. Rep. 192. By the weight of authority, however, the liability is contractual in its nature, and may be enforced in foreign jurisdictions. See, **U. S.**—*Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. ed. 587; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. ed. 1007. **Colo.**—*Adams v. Clark*, 36 Colo. 65, 85 Pac. 642. **Kan.** *Howell v. Mangelsdorf*, 33 Kan. 194, 5 Pac. 759. **Mich.**—*Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105. **Minn.**—*First Nat. Bank v. Gustin Mining Co.*, 42 Minn. 327, 44 N. W. 198. **Mo.**—*Hodgson v. Cheever*, 8 Mo. App. 318. **Pa.**—*Cushing v. Perot*,

It has been held that a stockholder's statutory liability may be enforced, within a foreign state, by the corporation when the statute authorizes the corporation to levy an assessment,³¹ and by a creditor when the law of the state in which the corporation was created makes the liability one upon which any creditor may sue.³²

5. Pleadings.—In a suit by a receiver to enforce the statutory liability of stockholders, it is not necessary that the petition should allege that the creditors authorized the suit. An allegation that the receiver was directed by the court to sue is sufficient.³³

C. ACTIONS TO ENFORCE DIVIDENDS.—**1. Right of Action.**—When a dividend is declared, it becomes a debt owed by the corporation to the stockholder, and is recoverable as such.³⁴ Until a dividend, however, is declared, a stockholder has no title to the net earnings of a corporation.³⁵

Where, however, a corporation declares a dividend, but excepts one or more stockholders from the division, such stockholders may, nevertheless, maintain an action to recover their proper shares, since such a discrimination is illegal and void.³⁶

2. Form of Action.—**a. Dividend Declared.**—An action at law against the corporation, for the amount of his share, is the proper remedy for a stockholder to pursue where a declared dividend is due and unpaid,³⁷ assumpsit being the appropriate common law action.³⁸

175 Pa. 66, 34 Atl. 447, 52 Am. St. Rep. 835.

31. *Pfaff v. Gruen*, 92 Mo. App. 560.

Receiver May Sue.—That the receiver may also sue in a foreign jurisdiction, see, *U. S.*—*Kirtley v. Holmes*, 107 Fed. 1, 46 C. C. A. 102. *Mass.*—*Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 838, 49 L. R. A. 301. *N. Y.*—*Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725.

32. *U. S.*—*Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. ed. 587; *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966; *Hale v. Hardon*, 95 Fed. 747, 37 C. C. A. 240. *Cal.*—*Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023. *Ill.*—*Bell v. Farwell*, 176 Ill. 489, 52 N. E. 346. *Mo.*—*Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132. *Ohio.*—*Blair v. Newbegin*, 65 Ohio St. 425, 62 N. E. 1040. *Ore.*—*Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 32 Pac. 756, 41 Am. St. Rep. 831.

33. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

34. *University v. North Carolina R. Co.*, 76 N. C. 103, 22 Am. Rep. 671.

35. *Ill.*—*Waterman v. Alden*, 42 Ill. App. 294. *Me.*—*Goodwin v. Hardy*, 57

Me. 143, 99 Am. Dec. 758. *Mass.*—*Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705. *N. Y.*—*Beveridge v. New York El. R. Co.*, 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449.

Dividend Payable at Fixed Time. Where, however, by contract between the corporation and its stockholders, a dividend is payable at a fixed period, the stockholder may sue to recover the same, upon the expiration of the period, irrespective of a formal declaration of the dividend. *State v. Louisiana Bank*, 5 Mart. N. S. (La.) 327.

36. *Hill v. Atoka Coal & Min. Co. (Mo.)*, 21 S. W. 508.

37. *Ill.*—*Cratty v. Peoria Law Library Assn.*, 219 Ill. 516, 76 N. E. 707. *Me.*—*Smith v. Poor*, 40 Me. 415. *Mass.*—*French v. Fuller*, 23 Pick. 108; *Ellis v. Proprietors*, etc., 19 Mass. 243. *Ohio.*—*Larwill v. Burke*, 19 Ohio Cir. Ct. 449. *Pa.*—*West Chester*, etc., *R. Co. v. Jackson*, 77 Pa. 321.

38. *Conn.*—*Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542. *N. J.*—*Jackson's Admr. v. Newark Plankroad Co.*, 31 N. J. L. 277; *King v. Paterson & H. R. Co.*, 29 N. J. L. 82. *N. Y.*—*Jones v. Terre Haute*, etc., *R.*

It is also held that a bill in equity for an accounting is a proper remedy where a corporation, after a dividend is declared, refuses to pay a member his share.³⁹

b. *To Compel Declaration of Dividend.*—To compel the declaration of a dividend, a stockholder should first make application to the directors.⁴⁰ Should they refuse, upon such a request, to declare a dividend, possibly relief may be obtained in equity,⁴¹ providing the condition of the accumulated profits is such as to justify the suit.⁴² Courts of equity, however, will seldom give aid to such petitioners, generally refusing to interfere in the absence of the abuse of the directors' discretionary powers.⁴³

c. *Demand Before Suit.*—A demand upon the directors is usually a condition precedent to the right to use,⁴⁴ although where there has been a refusal to pay a dividend declared and due, no such previous demand is requisite.⁴⁵

3. *Parties.*—In a suit to enforce the payment of dividends, the action is against the corporation, and not against the officers.⁴⁶

Also, in a suit to enforce the declaration of a dividend by the directors, the corporation is a necessary party defendant.⁴⁷

4. *Pleading.*—The declaration or petition should aver that a

Co., 57 N. Y. 196. Pa.—West Chester, etc., R. Co. v. Jackson, 77 Pa. 321. Vt.—Chaffee v. Rutland, etc., R. Co., 55 Vt. 110.

39. See, Cook County Brick Co. v. Kaehler, 83 Ill. App. 448, holding that a court of equity has jurisdiction for the purpose of investigating as to the profits or net earnings of the corporation, and thus ascertaining the value of the shares.

Bill to Prevent Unfair Distribution of Dividends.—"Dividends among stockholders of the same class must always be equal and without discrimination, and a bill in equity may be maintained by a stockholder to prevent discrimination of unequal or unfair distribution." Cratty v. Peoria Law Library Assn., 219 Ill. 516, 76 N. E. 707.

40. Maeder v. Buffalo Bill's Wild West Co., 132 Fed. 280.

41. Ill.—Cratty v. Peoria Law Library Assn., 219 Ill. 516, 76 N. E. 707. Mich.—Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218. N. J.—Fougeray v. Cord, 50 N. J. Eq. 185, 24 Atl. 499. N. Y.—Brown v. Buffalo, etc., R. Co., 27 Hun 342; Scott v. Eagle Fire Ins. Co., 7 Paige 198.

42. Lillard v. Oil, Paint & Drug Co., 70 N. J. Eq. 197, 56 Atl. 254, 58 Atl. 188; Griffing v. A. A. Griffin Iron Co.,

61 N. J. Eq. 269, 48 Atl. 910; Trimble v. American Sugar-Refining Co., 61 N. J. Eq. 340, 48 Atl. 912.

43. See, U. S.—New York, etc., R. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. ed. 363. Ala.—Smith v. Prattville Mfg. Co., 29 Atl. 503. N. J.—Park v. Grant Locomotive Works, 40 N. J. Eq. 114. N. Y.—Williams v. Western Union Tel. Co., 93 N. Y. 162.

44. Ia.—Redhead v. Iowa Nat. Bank, 127 Iowa 572, 103 N. W. 796. Md. State v. Baltimore & O. R. Co., 6 Gill 363. Me.—Hagar v. Union Nat. Bank, 63 Me. 509. N. J.—King v. Paterson & H. R. Co., 29 N. J. L. 82.

Letter of Inquiry.—A letter inquiring if a dividend was to be paid, does not amount to a demand for payment. Scott v. Central R. R. of Georgia, 52 Barb. (N. Y.) 45.

45. Redhead v. Iowa Nat. Bank, 127 Iowa 572, 103 N. W. 796.

46. French v. Fuller, 23 Pick. (Mass.) 108.

Bill of Interpleader.—If two claimants sue for the same dividend, the corporation may file a bill of interpleader. Salisbury Mills v. Townsend, 109 Mass. 115.

47. Stevens v. United States Steel Corp., 68 N. J. Eq. 373, 59 Atl. 905.

dividend has been declared;⁴⁸ yet a petition alleging that a dividend on stock has accrued, that it became due and payable at a certain time, that it was demanded of the corporation and was wrongfully refused, may well be construed to mean that a dividend had been declared.⁴⁹

5. Set-Off. — Counterclaim. — In an action against the corporation for a dividend, the corporation by way of set-off or counterclaim may plead any debt owed to it by the plaintiff.⁵⁰

D. ACTIONS FOR OFFICIAL MISMANAGEMENT OR NEGLECT. — For losses caused by the fraudulent or negligent conduct of the officers and directors of a corporation, an action may be maintained against them for damages.⁵¹

Who May Sue. — The corporation, while solvent, is the proper party plaintiff.⁵² Should the corporation refuse to sue, the right may devolve upon the stockholders.⁵³

Form of Action. — The action for breach of official duty is generally

48. *Hill v. Atoka Coal & Min. Co.* (Mo.), 21 S. W. 508.

49. **Form of Petition.** — Plaintiff states that defendant is a corporation organized under the laws of the state of Illinois, having property in the state of Missouri, and an office in the city of St. Louis, in said state, for the transaction of its usual and customary business. Plaintiff further states that defendant is indebted to plaintiff in the sum of three thousand dollars for dividends which have accrued upon one hundred shares of the capital stock of defendant's said corporation, held and owned by plaintiff, being the one hundred shares described in stock certificate No. 14 of said corporation, originally issued and delivered to one E. J. Crandall, and by him transferred for value to plaintiff. Plaintiff says that said dividends became due and payable in St. Louis, Missouri, on or about the 10th day of December, 1889, that, although demanded, defendant refuses to pay the same, wherefore, plaintiff prays judgment for said sum of three thousand dollars, with interest from the 10th day of December, 1889, and for his costs. *Hill v. Atoka Coal & Min. Co.* (Mo.), 21 S. W. 508.

50. **Me.**—*Hagar v. Union Nat. Bank*, 63 Me. 509. **Md.**—*Gemmell v. Davis*, 75 Md. 546, 23 Atl. 1032. **N. J.**—*King v. Paterson, etc., R. Co.*, 29 N. J. L. 504.

51. **U. S.**—*American Spirits Mfg. Co. v. Easton*, 129 Fed. 1004, 62 C.

C. A. 679. **Ga.**—*Fricker v. American Mfg. & Imp. Co.*, 124 Ga. 165, 52 S. E. 65. **Mo.**—*Thompson v. Greeley*, 107 Mo. 577, 17 S. W. 962. **N. Y.**—*Stoddard v. Bell & Co.*, 100 App. Div. 389, 91 N. Y. Supp. 477.

52. **Ky.**—*Western Bank v. Colde-
wey's Exr.*, 120 Ky. 776, 83 S. W. 629;
Jones v. Johnson, 10 Bush 649. **Md.**
Bethel Church v. Carmack, 2 Md. Ch.
143. **Mass.**—*Atlantic Nat. Bank v.*
Harris, 118 Mass. 147. **Minn.**—*Horn*
Silver Mining Co. v. Ryan, 42 Minn.
196, 44 N. W. 56. **N. J.**—*Conway v.*
Halsey, 44 N. J. L. 462. **N. Y.**—*Hand*
v. Atlantic Nat. Bank, 55 How. Pr.
231.

53. **When Stockholder May Sue.**—The weight of authority is in favor of the doctrine that an action for injuries caused by the misapplication or waste of corporate funds and property by an officer of the corporation must be brought in the name of the corporation, unless such corporation or its officers, upon being applied to for such a purpose by a stockholder, refuse to bring such action. In that contingency, and then only, can a stockholder bring an action for the benefit of himself, and others similarly situated. *Greaves v. Gouge*, 69 N. Y. 154, 157.

Stockholder When Wrong Was Committed.—In order that a stockholder may sue, he must have been a stockholder when the wrong complained of was committed. *Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778.

at law,⁵⁴ although a bill in equity may be filed for an accounting,⁵⁵ or for the cancellation of deeds fraudulently conveying corporate lands.⁵⁶

A suit in equity has also been maintained on the ground that an offending officer occupied a fiduciary relation to the corporation.⁵⁷ In case a stockholder sues, the remedy is usually in equity, the amount recovered being for the benefit of all the stockholders.⁵⁸

Allegations in Petition or Complaint.—The bill or petition should show the official connection of the defendant with the corporation.⁵⁹

If the action is based upon negligence, the negligence and the resulting loss must be alleged,⁶⁰ and in order to hold an individual director liable, an averment of his personal neglect is necessary.⁶¹

Limitation of Actions.—Actions at law to enforce the civil liability of officials and agents are usually limited by the statute regulating actions in general.⁶² In a case of fraud, the statute will begin to run after the discovery of the fraud.⁶³ Where, moreover, the suit is in equity, the court may apply the statutory period limiting proceedings at law.⁶⁴

54. *Ill.*—*Adams v. Burke*, 201 Ill. 395, 66 N. E. 235, recovery of unreasonable salary voted to the president of a corporation. *Mo.*—*Union Nat. Bank v. Hill*, 148 Mo. 380, 49 S. W. 1012. *N. Y.*—*Dykman v. Keeney*, 154 N. Y. 483, 48 N. E. 894.

55. *U. S.*—*Hunter v. Robbins*, 117 Fed. 920. *N. Y.*—*Bosworth v. Allen*, 168 N. Y. 157, 61 N. E. 163, 85 Am. St. Rep. 667, 55 L. R. A. 751. *Wis.*—*Consolidated Vinegar Works v. Brew*, 112 Wis. 610, 88 N. W. 603.

56. *Mobile Land Imp. Co. v. Gass*, 129 Ala. 214, 29 So. 920.

57. *Flynn v. Third Nat. Bank*, 122 Mich. 642, 81 N. W. 572; *North Hudson B. & L. Assn. v. Childs*, 82 Wis. 460, 52 N. W. 600.

Directors Are Trustees.—Suits of this nature relate to the execution of a trust, and are for the recovery of money alleged to have been fraudulently dissipated by unfaithful agents, who are the defendants called to account. Such cases are cognizable in equity, whenever a suit in equity affords the only complete and adequate remedy. In equity, the relation of the directors to the bank are similar, if not identical, to that of trustees and *cestui que trust*; and in equity the trustee's personal liability to make compensation for the losses occasioned by a breach of trust is a simple contract equitable debt. It may be enforced by a suit in equity against the trustee himself, or against

his estate after his death. *National Bank v. Wade*, 84 Fed. 10, 14.

58. *Cal.*—*Chetwood v. California Nat. Bank*, 113 Cal. 414, 45 Pac. 704. *N. J.*—*Knopp v. Bohmrick*, 49 N. J. Eq. 82, 23 Atl. 118. *Tenn.*—*Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625. *Wis.*—*Gores v. Field*, 109 Wis. 408, 84 N. W. 867, 85 N. W. 411.

59. *Gores v. Elliott*, 108 Wis. 465, 84 N. W. 865.

Forms of Petitions.—See, *North Hudson B. & L. Assn. v. Childs*, 82 Wis. 460, 52 N. W. 600; *Zinn v. Baxter*, 65 Ohio St. 341, 62 N. E. 327.

Allegations Held Sufficient.—See, in general, *Minn.*—*Horn Silver-Mining Co. v. Ryan*, 42 Minn. 196, 44 N. W. 56. *N. Y.*—*Smith v. Rathbun*, 22 Hun 150. *Ohio.*—*Portage County Mut. Ins. Co. v. Wetmore*, 17 Ohio 330. *Pa.*—*Third Reformed Dutch Church v. Jones*, 132 Pa. 462, 19 Atl. 279.

60. *Merchants' Bank v. Jeffries*, 21 W. Va. 504.

61. *Fisher v. Graves*, 80 Fed. 590.

62. *Colo.*—*Larsen v. James*, 1 Colo. App. 313, 29 Pac. 183. *Ia.*—*Knopp v. Blaffer*, 39 La. Ann. 23, 6 So. 9. *N. Y.*—*Brinkerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663.

63. *Bent v. Priest*, 86 Mo. 475.

64. *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625. But see, *Bankin v.*

E. STOCKHOLDERS' SUITS. — 1. Generally Stockholder Cannot Sue for Corporation. — While a stockholder may, as any other individual, sue the corporation of which he is a member for the enforcement of his own individual rights against the corporation,⁶⁵ yet, a stockholder cannot, as a general rule, sue, in behalf of the corporation, in order to enforce its rights.⁶⁶

Even if one became the owner of all the stock of a corporation, he could not sue in his own name on a claim belonging to the corporation.⁶⁷ The right to sue belongs to the corporation itself.⁶⁸ Even though the corporation should, in its discretion, refuse, through its directors or other managing officers, to bring suit, a stockholder, or any number of stockholders, could not, thereupon, bring an action in their own names.⁶⁹

2. Modification of General Rule. — Stockholders' Suit. — a. General Statement. — There is an important modification, however, of the general rule as stated in the preceding paragraph. While the corporation through the acts of the majority or its managing agents is faithful to its trusts, no cause of action as a basis for a stockholders' suit can arise;⁷⁰ but when there is an abuse of power by the majority;

Cooper, 149 Fed. 1010; Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402.

65. See *supra*, III, p. 564.

66. U. S.—Langdon v. Hillside Coal & Iron Co., 41 Fed. 609. Ga.—Blackman v. Central R. & B. Co., 58 Ga. 189. Ill.—Gunderson v. Ill. Trust & Sav. Bank, 199 Ill. 422, 65 N. E. 326. Ind.—Smith v. Parker, 148 Ind. 127, 45 N. E. 770; Tomlinson v. Bricklayers' Union, 87 Ind. 308. Ky.—Collier v. Deering Camp Ground Assn., 23 Ky. L. Rep. 1799, 66 S. W. 183. Minn.—Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 461; Stewart v. Erie, etc., Transp. Co., 17 Minn. 372. Pa.—*In re Hasinger*, 2 Ashm. 287. Utah.—Hearst v. Putnam Min. Co., 28 Utah 184, 77 Pac. 753, 107 Am. St. Rep. 698, 66 L. R. A. 784. Wis.—Jenkins v. Bradley, 104 Wis. 540, 80 N. W. 1025. Eng.—Wallworth v. Holt, 4 Mylne & Co. 619, 41 Eng. Reprint 238.

67. Randall v. Dudley, 111 Mich. 437, 69 N. W. 729; Button v. Hoffman, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131.

68. U. S.—Forbes v. Memphis E. P. & P. R. Co., 2 Woods 323, 9 Fed. Cas. No. 4,926. Mass.—Abbott v. Merriam, 8 Cush. 588. Eng.—MacDougall v. Gardiner, L. R. 1 Ch. Div. 13.

69. "It would be a doctrine attended with very serious consequences if every individual shareholder, assuming

the place of the corporation, could decide for it when action should be brought to vindicate its supposed right. Each one of the shareholders might elect to claim a remedy, and resort to a tribunal different from those chosen by every other, and use the court of equity to enforce his views, regardless of its duly constituted officers and all other parties having interests, rights, and powers equal to his own." Mr. Justice Miller in Samuel v. Holladay, 1 Woolworth 400, 21 Fed. Cas. No. 12,288. And see, Green v. Compton, 41 Misc. 21, 83 N. Y. Supp. 588.

70. Kennebec & P. R. Co. v. Portland & K. R. Co., 54 Me. 173; Meyer v. Bristol Hotel Co., 163 Mo. 59, 63 S. W. 96.

Corporate Remedies Must Be Exhausted.—"Before a court of equity will open its doors to a single stockholder, although he comes, as he must, not only on behalf of himself, but also in behalf of all other stockholders, to an inquiry into grievances of this kind, he must show that there is no other road to redress; and he does not show this, unless he shows that all remedies within the corporation itself have been exhausted." Vogeler v. Punch, 205 Mo. 553, 103 S. W. 1001; Slattery v. Trans. Co., 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245.

Proof of Official Fraud or Neglect.

where official misconduct, in the nature of neglect of duty, fraud, or wilful wrong, is wasting the resources of the corporation, impairing its revenues, neglecting its business interests, or engaging in *ultra vires* transactions; and where the directors of the corporation, in wilful disregard of the rights of the minority, refuse, upon the request of a stockholder, to take proper action to remedy these wrongs, the courts will, within the principles of equity, afford relief to such a complaining stockholder.⁷¹

Such suits are known as stockholders' suits, and among their chief objects are, to enjoin directors, or other corporate officers, from do-

"To enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself and in which it is the appropriate plaintiff, there must exist and be established by evidence, as a foundation of such suit, some actual or contemplated action by the directors, or other acting managers, or by a majority of the stockholders themselves, which is beyond their lawful power, or fraudulent and subversive of the interests of the corporation itself or of the other shareholders." *Home Min. Co. v. McKibben*, 60 Kan. 387, 56 Pac. 756; *Clark v. Apex Gold Min. Co.*, 13 N. M. 416, 85 Pac. 968.

71. **U. S.**—*Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549; *Kessler & Co. v. Ensley Co.*, 129 Fed. 397; *Weidenfeld v. Sugar Run R. R. Co.*, 48 Fed. 615; *Rogers v. Nashville, etc., R. Co.*, 91 Fed. 299, 33 C. C. A. 517. **Ala.**—*Nathan v. Thompson*, 82 Ala. 437, 2 So. 747. **Cal.**—*Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508. **Ill.**—*Gunderson v. Ill. Trust & Sav. Bank*, 199 Ill. 422, 65 N. E. 326. **Md.**—*Sloan v. Clarkson*, 105 Md. 171, 66 Atl. 18. **Mass.**—*Brewer v. Boston Theatre*, 104 Mass. 378. **Mich.**—*Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412. **N. Y.**—*Sheridan v. Sheridan Electric Light Co.*, 38 Hun 396; *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513. **Utah.**—*Hearst v. Putnam Min. Co.*, 28 Utah 184, 77 Pac. 753, 107 Am. St. Rep. 698, 66 L. R. A. 784.

In the leading case of *Foss v. Harbottle*, 2 Hare 461, 67 Eng. Reprint 189, decided in 1843, vice-chancellor Wigram said: "If a case should arise of injury to a corporation by some of its members, for which no adequate rem-

edy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in *Wallworth v. Holt*, 4 Myl. & Cr. 635, and other cases would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue."

Directors Refusing To Sue.—An individual stockholder may maintain a petition in equity against the directors of a corporation for misconduct in office, where the corporation is unable to bring a suit at law, or where, through collusion or fraud, it neglects to seek redress, and an application has been made to the directors for the use of the corporate name to bring suit, which has been refused. *Allen v. Curtis*, 26 Conn. 456.

Must Be Stockholder at Time.—In order, however, to maintain a stockholder's suit, the complainant must have been a stockholder at the time when the transaction complained of took place. **U. S.**—*Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827. **Ga.**—*Alexander v. Searey*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337. **Neb.**—*Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024.

Wrongdoers in Control.—That the officials complained of were in control of the corporate affairs at the time the fraudulent or negligent or unlawful acts were committed is not sufficient. They must also be in control at the time the suit is brought. *Kessler v. Ensley Co.*, 123 Fed. 546; *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493, 53 N. E. 520.

ing, in relation to the corporation, certain unlawful acts;⁷² to set aside *ultra vires* transactions;⁷³ to obtain the appointment of a receiver;⁷⁴ to seek an accounting;⁷⁵ and, possibly, a dissolution.⁷⁶

72. U. S.—*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. ed. 759. Ala.—*Coxe v. Huntsville, etc., Co.*, 129 Ala. 496, 29 So. 867. N. Y.—See, *Young v. Round-out, etc., Co.*, 129 N. Y. 57, 29 N. E. 83. Utah.—*Hearst v. Putnam Min. Co.*, 28 Utah 184, 77 Pac. 753, 107 Am. St. Rep. 698, 66 L. R. A. 784. Wis.—*Theis v. Durr*, 125 Wis. 651, 104 N. W. 985, 110 Am. St. Rep. 880, 1 L. R. A. (N. S.) 571.

And see *infra*, p. 701.

B remedy of Injunction.—"It is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventative remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law." *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. ed. 401.

73. U. S.—*Metcalf v. American School Furniture Co.*, 122 Fed. 115. Ala.—*Tutwiler v. Tuskaloosa Coal, etc., Co.*, 89 Ala. 391, 7 So. 398. La.—*Watkins v. North American Land & Timber Co.*, 107 La. 107, 31 So. 683. Neb.—*McLeod v. Lincoln Medical College*, 69 Neb. 550, 98 N. W. 672, 96 N. W. 265. Tenn.—*Knapp v. Supreme Commandery, etc.*, 121 Tenn. 212, 118 S. W. 390.

Ulterior Motive Illegal.—Where there is no bad faith, but only error of judgment, a court of equity cannot

supervise or revise corporate action within the scope of corporate power. Where, however, the act of the governing body, "though lawful in itself, is designed to accomplish some illegitimate object—the mainspring of the action is some ulterior motive—and the result, if permitted to operate, will be injurious to the corporation or members not concerned in the transaction, such a member may successfully invoke equity jurisdiction for protection of the corporation where the proper officers will not do it. That cannot be too strongly impressed upon the minds of those in control of corporate affairs." Consequently where proceedings had been taken by a corporation reducing its authorized capital stock for the special advantage of certain stockholders, a decree directing the cancellation of the record of such proceeding is proper. *Theis v. Durr*, 125 Wis. 651, 104 N. W. 985, 110 Am. St. Rep. 880, 1 L. R. A. (N. S.) 571. And see, *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842.

74. U. S.—*Columbia Sand Dredging Co. v. Sand Co.*, 136 Fed. 710; *Powers v. Blue Grass Bldg. Assn.*, 86 Fed. 705. Ill.—*Chandler Mtg. Co. v. Loring*, 113 Ill. App. 423. Md.—*Dupuy v. Terminal Co.*, 82 Md. 408, 33 Atl. 889, 34 Atl. 910. Mo.—*Ford v. Kansas City, etc., R. Co.*, 52 Mo. App. 439. Va.—*Stevens v. Davison*, 18 Gratt. 819, 20 Am. Dec. 692. Wis.—*Haywood v. Lincoln Lumb. Co.*, 64 Wis. 639, 26 N. W. 184.

75. Ind.—*Tevis v. Hammersmith*, 161 Ind. 74, 67 N. E. 672. Md.—*Sloan v. Clarkson*, 105 Md. 171, 66 Atl. 18. N. Y.—*Thompson v. Stanley*, 73 Hun 248, 25 N. Y. Supp. 890.

76. By force of statute, proceedings to dissolve a corporation, or to wind up its affairs preparatory to dissolution, may be instituted, in some instances, by a stockholder. See, U. S. *Briggs v. Traders' Co.*, 145 Fed. 254, construing the West Virginia statute. Ark.—*Corn v. Skillern*, 75 Ark. 148, 87 S. W. 142. N. Y.—*Zeltner v. Henry Zeltner Brew. Co.*, 174 N. Y. 247, 66 N. E. 810, 95 Am. St. Rep. 574, suit may be instituted by the officers of a corporation under New

b. *Jurisdiction of Federal Courts.*—The larger number of stockholders' suits are brought in the federal courts on the ground of diverse citizenship,⁷⁷ the complaining stockholder or stockholders being citizens of a different state than the domicile of the corporation.⁷⁸

Prior to the promulgation of equity rule 94, in 1881, a complaining stockholder could transfer his stock, or a part thereof, to some non-resident, so that the suit might be brought in the federal court.⁷⁹ The purpose of equity rule 94 was to prevent collusion, and to make the question of jurisdiction a preliminary one.⁸⁰ Under this rule it is necessary to aver that the complaining stockholder was a stockholder at the time of the alleged wrongful transaction.⁸¹

York code. **W. Va.**—*Rainey v. Freeport Smokeless Coal & Coking Co.*, 58 W. Va. 424, 52 S. E. 528.

Generally Instituted by the State. As a general rule, however, proceedings to enforce the dissolution of a corporation must be brought by the proper official of the state, and a stockholder, as such cannot maintain the action. **Colo.**—*People v. District Court*, etc., 33 Colo. 293, 80 Pac. 908. **Ill.** *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 563. **Ia.**—*Stewart v. Pierce*, 116 Iowa 733, 89 N. W. 234. **Mass.**—*Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71. **Mich.**—*Heap v. Heap Mfg. Co.*, 97 Mich. 147, 56 N. W. 349.

77. In the leading case of *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. ed. 401, it was held that if the stockholder be a resident of another state than that in which the corporation and persons attempting to violate its charter, or commit a breach of trust or duty have their domicile, he may file his bill in the courts of the United States. He has this right under the constitution and laws of the United States. And see, *Hawes v. Oakland*, 104 U. S. 450, 452, 26 L. ed. 827, where Mr. Justice Miller of the United States Supreme Court comments upon the frequency of such suits in the federal courts since the decision in *Dodge v. Woolsey*, *supra*.

78. **All the Parties on One Side.**—All the parties on one side must, however, be of diverse citizenship from all of those upon the other side. See, *East Tenn.*, etc., *R. Co. v. Grayson*, 119 U. S. 240, 7 Sup. Ct. 190, 30 L. ed. 382; *New Jersey Central R. v. Mills*, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. ed. 949; *Bell v. Donohoe*, 17 Fed. 710.

Amount in Dispute.—Under the federal statute requiring the amount in dispute to exceed, exclusive of interest and costs, the sum of two thousand dollars (see Act of March 3, 1887, §1; 24 St. L., ch. 373), the amount has been held, in a suit to enforce a corporation's right of action, to be the value of the corporation's interest, not the mere value of the plaintiff's interest. *Hill v. Glasgow R. Co.*, 41 Fed. 610. See, also, *Towle v. American Bldg., etc., Soc.*, 60 Fed. 131.

Must Be a Right To Sue.—The mere fact that the complainant is a citizen of one state and that the defendant is a citizen of another state is not sufficient to give the complainant a right to maintain a suit in the federal court. There must be also a right to maintain a suit in the state court based upon averments that the corporation or its officers are derelict in their duty. Unless the suit can be maintained in the state court it cannot be maintained in the federal court. "The latter court cannot create a right to sue; it can only take jurisdiction of such a right when it already exists, and when the complainant, at the same time, is a citizen of another state." *Morgan v. New Orleans, M. & C. R. Co.*, 1 Woods 15, 17 Fed. Cas. No. 9,806.

79. See, *Hawes v. Oakland*, 104 U. S. 450, 453, 26 L. ed. 827.

80. *Eldred v. Am. Palace-Car Co.*, 99 Fed. 168.

81. *Davis & Fernum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. ed. 778; *Corbus v. Alaska T. Gold Min. Co.*, 187 U. S. 453, 23 Sup. Ct. 157, 47 L. ed. 256; *Quincy v. Steel*, 120 U. S. 241, 7 Sup. Ct. 520, 30 L. ed. 624; *Hawes v. Oakland*, 104

c. *Illustrations of Grounds for Suits.*—The different phases of corporate abuse which will justify the interference of a stockholder are numberless, and as varied as the possible forms of negligence, fraud, and *ultra vires* acts. Some illustrations, however, of the grounds upon which such suits have been brought will serve to show the general nature of such proceedings.

Thus, stockholders' suits have been brought to recover secret profits made by promoters;⁸² to declare bonds issued by the corporation to be *ultra vires* and void;⁸³ to cancel an illegal contract;⁸⁴ to prevent or to seek redress for the fraudulent manipulation of stockholders' meetings, as, for example, fraudulently postponing an annual meeting;⁸⁵ or unlawfully rejecting a stockholder's vote in a stockholders' meeting;⁸⁶ to set aside an unlawful election of directors;⁸⁷ to enjoin an unlawful consolidation;⁸⁸ to prevent the transfer of the franchises and property of the corporation to another corporation;⁸⁹ to prevent a violation of the right of a stockholder to take up new shares in preference to third persons, when an increase of capital stock is voted;⁹⁰ to cancel an issue of illegal stock;⁹¹ to enjoin the collection of an unconstitutional tax;⁹² to enjoin the corporation from leasing its franchises;⁹³ to set aside a deed for fraud and irregularities;⁹⁴ to restrain the con-

U. S. 450, 26 L. ed. 827; Macon, etc., R. Co. v. Shailer, 141 Fed. 585, 72 C. C. A. 631; Eagle Iron Co. v. Colyar, 156 Fed. 954; Poor v. Iowa Cent. R. Co., 155 Fed. 226; Perkins v. North Pac. Ry. Co., 155 Fed. 445; McHenry v. N. Y., etc., R. Co., 22 Fed. 130; Dannmeyer v. Coleman, 11 Fed. 97.

"Without complying with this rule, a stockholder, can no more maintain a bill founded upon rights which may properly be asserted by the corporation, than an entire stranger to the corporation and its property." Gage v. Riverside Trust Co., 156 Fed. 1002.

82. Mason v. Carrothers, 105 Me. 392, 74 Atl. 1030; Arnold v. Searing, 73 N. J. Eq. 262, 67 Atl. 831; Groel v. United Electric Co., 70 N. J. Eq. 616, 61 Atl. 1061.

83. City of Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899.

84. Jacobs v. Mexican Sugar Refining Co., 104 App. Div. 242, 93 N. Y. Supp. 776; Leslie v. Lorrillard, 40 Hun 392.

Illegal Transfer of Property.—The minority stockholders can maintain an action in their own names to set aside an illegal transfer of all property and good-will of the corporation, when such transfer is made by the board of directors of the corporation pursuant to instructions of the majority of the

stockholders. McLeod v. Lincoln Med. College, 69 Neb. 550, 93 N. W. 672, 96 N. W. 265.

85. Elkins v. Camden, etc., R. R. Co., 36 N. J. Eq. 467.

86. Supreme Lodge v. Simering, 88 Md. 276, 40 Atl. 723, 71 Am. St. Rep. 409, 41 L. R. A. 720; Pender v. Lushington, 6 Ch. Div. 70.

87. Wright v. Central Cal. Colony Water Co., 67 Cal. 532, 8 Pac. 70.

88. Nathan v. Tompkins, 82 Ala. 437, 2 So. 747.

89. Greenwood v. Union Freight R. Co., 105 U. S. 13, 26 L. ed. 961; Mitchell v. United Box Board & Paper Co., 72 N. J. Eq. 580, 66 Atl. 938.

90. Way v. Am. Grease Co., 60 N. J. Eq. 263, 47 Atl. 44; Dousman v. Wis., etc., Co., 40 Wis. 418.

91. N. J.—Stephany v. Marsden, 76 N. J. Eq. 611, 71 Atl. 599. S. D. Anderson v. Scandia Mining Syndicate, 128 N. W. 1016. Wis.—Brahm v. Gehl Co., 132 Wis. 674, 112 N. W. 1097; Wood v. Union, etc., Assn., 63 Wis. 9, 22 N. W. 756.

92. Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Starr v. Shepard, 145 Mich. 302, 108 N. W. 709.

93. Da Ponte v. Louisiana State Lottery Co., 6 Fed. Cas. No. 3,569.

94. Scanlan v. Snow, 2 App. Cas. (D. C.) 137.

trol of the corporation by a rival corporation;⁹⁵ to prevent the unauthorized purchase of stock in another corporation;⁹⁶ to prevent a fraudulent foreclosure suit of corporate property as dictated by the majority;⁹⁷ and to set aside transactions made by the directors for their own personal benefit.⁹⁸

Stockholders may also sue for the company when the corporation refuses to take proper steps to protect its interests, either by neglecting to bring actions,⁹⁹ or by neglecting to defend actions brought against the corporation.¹

Stockholders may also seek redress when a majority of the stockholders combine to appropriate in salaries to themselves the profits of the corporation.²

d. *Nature of the Remedy.—In Equity.*—Stockholders' suits are properly brought in equity.³ It is true that some controversy has been

95. *Bigelow v. Clumet & Hecla Min. Co.*, 155 Fed. 869; *George v. Cent. R. & Banking Co.*, 101 Ala. 607, 14 So. 752.

96. *Cent. R. Co. v. Collins*, 40 Ga. 582.

97. *Henry v. Travelers' Ins. Co.*, 16 Colo. 179, 26 Pac. 318; *Whitney v. Hazzard*, 18 S. D. 496, 101 N. W. 346.

98. *U. S.—Metcalf v. American School Furniture Co.*, 122 Fed. 115. *N. Y.—Gray v. New York, etc., Co.*, 3 Hun 383, 5 Thomp. & C. 224. *Wis. Donnelly v. Sampson*, 135 Wis. 368, 115 N. W. 1089.

99. *U. S.—Greenwood v. Union F. R. Co.*, 105 U. S. 13, 26 L. ed. 961; *Davenport v. Dows*, 18 Wall. 626, 21 L. ed. 938; *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615; *Perdicaris v. Charleston Gaslight Co.*, 19 Fed. Cas. No. 10,974; *Pond v. Vt. Val. R. Co.*, 19 Fed. Cas. No. 11,265. *Idaho.—Just v. Idaho Canal, etc., Co.*, 16 Idaho 639, 102 Pac. 381. *La.—Watkins v. North Am. L. & T. Co.*, 107 La. 107, 31 So. 683. *Md.—Mottu v. Primrose*, 23 Md. 482. *N. Y.—Young v. Equitable Life Assur. Soc.*, 116 App. Div. 911, 101 N. Y. Supp. 1150; *Sheridan v. Sheridan Electric Light Co.*, 38 Hun 396.

1. *U. S.—Foote v. Linck*, 5 McLean 616, 9 Fed. Cas. No. 4,913. *Colo.—Paxton v. Heron*, 41 Colo. 147, 92 Pac. 15. *W. Va.—Park v. Ulster & K. Petroleum Co.*, 25 W. Va. 108.

2. *Sellers v. Phoenix Iron Co.*, 13 Fed. 20.

Directors Voting Unreasonable Salaries.—“So, too, if the directors have,

in abuse of their trust, paid to themselves unreasonable salaries as officers of the corporation,” a stockholder has like rights and remedies. *Donald v. Manufacturers' Export Co.*, 142 Ala. 578, 38 So. 841; *Alabama Coal & Coke Co. v. Shackelford*, 137 Ala. 224, 34 So. 833, 97 Am. St. Rep. 23.

3. *U. S.—Hawes v. Oakland*, 104 U. S. 450, 460, 26 L. ed. 827; *Huntington v. Palmer*, 104 U. S. 482, 26 L. ed. 833; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Whitney v. Fairbanks*, 54 Fed. 985. *Mass.—Converse v. United Shoe Machinery Co.*, 185 Mass. 422, 70 N. E. 444. *Mich.—Starr v. Shepard*, 145 Mich. 302, 108 N. W. 709. *N. Y.—Flynn v. Brooklyn, etc., R.*, 9 App. Div. 269, 41 N. Y. Supp. 566; *Hanna v. People's, etc., Bank*, 35 Misc. 517, 71 N. Y. Supp. 1076. *Eng.—Sweny v. Smith*, L. R. 7 Eq. 324.

The Doctrine Stated.—“In equity the conception of a corporate entity is used merely as a formula for working out the rights and equities of the real parties in interest. . . . In equity the relationship between the shareholders is recognized whenever this becomes necessary to the attainment of justice; at law this relationship is not recognized at all. . . . It follows, therefore, that a corporation can obtain redress for a wrong committed against it, only through the action of its regular officers; and, if these are either unwilling or unable to act, the corporation as an entity has no means of obtaining a remedy. Under these circumstances it becomes necessary to take cognizance of the equit-

raised as to the nature of such suits, whether they should be in equity or at law, yet it should be clear, both from the character of the relief sought, as, also, from the parties to be benefited, that the remedy is in equity,⁴ and not at law.⁵

That the remedy is in equity rather than at law, follows, also, from the fact that an injury to the stock and capital resulting through negligence or defeasance is an injury to all the stockholders in common.⁶

While the usual procedure is for one or more stockholders to bring the suit in their own behalf, and also in behalf of such other stockholders as may wish to come in,⁷ yet the suit is for the benefit of all the stockholders, or, what amounts to the same thing, for the benefit of the corporation.⁸

Even should a single stockholder maintain the suit alone, and should

able interests of the individual shareholders, and to allow them to sue for the protection of their rights." 1 Mor. Priv. Corp., §§227, 238.

Georgia.—"A corporation is a separate person from any or all of the stockholders. When it is sued alone, they are not before the court; and they cannot interpose in that suit, without express statutory authority. In equity, or possibly at law, under our peculiar jurisprudence, they can take measures, by an original proceeding in their own behalf, to prevent the appropriation of corporate assets to fraudulent claims, though such claims have been fraudulently, by the connivance of the corporation or its officers, reduced to judgment." Blackman v. Central R. & B. Co., 58 Ga. 189.

No Trial by Jury.—It accordingly follows that in such a suit there is no trial by jury as a matter of right. MacNaughton v. Osgood, 114 N. Y. 574, 21 N. E. 1044; Brinckerhoff v. Bostwick, 105 N. Y. 567, 12 N. E. 58.

4. U. S.—Ritchie v. McMullen, 79 Fed. 522, 25 C. C. A. 50; Hirsh v. Jones, 56 Fed. 137. **Conn.**—Allen v. Curtis, 26 Conn. 456. **Mass.**—Richardson v. Clinton Wall Trunk Co., 181 Mass. 580, 64 N. E. 400; Dunphy v. Traveler News Assn., 146 Mass. 495, 76 N. E. 426; Peabody v. Flint, 6 Allen 52. **N. J.**—Conway v. Halsey, 44 N. J. L. 462.

5. Hirsh v. Jones, 56 Fed. 137; Converse v. United Shoe Machinery Co., 185 Mass. 422, 70 N. E. 444; Smith v. Hurd, 12 Metc. 371, 46 Am. Dec. 690.

6. Conn.—Allen v. Curtis, 26 Conn. 456. **Ill.**—Eldred v. Ripley, 97 Ill. App.

503. **Mass.**—Smith v. Hurd, 12 Metc. 371. **N. Y.**—Niles v. New York Cent., etc., R. Co., 176 N. Y. 119, 68 N. E. 142; Brinckerhoff v. Bostwick, 88 N. Y. 52. **Pa.**—Craig v. Gregg, 83 Pa. 19.

7. Cal.—Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788. **Ga.**—McAfee v. Zettler, 103 Ga. 579, 30 S. E. 268. **Ind.**—See Rogers v. Lafayette Agric. Works, 52 Ind. 296. **N. H.**—Winsor v. Bailey, 55 N. H. 218.

8. U. S.—Howe v. Barney, 45 Fed. 668. **Cal.**—Fox v. Hale, 108 Cal. 475, 41 Pac. 328. **Ia.**—Troutman v. Council Bluffs, etc., Co., 142 Iowa 140, 120 N. W. 730. **Me.**—Wells v. Dane, 101 Me. 67, 63 Atl. 324. **Md.**—Davis v. Gemmell, 73 Md. 530, 21 Atl. 712. **Tenn.**—Grant v. Lookout Mountain Top Co., 93 Tenn. 691, 28 S. W. 90; Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448.

Sues Not as an Individual.—The stockholder does not sue as an individual, that is, not to enforce his own right, but to enforce the corporation's rights. De Neufville v. New York & N. R. Co., 81 Fed. 10, 26 C. C. A. 306; Troutman v. Council Bluffs, etc., Co., 142 Iowa 140, 120 N. W. 730.

Ultra Vires Act.—On the ground, however, that a threatened *ultra vires* act is a wrong to the individual, it has been held that a suit to enjoin such a transaction may be brought by a stockholder as an individual. Hoole v. Great Western R. Co., L. R. 3 Ch. 262. And see, Zabriskie v. Cleveland, etc., R. Co., 23 How. (U. S.) 381, 16 L. ed. 488.

recover property as a result thereof, the property would not belong to him individually, but to the corporation.⁹

e. *Limitations of Suits.*—*Laches.*—Courts of equity, in connection with stockholders' suits will often be governed by the statute of limitations.¹⁰ Unless, however, stockholders assert their rights within a reasonable time, they will be presumed to acquiesce in the transaction, and will thus be barred from complaining thereof.¹¹

Suits based upon official neglect or fraud must be brought within a reasonable time after the discovery of the fraud or negligence.¹²

3. **Corporation In Hands of Receiver.**—If the corporation is in the hands of a receiver, the receiver must refuse to sue before a stockholder can institute a suit.¹³

4. **Corporation Insolvent or Dissolved.**—Where a trustee in insolvency refuses to sue, a stockholder may sue for the corporation.¹⁴

If the corporation is dissolved, no suit can be maintained by a stockholder unless the statutes provide for the continuation of the corporate existence for the purpose of winding up its affairs.¹⁵

5. **Corporation Must Refuse to Sue.**—As a condition precedent

9. *Lawrence v. Southern Pac. Co.*, 180 Fed. 822; *Young v. Equitable Life Assur. Soc.*, 116 App. Div. 911, 101 N. Y. Supp. 1150.

10. *Montgomery v. Lahey*, 121 Ala. 131, 25 So. 1006; *Boyd v. Mutual, etc., Assn.*, 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171.

11. *U. S.*—*Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196; *Illinois Pneumatic Gas Co. v. Berry*, 113 U. S. 322, 5 Sup. Ct. 525, 28 L. ed. 1003; *Kessler v. Ensley Land Co.*, 148 Fed. 1019, 79 C. C. A. 534; *Edwards v. Merc. Trust Co.*, 124 Fed. 381; *Allen v. Wilson*, 28 Fed. 677. *Ala.*—*Montgomery, etc., Co. v. Lahey*, 121 Ala. 131, 25 So. 1006. *Ga.*—*Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337. *Ill.*—*Aurora, etc., Soc. v. Paddock*, 80 Ill. 263. *Ia.*—*Thompson v. Lambert*, 44 Iowa 239. *Mass.*—*Royal Bank v. Grand Junction R. Co.*, 125 Mass. 490. *Mich.*—*McLoughlin v. Detroit, etc., R. Co.*, 8 Mich. 100. *Minn.*—*Stewart v. Erie etc., Transportation Co.*, 17 Minn. 372. *Mo.*—*Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63. *N. J.*—*Stephany v. Marsden*, 76 N. J. Eq. 611, 75 Atl. 899; *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178. *N. Y.*—*Boardman v. Lake Shore, etc. R. Co.*, 84 N. Y. 157. *Pa.*—*Ashhurst's Appeal*, 60 Pa. 290. *R. I.*—*Boston, etc. R. Co. v. New York, etc. R. Co.*, 13

R. I. 260. *Tex.*—*International, etc. R. Co. v. Bremond*, 53 Tex. 96.

12. *U. S.*—*Brinckerhoff v. Roosevelt*, 143 Fed. 478, 74 C. C. A. 498. *Colo.*—*Boldenweck v. Bullis*, 40 Colo. 253, 90 Pac. 634. *Ill.*—*Stoddard v. Decatur, etc. Co.*, 184 Ill. 53, 56 N. E. 327. *Mo.*—*Loomis v. Missouri, etc. R.*, 165 Mo. 469, 65 S. W. 962. *S. D.*—*Anderson v. Scandia Min. Syndicate*, 128 N. W. 1016.

13. *U. S.*—*Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. ed. 815; *Lafayette Co. v. Neely*, 21 Fed. 738. *Mich.*—*Flynn v. Third Nat. Bank*, 122 Mich. 642, 81 N. W. 572. *Mo.*—*Union Nat. Bank v. Hill*, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615. *N. J.*—*Ackerman v. Halsey*, 37 N. J. Eq. 356. *N. C.*—*Coble v. Beall*, 130 N. C. 533, 41 S. E. 793. *S. C.*—*Sigwald v. City Bank*, 82 S. C. 382, 64 S. E. 398.

Receiver Refusing To Sue.—It has also been held that although the receiver refuses to sue, a stockholder cannot bring the suit without first requesting the court to order the receiver to sue. *Swope v. Villard*, 61 Fed. 417. 14. *Streight v. Junk*, 59 Fed. 321, 8 C. C. A. 137; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

15. *General Electric Co. v. West Asheville Imp. Co.*, 73 Fed. 386; *Howe v. New York, N. H. & H. R. Co.*, 142 App. Div. 451, 126 N. Y. Supp. 1090.

to the right of a stockholder to sue, it must appear that the corporation refuses to sue,¹⁶ since the gist of the stockholder's complaint is that the corporation refuses to use its remedies.¹⁷

6. As To Demand and Refusal.—a. *Necessity of Demand.*—In many cases, moreover, a formal demand must be made upon the corporation to institute the suit in the corporate name,¹⁸ for the reason that the stockholder should exhaust the means for redress within the corporation before bringing a suit himself.¹⁹

16. **U. S.**—*City of Davenport v. Dows*, 18 Wall. 626, 21 L. ed. 938; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Savings & Trust Co. v. Bear Valley Irr. Co.*, 112 Fed. 693; *Holton v. Wallace*, 77 Fed. 61, 23 C. C. A. 71; *Putnam v. Ruch*, 56 Fed. 416; *Whitney v. Fairbanks*, 54 Fed. 985. **Ill.**—*Eldred v. Ripley*, 97 Ill. App. 503. **Ind.**—*Wright v. Floyd*, 43 Ind. App. 546, 86 N. E. 971. **Kan.**—*Fry v. Rush*, 63 Kan. 429, 65 Pac. 701. **Ky.**—*Reincke v. Bailey*, 33 Ky. L. Rep. 977, 112 S. W. 569. **Me.**—*Kennebec & P. R. Co. v. Portland & K. R. Co.*, 54 Me. 173. **Mass.**—*Converse v. United Shoe Machinery Co.*, 185 Mass. 422, 70 N. E. 444. **Neb.**—*State v. Holmes*, 60 Neb. 39, 82 N. W. 109. **N. Y.**—*McCrea v. Robertson*, 132 N. Y. 150, 84 N. E. 960; *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493, 53 N. E. 520; *Rosenbaum v. Rice*, 86 App. Div. 617, 83 N. Y. Supp. 494. **Pa.**—*Holton v. New Castle R. Co.*, 138 Pa. 111, 20 Atl. 937. **Tex.**—*People's Inv. Co. v. Crawford* (Tex. Civ. App.), 45 S. W. 738. **W. Va.**—*Deveny v. Hart Coal Co.*, 63 W. Va. 650, 60 S. E. 789; *Park v. New York & K. Oil Co.*, 26 W. Va. 486. **Wis.**—*Huber v. Martin*, 127 Wis. 412, 105 N. W. 1031, 115 Am. St. Rep. 1023, 3 L. E. A. (N. S.) 653.

17. *Forbes v. Gracey*, 9 Fed. Cas. No. 4,924, affirmed in 94 U. S. 762, 24 L. ed. 313.

Refusal Essential.—The refusal of the board of directors is essential in order to give the stockholder any standing in court. There must be a clear default on the directors' part, involving a breach of duty, within the rule established in equity, to authorize a stockholder to institute the suit in his own behalf, or for himself and other stockholders who may choose to join. *Memphis City v. Dean*, 8 Wall. (U. S.) 64, 19 L. ed. 327; *La Grange v. State Treasurer*, 24 Mich. 468, 473.

18. **U. S.**—*Dimpfell v. Ohio & M. R. Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. ed. 121; *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827 (a leading case). **Ala.**—*Crow v. Florence Ice & Coal Co.*, 143 Ala. 541, 39 So. 401. **Colo.**—*Horst v. Traudt*, 43 Colo. 445, 96 Pac. 259. **Pa.**—*Law v. Fuller*, 217 Pa. 439, 66 Atl. 754. **Tenn.**—*Boyd v. Sims*, 87 Tenn. 771, 11 S. W. 948.

19. **U. S.**—*Dimpfell v. Ohio, etc. R. Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. ed. 121; *Foot v. Cunard Min. Co.*, 17 Fed. 46; *Bill v. Western Union Tel. Co.*, 16 Fed. 14. **Colo.**—*Smith v. Bulkley*, 18 Colo. App. 227, 70 Pac. 958. **Pa.**—*Wolfe v. Pennsylvania R. R.*, 195 Pa. 91, 45 Atl. 936. **Wash.**—*Seattle, etc. R. Co. v. Bowman*, 53 Wash. 416, 102 Pac. 27; *Elliott v. Puget Sound Wood Products Co.*, 52 Wash. 637, 101 Pac. 228. **W. Va.**—*Rathbone v. Parkersburg Gas Co.*, 31 W. Va. 798, 8 S. E. 570.

Must Exhaust Means for Redress.—“Courts of equity are swift to protect helpless minorities of stockholders of corporations from oppression and fraud of majorities. But the legal relations into which the members of a corporation enter require them to seek redress of supposed wrongs done them as stockholders from its officers, and from the corporation itself, before applying elsewhere. . . . Stockholders in a corporation impliedly agree, when they join in, to act in the corporate business through officers chosen to represent them, or by vote at meetings of the members regularly called. And so, if they deem themselves aggrieved as shareholders by the dealings of others with it, or by the acts of its managers, they are bound to seek their remedy through corporate channels: first, by application to the officers in charge; and, failing there; secondly, to the corporation itself, at a meeting of its members. If they can obtain jus-

b. *Demand Made Upon Whom.*—The demand should be made, generally, upon the board of directors,²⁰ although it has been held that a demand made upon the executive committee of the board, is sufficient.²¹

Demand Upon Majority Stockholders.—It is held in a number of cases that a complaining shareholder should, in case of alleged misconduct on the part of the directors, prefer his grievance to a meeting of the stockholders, in order to determine the will of the majority.²²

In many cases it is obvious, however, that the calling of a meeting of the stockholders would be impracticable; that irreparable delay might ensue; and that the relief desired might, thus, come too late; consequently the weight of authority is to the effect that the action of the directors is the action, for the time being, of the majority, and that no reference to a stockholders' meeting is necessary.²³

It is held, however, that although an appeal to the stockholders

tice at the hands of neither, the courts are open for their relief. It would be contrary to the fundamental principles of corporate organizations to hold that a single shareholder can at any time launch the corporation into litigation to obtain from another what he deems to be due it, or to prevent methods of management which he thinks unwise." *Dunphy v. Travelers' Newspaper Assn.*, 146 Mass. 495, 16 N. E. 427.

20. **U. S.**—*Dimpfell v. Ohio & M. R. Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. ed. 121; *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827. **Conn.**—*Allen v. Curtis*, 26 Conn. 456. **Pa.**—*McCloskey v. Snowden*, 212 Pa. 249, 61 Atl. 796, 108 Am. St. Rep. 867. **Tenn.**—*Boyd v. Sims*, 87 Tenn. 771, 11 S. W. 948. **Va.**—*Virginia Passenger, etc. Co. v. Fisher*, 104 Va. 121, 51 S. E. 198.

21. *Hazard v. Durant*, 11 R. I. 195.

Demands Made Upon President.—A demand made upon the president of the corporation has been held insufficient. *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448. Where, however, the president was the managing officer and was practically the entire corporation, a demand upon him was held sufficient. *City of Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899.

No Governing Body.—A demand is not necessary where there is no governing bod to which an application for redress could be made. *Sheridan Brick Works v. Marion Trust Co.*, 157 Ind. 292, 61 E. 666, 87 Am. St. Rep.

207; *Tennessee Mountain Petroleum, etc. Co. v. Ayers* (Tenn. Ch. App.), 43 S. W. 744.

Theory of Right To Sue.—The right of the minority stockholders to sue is based upon the theory that the majority, as represented by the directors who should see that a suit is brought, refuses to perform its duty, and is thus guilty of bad faith towards the complainant. *Kessler & Co. v. Ensley Co.*, 129 Fed. 397; *Weidenfeld v. Sugar Run R. R. Co.*, 48 Fed. 615.

22. **U. S.**—*Bill v. Western Union Tel. Co.*, 16 Fed. 14. **Ala.**—*Johns v. McLester*, 137 Ala. 283, 34 So. 174, 97 Am. St. Rep. 27; *Montgomery Light, etc. Co. v. Lahey*, 121 Ala. 131, 25 So. 1006. **Colo.**—*Miller v. Murray*, 17 Colo. 408, 30 Pac. 46. **Mass.**—*Dunphy v. Traveller Newspaper Assn.*, 146 Mass. 495, 16 N. E. 426. **N. Y.**—*Kavanaugh v. Com. Trust Co.*, 103 App. Div. 95, 92 N. Y. Supp. 543, *affirmed*, 181 N. Y. 121, 73 N. E. 562. **W. Va.**—*Ward v. Hotel Co.*, 65 W. Va. 721, 63 S. E. 613. **Eng.**—*Foss v. Harbottle*, 2 Har. 461, 67 Eng. Reprint 189.

English Practice.—Under the English practice, the court may direct a general meeting of the stockholders to be called. *MacDougall v. Gardiner*, L. R. 1 Ch. Div. 13; *East Pant Du United Lead Min. Co. v. Merryweather*, 13 W. R. 216, 2 H. & M. 254, 71 Eng. Reprint 460.

23. *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827; *Schoening v. Schwenck*, 112 Iowa 733, 84 N. W. 916.

might be useless, that fact does not excuse a demand upon the directors.²⁴

c. *No Demand Required When.*—Where, however, a demand would be futile, since the very parties of whom the demand should be made are the wrong-doers complained of, no demand need be made.²⁵ Thus, where the officers and directors are seeking to control the corporate property in their own interest,²⁶ or where the majority of the stock is controlled by a rival corporation,²⁷ a demand would be useless and is therefore not required.

There may be, also, instances of urgent need for immediate relief, particularly by way of injunction, where a demand upon the directors would be excused,²⁸ and in general, a threatened *ultra vires* act may be enjoined by a stockholder without a preliminary demand upon the directors.²⁹

24. *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 21 So. 315, 59 Am. St. Rep. 140.

25. *U. S.*—*Berwind v. Canadian Pac. R. Co.*, 98 Fed. 158; *Earle v. Seattle, etc. R. Co.*, 56 Fed. 909. *Ala.*—*Tillis v. Brown*, 154 Ala. 403, 45 So. 589; *Montgomery Traction Co. v. Harmon*, 140 Ala. 505, 37 So. 371; *Memphis, etc. R. R. Co. v. Woods*, 88 Ala. 630, 7 So. 108, 16 Am. St. Rep. 81, 7 L. R. A. 605. *Cal.*—*Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024. *Colo.*—*Duquesne Gold Min. Co. v. Glaser*, 46 Colo. 186, 103 Pac. 299; *Horst v. Traudt*, 43 Colo. 445, 96 Pac. 259. *Ind.*—*Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487. *Ill.*—*Babcock v. Farwell*, 245 Ill. 14, 91 N. E. 683; *Harding v. Am. Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738; *Perry County v. Stebbins*, 66 Ill. App. 427. *Mass.*—*Von Arnim v. Am. Tube Works*, 188 Mass. 515, 74 N. E. 680. *Mich.*—*Kern v. Arbeiter, etc., Verein*, 139 Mich. 233, 102 N. W. 746. *Mo.*—*Hingston v. Montgomery*, 121 Mo. App. 451, 97 S. W. 202. *N. Y.*—*Boaz v. Sterlingworth Ry. Supply Co.*, 68 App. Div. 1, 73 N. Y. Supp. 1039; *Lawrence v. Weber*, 122 N. Y. Supp. 1134. *Pa.*—*Law v. Fuller*, 217 Pa. 439, 66 Atl. 754. *Tex.*—*Caffall v. Bandera Tel. Co.* (Tex. Civ. App.), 136 S. W. 105. *Wash.*—*Williams v. Erie Mountain Consol. Min. Co.*, 47 Wash. 360, 91 Pac. 1091. *Wis.*—*Donnelly v. Sampson*, 135 Wis. 368, 115 N. W. 1089; *Doud v. Wisconsin, etc. Ry. Co.*, 65 Wis. 108.

Refusal May Be Shown in Two Ways. "That the persons having the primary right to act will not perform their

duty may be shown in either of two ways: By showing that they have neglected or refused to proceed after being requested to do so by some person or persons whose requests in that regard should be honored; or by showing, expressly or by necessary inference, that they are so concerned in the wrong redressed, and hostile to any vindication or attempt to vindicate the corporate rights, that it is reasonably certain that a request to them to proceed to that end by judicial remedies would be unavailing." *Northern Trust Co. v. Snyder*, 113 Wis. 516, 89 N. W. 460.

26. *U. S.*—*Excelsior Pebble Phosphate Co. v. Brown*, 74 Fed. 321, 20 C. C. A. 428, 42 U. S. App. 55. *Mont.*—*Gerry v. Bismark Bank*, 19 Mont. 191, 47 Pac. 810. *N. J.*—*Appleton v. Am. Matting Co.*, 65 N. J. Eq. 375, 54 Atl. 454. *N. Y.*—*Walter v. McAlister Co.*, 21 Misc. 747, 27 Civ. Proc. 33, 48 N. Y. Supp. 26; *Davis v. Congregation Beth Tephilas Israel*, 40 App. Div. 424, 57 N. Y. Supp. 1015.

27. *George v. Central R. R. & Banking Co.*, 101 Ala. 607, 14 So. 752; *Loewenstein v. Diamond Soda Water Mfg. Co.*, 94 App. Div. 383, 88 N. Y. Supp. 313.

28. *U. S.*—*Corbus v. Alaska, etc. Gold Min. Co.*, 187 U. S. 455, 465, 23 Sup. Ct. 157, 47 L. ed. 256. *Ind.*—*Supreme Sitting, etc. v. Baker*, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210. *Mich.*—*Starr v. Shepard*, 145 Mich. 302, 108 N. W. 709.

29. *Dickinson v. Consolidated Traction Co.*, 114 Fed. 232; *Heath v. Erie R. Co.*, 8 Blatchf. 347, 11 Fed. Cas.

d. *Form of the Demand.*—*Requisites.*—A mere request or suggestion that a suit should be brought is not sufficient,³⁰ but a positive and direct demand by the stockholder, or someone representing him should be made.³¹

e. *Form of the Refusal.*—A mere neglect to bring a suit is not a refusal,³² neither is a refusal based upon a misunderstanding of the situation sufficient.³³ The refusal that authorizes the stockholder to sue, is not the refusal of discretion and judgment, but it must appear to be wilful and wrongful.³⁴

7. **Who May Sue.**—a. *Stockholders.*—As implied from the name given to the suits under discussion, the plaintiff must be a stockholder.³⁵

He must, also, be a stockholder when the suit was brought.³⁶ One who has transferred his stock,³⁷ or who is under suspension as a member,³⁸ is not entitled to sue.

One,³⁹ or more stockholders,⁴⁰ may sue, and even the owner of a single share may sue,⁴¹ although in such a case the equities must be clear.⁴²

No. 6,306; *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048.

30. *Doherty v. Merc. Trust Co.*, 184 Mass. 590, 69 N. E. 335; *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97, 44 N. E. 112.

31. See, in general, **U. S.**—*Ball v. Rutland R. Co.*, 93 Fed. 513. **Ala.**—*Memphis, etc. R. Co. v. Woods*, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605, 16 Am. St. Rep. 81. **Mo.**—*Vogeler v. Punch*, 205 Mo. 558, 103 S. W. 1001.

Demand Must Be Reasonable.—A demand that a suit be filed in a certain court which, in fact, has no jurisdiction of the case, is not a sufficient demand. *Kemmerer v. Haggerty*, 139 Fed. 693.

32. *Polhemus v. Polhemus*, 108 App. Div. 353, 95 N. Y. Supp. 325; *Kavanaugh v. Com. Trust Co.*, 45 Misc. 295, 92 N. Y. Supp. 233; *Leslie v. Lorillard*, 31 Hun 305.

33. *Samuel v. Holladay*, *Woolw.* 400, 21 Fed. Cas. No. 12,288.

34. **U. S.**—*Kessler v. Ensley Co.*, 123 Fed. 546; *Hendrickson v. Bradley*, 85 Fed. 508, 29 C. C. A. 303. **Ill.**—*Babcock v. Farwell*, 245 Ill. 14, 91 N. E. 683. **Kan.**—*Fitzwater v. Nat. Bank of Seneca*, 62 Kan. 163, 61 Pac. 684, 84 Am. St. Rep. 377. **Pa.**—*McCloskey v. Snowden*, 212 Pa. 249, 61 Atl. 796, 108 Am. St. Rep. 867. **Tenn.**—*Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

Failing To Bring Suit.—Where a sufficient demand is made, a failure to bring suit within a reasonable time, has been construed as amounting to a refusal. *Starr v. Shepard*, 145 Mich. 302, 108 N. W. 709; *Kavanaugh v. Com. Trust Co.*, 103 App. Div. 95, 92 N. Y. Supp. 543, *affirmed*, 181 N. Y. 121, 73 N. E. 562.

35. *Bostock v. Edgar*, 24 Vict. L. R. (Australia), 677.

36. **U. S.**—*MacVeagh v. Denver City Waterworks Co.*, 107 Fed. 17, 46 C. C. A. 118. **Ala.**—*Jefferson County Sav. Bank v. Francis*, 115 Ala. 317, 23 So. 48. **D. C.**—*Scanlan v. Snow*, 2 App. Cas. 137. **N. Y.**—*Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778; *Fitchett v. Murphy*, 46 App. Div. 181, 61 N. Y. Supp. 182. **Ohio.**—*Zinn v. Baxter*, 65 Ohio St. 341, 62 N. E. 327. **Australia.**—*Bostock v. Edgar*, 24 Vict. L. R. 677.

37. See the following page.

38. *Bostock v. Edgar*, 24 Vict. L. R. (Australia) 677.

39. *Greenwood v. Union Freight R. Co.*, 105 U. S. 13, 26 L. ed. 961; *Davis v. Congregation Beth Tephilas Israel*, 40 App. Div. 424, 57 N. Y. Supp. 1015; *Ithaca, etc. Co. v. Treman*, 30 Hun 212.

40. *Barr v. New York L. E., etc. R. Co.*, 96 N. Y. 444.

41. *Seaton v. Grant*, L. R. 2 Ch. (Eng.) 459.

42. *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63.

When suit is brought, any other stockholder may intervene and be made a party plaintiff.⁴³

b. *Equitable Owner*.—The equitable owner of stock may sue.⁴⁴

c. *Pledgor of Stock*.—One who has pledged his stock may sue,⁴⁵ likewise a pledgee of stock, in order to prevent the impairment of the value of the property.⁴⁶

d. *Administrator*.—An administrator of a deceased stockholder may bring a suit.⁴⁷

e. *Subscriber for Stock*.—Subscribers for stock who have not complied with the conditions of their subscriptions cannot sue,⁴⁸ but a stockholder may sue although no certificate of shares has been issued in his name.⁴⁹

f. *Transferor of Stock*.—One who has transferred his stock cannot sue,⁵⁰ and although he was one of the original corporators, yet he has no interest entitling him to sue, although the stock still remains in his name on the books of the company.⁵¹

g. *Transferee of Stock*.—A stockholder to whom stock has been transferred may, by general rule, sue, even though the transaction of which he complains occurred before the transfer was made.⁵²

The federal courts, however,⁵³ and some state courts,⁵⁴ require that

43. *Coltrane v. Templeton*, 106 Fed. 370, 45 C. C. A. 328.

44. *U. S.*—*McHenry v. New York*, etc. R. R. Co., 22 Fed. 130. *N. Y.* *Weber v. Wallerstein*, 111 App. Div. 693, 97 N. Y. Supp. 846. *Eng.*—*Great Western R. Co. v. Rushout*, 5 De G. & Sm. 290, 64 Eng. Reprint 1121.

45. *Fisher v. Patton*, 134 Mo. 32, 34 S. W. 1096, 33 S. W. 451.

Pledged Stock Sold.—That one cannot sue who has pledged his stock as collateral to a note, and the stock has been sold under the terms of the deposit, see *Dudley v. Armenia Ins. Co.*, 115 App. Div. 380, 100 N. Y. Supp. 818.

46. *U. S.*—*Gorman-Wright Co. v. Wright*, 134 Fed. 363, 67 C. C. A. 345. *Ill.*—*Green v. Hedenberg*, 159 Ill. 489, 42 N. E. 851, 50 Am. St. Rep. 178. *B. I.*—*Chafee v. Quidnick Co.*, 14 R. I. 75.

47. *Scanlan v. Snow*, 2 App. Cas. (D. C.) 137.

48. *Bussey v. Hooper*, 35 Md. 15.

49. *Cal.*—*Parrott v. Byers*, 40 Cal. 614. *D. C.*—*Scanlan v. Snow*, 2 App. Cas. 137. *Ia.*—*Carson v. Iowa City Gaslight Co.*, 80 Iowa 638, 45 N. W. 1068. *N. J.*—*O'Connor v. International Silver Co.*, 68 N. J. Eq. 67, 59 Atl. 321.

50. *MacVeagh v. Denver City Waterworks Co.*, 107 Fed. 17, 46 C. C. A. 118.

51. *Scanlan v. Snow*, 2 App. Cas. (D. C.) 137.

52. *Ala.*—*Montgomery Light, etc. Co. v. Lahey*, 121 Ala. 131, 25 So. 1006. *Idaho*.—*Just v. Idaho Canal, etc. Co.*, 16 Idaho 639, 102 Pac. 381. *Ill.*—*City of Chicago v. Cameron*, 22 Ill. App. 91. *N. H.*—*Winsor v. Bailey*, 55 N. H. 218. *N. Y.*—*O'Connor v. Va. Pass. & Power Co.*, 46 Misc. 530, 92 N. Y. Supp. 525. *S. C.*—*State v. Port Royal, etc. R. Co.*, 45 S. C. 470, 23 S. E. 333. *Eng.*—*Seaton v. Grant*, L. R. 2 Ch. 459; *Bloxam v. Metropolitan R. Co.*, L. R. 3 Ch. 337.

53. *Bimber v. Calivada Colonization Co.*, 110 Fed. 58. And see, *infra*, *United States Equity Rule No. 94*.

54. *Colo.*—*Boldenweck v. Bullis*, 40 Colo. 253, 90 Pac. 634; *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46. *Ga.* *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337. *Neb.* *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927. *N. J.*—*Colgate v. United States Leather Co.*, 73 N. J. Eq. 72, 67 Atl. 657.

Transfer Not Recorded.—When a transferee is entitled to sue, he may bring suit although the transfer has

the plaintiff should have been a stockholder when the wrong was committed.

It has also been held that a transferee may sue even though he purchased the stock for the express purpose of bringing the action.⁵⁵ If, however, the former owner of the stock was estopped by laches,⁵⁶ or guilty participation in the wrongful acts,⁵⁷ his transferee will also be incompetent to sue.

In the federal courts, the rule as to the right of a transferee to sue is different. By equity rule 94, a plaintiff must have been a stockholder at the time of the transaction complained of, or else the stock must have devolved upon him by operation of law.⁵⁸

Under the influence of this federal rule, some of the state courts hold to the same effect, requiring a plaintiff to be a stockholder at the time the wrongful act took place.⁵⁹

8. Good Faith Required.—A stockholder who brings a suit by corrupt agreement with a rival corporation does not act in good faith, and his bill will be dismissed.⁶⁰

9. Estopped From Suing.—A stockholder who has acquiesced or participated in the wrong complained of, or who willingly shared in the benefits thereof, will generally be estopped from maintaining a suit.⁶¹

not been recorded on the books of the corporation. *Ernst v. Elmira Municipal Imp. Co.*, 24 Misc. 583, 54 N. Y. Supp. 116.

55. *Ia.*—*Carson v. Iowa City Gas-light Co.*, 80 Iowa 638, 45 N. W. 1068. *N. Y.*—*Ramsey v. Gold*, 57 Barb. 398. *Eng.*—*Bloxam v. Metropolitan R. Co.*, L. R. 3 Ch. 337; *Seaton v. Grant*, L. R. 2 Ch. 459; *Hare v. London, etc. R. Co.*, Johns. 722, 70 Eng. Reprint 610. *Can.* *Jones v. Imperial Bank*, 23 Grant Ch. 262.

56. *U. S.*—*Young v. Comrs. of Mahoning Co.*, 53 Fed. 895. *Idaho.*—*Just v. Idaho Canal, etc. Co.*, 16 Idaho 639, 102 Pac. 381. *Neb.*—*Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927.

57. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927.

58. *Dimpfel v. Ohio & M. R. Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. ed. 121; *United, etc. Co. v. La Electric Light Co.*, 68 Fed. 673; *McHenry v. New York, etc. R. R. Co.*, 22 Fed. 130; *Danmeyer v. Coleman*, 11 Fed. 97.

59. *Colo.*—*Boldenwick v. Bullis*, 40 Colo. 253, 90 Pac. 634; *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46. *Ga.*—*Alex-*

ander v. Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337. *Ia.*—*Clark v. American Coal Co.*, 86 Iowa 436, 53 N. W. 291. *Neb.*—*Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927. *Pa.*—*Pennsylvania Works v. Sowers*, 2 Walk. 416.

60. *U. S.*—*Camblos v. Philadelphia, etc. R. R.*, 4 Brewst. 563, 4 Fed. Cas. No. 2,331. *Colo.*—*Beshoar v. Chappell*, 6 Colo. App. 323, 40 Pac. 244. *Ill.* *Watson v. LeGrand, etc. Co.*, 177 Ill. 203, 52 N. E. 317. *N. Y.*—*Belmont v. Erie Ry.*, 52 Barb. 637; *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. 157. *Eng.*—*Filder v. London, etc. Ry.*, 1 Hem. & M. 489, 71 Eng. Reprint 214; *Forrest v. Manchester, etc. R. Co.*, 4 De G., F. & J. 126, 45 Eng. Reprint 1131.

61. *Conn.*—*Terry v. Eagle Lock Co.*, 47 Conn. 141. *Ga.*—*Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337. *Ind.*—*Hill v. Nisbet*, 100 Ind. 341. *Ia.*—*Thompson v. Lambert*, 44 Iowa 239. *Minn.*—*Pinkus v. Minneapolis, etc. Mills*, 65 Minn. 40, 67 N. W. 643. *Mo.*—*Burgess v. St. Louis, etc. R. R. Co.*, 99 Mo. 496, 12 S. W. 1050. *N. J.*—*Knoop v. Bohmrich*, 49 N. J. Eq. 82, 23 Atl. 118. *N. Y.*—*Burden v. Burden*, 159 N. Y. 287, 304, 54

A transferee will also be estopped by the acts of his transferor.⁶²

10. **Laches.**—A stockholder who has slept upon his rights may be barred by his laches from prosecuting a suit.⁶³ Stockholders must act promptly,⁶⁴ and they will not be allowed to file suits after a reasonable time has passed.⁶⁵

11. **As To Creditors.**—A mere creditor who is not a stockholder cannot sue.⁶⁶

12. **Parties.**—a. *Plaintiffs.*—As to plaintiffs in a stockholders' suit, the bill may be brought by one of the stockholders,⁶⁷ or any num-

N. E. 17; *Warren v. Bigelow, etc. Co.*, 74 Hun 304, 26 N. Y. Supp. 649. **Pa.** *Coleman v. Columbia Oil Co.*, 51 Pa. 74. **Tenn.**—*McCampbell v. Fountain Head R. R. Co.*, 111 Tenn. 55, 77 S. W. 1070, 102 Am. St. Rep. 731. **Vt.**—*Davenport v. Crowell*, 79 Vt. 419, 65 Atl. 557. **Eng.**—*Burt v. British Nation Life Assn.*, 4 Deg. & J. 158, 45 Eng. Reprint 62. See however, *Fitzgerald v. Fitzgerald, etc. Co.*, 41 Neb. 374, 59 N. W. 838.

Not Estopped When.—Where, however, the officers of a corporation have abused their trust in the interests of another corporation with which they were also connected, the acquiescence of a stockholder in such wrong will not preclude a recovery in an action brought by him in a proper case for the benefit of such corporation. In such a case, the complaining stockholder is only a nominal plaintiff, since the action is, in reality, between the two corporations which are joined as defendants, the one as the party wronged, the other as the party which profited by the wrong. *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 41 Neb. 374, 59 N. W. 838.

62. See *supra*, p. 710.

63. **U. S.**—*Graham v. Boston, etc. R. Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196; *Illinois Pneumatic Gas Co. v. Berry*, 113 U. S. 322, 5 Sup. Ct. 525, 28 L. ed. 1003; *Allen v. Wilson*, 28 Fed. 667. **Ala.**—*Montgomery, etc. Co. v. Lahey*, 121 Ala. 131, 25 So. 1006. **Ga.**—*Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337. **Mass.**—*Snow v. Boston, etc. Co.*, 158 Mass. 325, 33 N. E. 588; *Royal Bank v. Grand Junction R. Co.*, 125 Mass. 490. **Mich.**—*Keeney v. Converse*, 99 Mich. 316, 58 N. W. 325. **Mo.**—*Loomis v. Missouri, etc. R.*, 165 Mo. 469, 65 S. W. 962; *Kitchen v. St. Louis, etc. R. Co.*, 69 Mo. 224. **N. J.**—*Gifford v.*

N. J. R. Co., 10 N. J. Eq. 171. **N. Y.** *Sheldon, etc. Co. v. Eickemeyer, etc. Co.*, 90 N. Y. 607; *Boardman v. Lake Shore, etc. R. Co.*, 84 N. Y. 157. **Pa.** *Ashhurst's Appeal*, 60 Pa. 290. **B. I.** *Boston, etc. R. Co. v. New York, etc. R. Co.*, 13 B. I. 260. **Tenn.**—*Cullen v. Coal Creek, etc. Co. (Tenn. Ch. App.)*, 42 S. W. 693. **Tex.**—*International, etc. R. Co. v. Bremond*, 53 Tex. 96.

64. **U. S.**—*Dimpfell v. Ohio, etc. R. Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 23 L. ed. 121; *Zabriskie v. Cleveland, etc. R. Co.*, 23 How. 381, 16 L. ed. 488; *Streight v. Junk*, 59 Fed. 321, 8 C. C. A. 137. **Colo.**—*Boldenwick v. Bullis*, 40 Colo. 253, 90 Pac. 634. **Ill.**—*Aurora, etc. Soc. v. Paddock*, 80 Ill. 263. **Ia.** *Thompson v. Lambert*, 44 Iowa 239. **Mass.**—*Peabody v. Flint*, 6 Allen 52. **Mich.**—*McLaughlin v. Detroit, etc. R. Co.*, 8 Mich. 100. **Minn.**—*Stewart v. Erie, etc. Transp. Co.*, 17 Minn. 372. **Mo.**—*Burgess v. St. Louis, etc. R. R. Co.*, 99 Mo. 496, 12 S. W. 1050. **N. J.** *Rabe v. Dunlap*, 51 N. J. Eq. 40, 25 Atl. 959; *Zabriskie v. Hackensack, etc. R. Co.*, 18 N. J. Eq. 178. **N. Y.**—*Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 14 Abb. N. C. 103, 11 Daly 373. **N. C.**—*Moore v. Silver Val. Min. Co.*, 104 N. C. 534, 10 S. E. 679.

65. *Loomis v. Missouri, etc. R.*, 165 Mo. 469, 65 S. W. 962.

66. *Arnold v. Searing*, 73 N. J. Eq. 262, 67 Atl. 831; *Mills v. Northern R. of Buenos Ayres Co.*, L. R. 5 Ch. 621, 628.

Wisconsin.—A Wisconsin statute accords shareholders rights to creditors in some cases. See *Land, etc. Co. v. McIntyre*, 100 Wis. 245, 256, 75 N. W. 964; *Gores v. Day*, 99 Wis. 276, 74 N. W. 787.

67. *Moyle v. Landers (Cal.)*, 21 Pac. 1133; *Hoole v. Great Western R.*, L. R. 3 Ch. App. 262; *Beman v. Rufford*, 1 Sim. (N. S.) 550, 61 Eng. Reprint 212;

ber of the stockholders may unite for the purpose of bringing such action.⁶⁸

The usual and approved form of the suit is for one or more of the stockholders to sue on behalf of all,⁶⁹ and a bill, brought for the plaintiff's behalf alone will be dismissed.⁷⁰

b. *Defendants*.—The corporation is a necessary party defendant,⁷¹ likewise the receiver if one has been appointed,⁷² and, also, the directors if it is desired to hold them personally liable.⁷³

Bagshaw v. Eastern Union R. Co., 19 L. J. (Ch.) 410.

An individual stockholder may maintain a petition in equity against the directors of a corporation for misconduct in office, where the corporation is unable to bring a suit, or where, through fraud or collusion, it neglects to seek redress. *Allen v. Curtis*, 26 Conn. 456.

68. *Moyle v. Landers* (Cal.), 21 Pac. 1133.

69. *U. S.*—*Zabriskie v. Cleveland*, etc. R. Co., 23 How. 381, 395, 16 L. ed. 488. *Cal.*—*Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788. *Ky.*—*Louisville & O., etc. Co. v. Ballard*, 2 Metc. 165. *Eng.*—*Wallworth v. Holt*, 4 Myl. & Cr. 619, 41 Eng. Reprint 238; *Taylor v. Salmon*, 4 Myl. & Cr. 134, 41 Eng. Reprint 53.

70. *Conn.*—*Allen v. Curtis*, 26 Conn. 456, 462. *Ga.*—*McAfee v. Zettler*, 103 Ga. 579, 30 S. E. 268; *Bethune v. Wells*, 94 Ga. 486, 21 S. E. 230. *N. H.*—*Winsor v. Bailey*, 55 N. H. 218. *Eng.*—*White v. Carmarthen & R. Co.*, 1 Hem. & M. 786, 71 Eng. Reprint 344.

Different Classes of Stockholders. Where there are different classes of stockholders, such, for example, as preferred and ordinary stockholders, the suit is not brought by a member of a class for the benefit of all the various stockholders, but only in behalf of the class affected. *Lord v. Governor & Co. of Copper Mines*, 2 Phil. Ch. 740, 751, 41 Eng. Reprint 1129.

Intervenor.—When the suit is brought, any other stockholder may intervene and be made a party plaintiff. *Coltrane v. Templeton*, 106 Fed. 370, 45 C. C. A. 328.

Who May Sue.—As to who may sue, see, in general, *supra*, p. 703.

71. *U. S.*—*Davenport v. Dows*, 18 Wall. 626, 21 L. ed. 938; *Morshead v. Southern Pac. Co.*, 123 Fed. 350; *Eldred v. Am. Palace-Car Co.*, 105 Fed. 457, 44 C. C. A. 554; *Putnam v. Ruch*, 54 Fed. 216, 56 Fed. 416. *Ala.*—*Amer-*

ican, etc. Co. v. Linn, 93 Ala. 610, 7 So. 191. *Colo.*—*Byers v. Rollins*, 13 Colo. 22, 21 Pac. 894. *Ill.*—*Bruschke v. Der Nord, etc. Verein*, 145 Ill. 433, 34 N. E. 417. *Ky.*—*Shawhan v. Zinn*, 79 Ky. 300. *Me.*—*Hersey v. Veazie*, 24 Me. 9, 41 Am. Dec. 364. *Mich.*—*Cicotte v. Anciaux*, 53 Mich. 227, 18 N. W. 793. *Mo.*—*Gruen v. Schaeffer*, 7 Mo. App. 587. *N. J.*—*Barry v. Moeller*, 68 N. J. Eq. 483, 59 Atl. 97. *N. Y.*—*Robinson v. Smith*, 3 Paige 222, 24 Am. Dec. 212; *Allen v. New Jersey, etc. R. R.*, 49 How. Pr. 14. *Ohio.*—*Zinn v. Baxter*, 65 Ohio St. 341, 62 N. E. 327. *S. C.*—*Charleston, etc. Co. v. Sebring*, 5 Rich Eq. 342. *Tenn.*—*Black v. Huggins*, 2 Tenn. Ch. 780. *Va.*—*Mount v. Radford Trust Co.*, 93 Va. 427, 25 S. E. 244. *Wis.*—*Putnam v. Sweet*, 1 Chand. 286, 337, 2 Pin. 302. *Eng.*—*Spokes v. Grosvenor Hotel Co.*, L. R. (1897) 2 Q. B. 124.

Corporation Extinct.—In a stockholders' suit where the bill avers that the corporation has been dissolved, its charter forfeited and all its assets sold except those sought to be secured and administered in this suit, there is no necessity or propriety for making this extinct corporation, a party defendant. "These averments show not only the uselessness but the impossibility of making said company a party." *Crumlish's Admrs. v. Shenandoah Val. R. Co.*, 28 W. Va. 623; *Steenrod's Admr. v. Wheeling, etc. R. Co.*, 27 W. Va. 10.

72. *Holton v. Wallace*, 77 Fed. 61, 23 C. C. A. 71.

73. *U. S.*—*Berwind v. Van Horne*, 104 Fed. 581. *Ala.*—*Tutwiler v. Tuska-loosa, etc. Co.*, 89 Ala. 391, 7 So. 398. *N. Y.*—*Small v. Minneapolis, etc. Co.*, 10 N. Y. Supp. 456. *Eng.*—*Mason v. Harris*, L. R. 11 Ch. D. 97; *Duckett v. Gover*, L. R. 6 Ch. D. 82.

Directors Conspiring.—Where the directors by conspiring together have refused to bring suit, they should be made defendants. *Slattery v. St. Louis,*

Where a part of the stockholders are charged with fraud, they also, or, at least, representatives of the class, should be made defendants;⁷⁴ and where the majority of the stockholders complained of is not numerous, it would not be improper to make them all defendants.⁷⁵

Any other party who would be affected by the decree must also be joined as a defendant, according to the general rules governing parties in equity suits.⁷⁶

13. Pleadings.—*a. Allegations in the Bill or Complaint.*—**(I.) Corporation's Right of Action.**—The bill or complaint should set forth a cause of action in favor of the corporation.⁷⁷

As to the general contents, it should, as a rule, contain such averments as would constitute grounds for equitable relief in case the corporation were actually bringing the suit.⁷⁸

(II.) Plaintiff's Right To Sue.—There should be a clear averment that the complainant is a stockholder,⁷⁹ and in the federal courts, by force of equity rule 94, a stockholder's bill must allege that the plaintiff was a stockholder at the time of the transaction complained of, or that his share has devolved upon him since by operation of law.⁸⁰

The facts that show the stockholder's right to bring the suit must

etc. Co., 91 Mo. 217, 4 S. W. 79, 60 Am. Rep. 245.

Corporation and Directors.—Both the corporation and the directors should be made parties defendant to the bill. Ellsworth, J., in *Allen v. Curtis*, 26 Conn. 456.

74. *Ribon v. Chicago, etc., Co.*, 16 Wall. (U. S.) 446, 21 L. ed. 367.

75. *East Rome Town Co. v. Nagle*, 58 Ga. 474.

76. **U. S.**—*Weidenfeld v. Northern Pac. R. Co.*, 129 Fed. 305, 63 C. C. A. 537. **Md.**—*Booth v. Robinson*, 55 Md. 419. **Mich.**—*Westcott v. Minnesota Min. Co.*, 23 Mich. 145. **N. Y.**—*Meyers v. Scott*, 50 Hun 603, 2 N. Y. Supp. 753; *Langan v. Francklyn*, 29 Abb. N. C. 102, 20 N. Y. Supp. 404.

77. **U. S.**—*De Neufville v. New York & N. R. Co.*, 81 Fed. 10, 26 C. C. A. 306. **Ala.**—*Montgomery Traction Co. v. Harmon*, 140 Ala. 505, 37 So. 371. **Cal.**—*Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111. **N. Y.**—*O'Connor v. Va. Pass., etc. Co.*, 184 N. Y. 46, 76 N. E. 1082; *Weber v. Wallerstein*, 111 App. Div. 693, 97 N. Y. Supp. 846.

78. *Kavanaugh v. Com. Trust Co.*, 181 N. Y. 121, 73 N. E. 562.

The petition should proceed as well for all the stockholders as the petitioner. It should make the directors and corporation parties. It should al-

lege the neglect of the corporation to seek redress, and the demand and refusal of the corporate name. *Allen v. Curtis*, 26 Conn. 456.

79. **U. S.**—*Dannmeyer v. Coleman*, 11 Fed. 97. **Ala.**—*Parson v. Joseph*, 92 Ala. 403, 8 So. 788. **Cal.**—*Moyle v. Landers*, 21 Pac. 1133. **Pa.**—*Holton v. New Castle N. R. Co.*, 8 Pa. Co. Ct. 430. **Australia.**—*Bostock v. Edgar*, 24 Vict. L. R. 677.

80. *Taylor v. Holmes*, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. ed. 179; *Whittemore v. Amoskeag Nat. Bank*, 26 Fed. 819; *McHenry v. New York, etc. R. Co.*, 22 Fed. 130; *Dannmeyer v. Coleman*, 11 Fed. 97.

Rule 94.—Equity rule 94 further provides that the bill must contain an allegation that the suit is not a collusive one to confer on the court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action. See Rule 94; see also, *Quincy v. Steel*, 120 U. S. 241, 7 Sup. Ct. 520, 30 L. ed. 624; *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 327; *Huntington v. Palmer*, 104 U. S. 482, 26 L. ed. 833.

also be alleged.⁸¹ Consequently, the bill must allege that the corporation was formally requested to bring suit,⁸² but that it refused to do so, in disregard of its duty.⁸³ Where, however, as previously stated, the case is one in which no demand is necessary,⁸⁴ the bill or complaint

81. U. S.—Taylor v. Holmes, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. ed. 179; De Neufville v. New York & N. R. Co., 81 Fed. 10, 26 C. C. A. 306; Kessler & Co. v. Ensley Co., 129 Fed. 397. Minn.—Stewart v. Erie, etc. Co., 17 Minn. 372. N. Y.—Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456. Pa.—South-West, etc. Co. v. Fayette, etc. Co., 145 Pa. 13, 23 Atl. 224, 29 W. N. C. 247; Holton v. New Castle N. R. Co., 8 Pa. Co. Ct. 430.

82. U. S.—Taylor v. Holmes, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. ed. 179; Macon, etc. R. Co. v. Shailer, 141 Fed. 585, 72 C. C. A. 631; Worth, etc. Co. v. Bingham, 116 Fed. 785, 54 C. C. A. 119; Holton v. Wallace, 77 Fed. 61, 23 C. C. A. 71; Weidenfeld v. Allegheny, etc. R. Co., 47 Fed. 11. Ala.—Roman v. Woolfolk, 98 Ala. 219, 13 So. 212; Nathan v. Tompkins, 82 Ala. 437, 2 So. 747. Colo.—Morgan v. King, 27 Colo. 539, 63 Pac. 416. Ia.—Dillon v. Lee, 110 Iowa 156, 81 N. W. 245. Kan.—Fry v. Rush, 63 Kan. 429, 65 Pac. 701. N. C.—Moore v. Silver Val. Min. Co., 104 N. C. 534, 10 S. E. 679. Pa.—McCloskey v. Snowden, 212 Pa. 249, 61 Atl. 796, 108 Am. St. Rep. 867; Southwest, etc. Co. v. Fayette, etc. Co., 145 Pa. 13, 23 Atl. 224. Wis.—Doud v. Wisconsin, etc. R. Co., 65 Wis. 108, 25 N. W. 533.

Particularity of Allegation.—A stockholder must allege that "he made an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on its part;" and the cause of failure in these efforts, should be stated with particularity. Foote v. Cunard Min. Co., 17 Fed. 46; Dannmeyer v. Coleman, 11 Fed. 97.

Sufficient Demand.—As to what amounts of sufficient allegations of a demand, see U. S.—Ball v. Rutland R. Co., 93 Fed. 513. Ala.—Memphis, etc. R. R. Co. v. Woods, 88 Ala. 630, 7 So. 107, 16 Am. St. Rep. 81, 7 L. R. A. 605. Mass.—Blair v. Telegram, etc., Co., 172 Mass. 201, 204, 51 N. E. 1080. R. I.—Hazard v. Durant, 11 R. I. 195.

Allegations Must Be Positive.—The allegation as to the demand must be positive, and an allegation that the complainants "repeatedly protested" against the wrongs, is insufficient. Boyd v. Sims, 87 Tenn. 771, 11 S. W. 948. Likewise, an allegation that the plaintiff "has endeavored unsuccessfully by application to the company to secure relief," is not sufficient. Vogeler v. Punch, 205 Mo. 558, 103 S. W. 1001.

83. U. S.—Newby v. Oregon, etc. R. Co., 1 Sawy. 63, 18 Fed. Cas. No. 10,145. Ga.—Ware v. Bazemore, 58 Ga. 316. Ky.—Shawhan v. Zinn, 79 Ky. 300. N. Y.—Flynn v. Brooklyn City R. Co., 158 N. Y. 493, 53 N. E. 520; O'Connor v. Va. Pass., etc. Co., 45 Misc. 228, 92 N. Y. Supp. 161; Kavanaugh v. Com. Trust Co., 45 Misc. 295, 92 N. Y. Supp. 233; House v. Cooper, 16 How. Pr. 292. Pa.—McCloskey v. Snowden, 212 Pa. 249, 61 Atl. 796, 108 Am. St. Rep. 867.

Refusal Must Affirmatively Appear.—"The right of an individual stockholder to act for the corporation is exceptional, and only arises on a clear showing of special circumstances, among which inability or unwillingness of the corporation itself, demand upon the regular corporate management and refusal to act are imperative requisites. And the refusal by the corporate management must appear affirmatively to be a disregard of duty and not an error of judgment; a non-performance of a manifest official obligation amounting to a breach of trust." McCloskey v. Snowden, 212 Pa. 249, 61 Atl. 796, 108 Am. St. Rep. 867; Wolf v. Pennsylvania R. R. Co., 195 Pa. 91, 45 Atl. 936.

Failure To Perform Duty.—A bill in a stockholder's suit must show not only that plaintiff requested the directors to bring suit and the directors' refusal but such stockholder must also show the failure of the managers of its affairs at the time to use their powers and to do their duty in respect thereto. Swope v. Villard, 61 Fed. 417.

84. See p. 707. See also the following cases: U. S.—Barr v. Pittsburgh,

should set forth the reason why no demand was made.⁸⁵

(III.) *Fraud*. — If fraud is the basis of the suit it must be clearly alleged.⁸⁶

(IV.) *Ultra Vires Acts*. — Where an injunction is sought to prevent an *ultra vires* act, sufficient facts must be alleged to show that the unlawful act is actually threatened.⁸⁷

Where, moreover, the object of the suit is to obtain the rescission of an *ultra vires* transaction, the allegations must show in what way the transaction was *ultra vires*.⁸⁸

Return of Consideration. — Where the relief sought is the setting aside of an *ultra vires* transaction, the bill should allege a readiness to return the consideration, if any, or to do such other equity as the circumstances may require.⁸⁹

b. *Demurrer*. — In the absence of necessary positive averments, the bill will be subject to demurrer.⁹⁰

c. *Bill Must Not Be Multifarious*. — The joinder in a stockholder's

etc. Co., 40 Fed. 412. Cal.—Ashton v. Dashaway Assn., 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091. Ill.—Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362.

Ind.—Sheridan, etc. W. v. Marion, etc. Co., 157 Ind. 292, 61 N. E. 666; Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487. Md.—Davis v. Gemmell, 70 Md. 356, 17 Atl. 259. Mont.—Gerry v. Bismark Bank, 19 Mont. 191, 47 Pac. 810. Minn.—Bjorngaard v. Goodhue County Bank, 49 Minn. 483, 52 N. W. 48. Mo.—Loomis v. Missouri, etc. R., 165 Mo. 469, 489, 65 S. W. 962; Hannerty v. Standard Theatre Co., 109 Mo. 297, 19 S. W. 82. Neb.—Ponca Mill Co. v. Mikesell, 55 Neb. 98, 75 N. W. 46. N. Y.—Brinckerhoff v. Bostwick, 88 N. Y. 52; Anderton v. Wolf, 41 Hun 571. S. D.—Loftus v. Farmers', etc., Assn., 8 S. D. 201, 65 N. W. 1076. S. C.—Stahn v. Catawba Mills, 53 S. C. 519, 31 S. E. 498. Tex.—Joy v. Ft. Worth, etc., Co., 24 Tex. Civ. App. 94, 58 S. W. 173. Wis.—Eschweiler v. Stowell, 78 Wis. 316, 47 N. W. 361.

85. U. S.—Berwind v. Canadian Pac. R. Co., 98 Fed. 158; Ziegler v. Lake St., etc. Co., 76 Fed. 662, 22 C. C. A. 465. Ala.—Montgomery Traction Co. v. Harmon, 140 Ala. 505, 37 So. 371; Louisville, etc. R. R. v. Neal, 128 Ala. 149, 29 So. 865. S. C.—Latimer v. Richmond, etc. R. Co., 39 S. C. 44, 17 S. E. 258. Tenn.—State v. U. S. Grant Univ., 115 Tenn. 238, 90 S. W. 294. Wis.—Northern Trust Co. v. Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

86. Russell v. Wakefield Waterworks Co., L. R. 20 Eq. 474.

87. Hutton v. Bancroft & Sons Co., 83 Fed. 17; Quin v. Havenor, 118 Wis. 53, 94 N. W. 642.

88. U. S.—Leo v. Union Pac. R. Co., 19 Fed. 283. Cal.—Applegarth v. McQuiddy, 77 Cal. 408, 19 Pac. 692. N. J. Trimble v. American, etc. Co., 61 N. J. Eq. 340, 48 Atl. 912.

89. Zebbley v. Farmers', etc. Co., 139 N. Y. 461, 34 N. E. 1067.

Agreement Between Corporation and Another. — In an action by a stockholder to set aside an agreement between the corporation and another, it is not necessary to allege an offer to return property by such corporation by means of such agreement; neither need such stockholder allege that he will try to get the property returned by the corporation. All that is required is to show a demand and a refusal by such corporation to begin proceedings. Edwards v. Mercantile Trust Co., 124 Fed. 381.

Verification. — Under the federal rule, every bill brought by one or more stockholders in a corporation against the corporation and other parties founded on rights which may properly be asserted by the corporation, must be verified by oath. Equity Rule 94.

90. Hutton v. Bancroft, etc. Co., 83 Fed. 17; Quin v. Havenor, 118 Wis. 53, 94 N. W. 642.

bill, which is a suit in behalf of all the stockholders, of an individual suit of the plaintiff will render the bill multifarious.⁹¹

Under the procedure of the codes, where two causes of action are thus combined, the plaintiff may be required to state and number them separately.⁹²

14. Costs.—The stockholders who bring the suit are liable *per capita* for the costs of the suit, and not *pro rata* according to their stock.⁹³

Stockholders who conduct a suit to a successful issue are entitled as a rule, to be reimbursed for reasonable attorneys' fees and expenses paid in the suit.⁹⁴

XIX. INSOLVENT CORPORATIONS.—A. INSOLVENCY DOES NOT DISSOLVE.—A corporation is not necessarily dissolved by the mere fact of its insolvency,⁹⁵ even though by reason of such condition

91. U. S.—Metcalf v. Am. School, etc. Co., 108 Fed. 909; Morse v. Bay State Gas Co., 91 Fed. 944; Church v. Citizens St. R. Co., 78 Fed. 526. **N. J.** Edwards v. Nat. Window Glass, etc. Assn. (N. J. Eq.), 58 Atl. 527. **N. Y.** Searles v. Gebbie, 115 App. Div. 778, 101 N. Y. Supp. 199; Stoddard v. Bell & Co., 100 App. Div. 389, 91 N. Y. Supp. 477. **Wis.**—Pietsch v. Krause, 116 Wis. 344, 93 N. W. 9.

Not Multifarious When.—In a stockholder's suit, where the principal object of the bill is to restrain the corporation from disposing of and to compel it to account for certain mortgage-bonds belonging to another corporation, which are in imminent danger of being lost to it; and, as an incident to the primary object, the bill asks that said bonds, when brought within the control of the court, may be duly administered because the corporation to which they belong has been dissolved and passed out of existence, such a bill cannot be regarded as multifarious. **U. S.**—Shields v. Thomas, 18 How. 253, 15 L. ed. 368; Gains v. Chew, 2 How. 619, 11 L. ed. 402. **Va.**—Segar v. Parrish, 20 Gratt. 672. **W. Va.**—Crumlish's Admr. v. Shenandoah Val. R. R. Co., 28 W. Va. 623, 631.

92. Scharf v. Warren-Scharf, etc. Co., 5 App. Div. 439, 39 N. Y. Supp. 197.

93. Edwards v. Bay State Gas Co., 130 Fed. 242; Com. v. New York, etc. Co., 138 Pa. 58, 20 Atl. 951.

94. U. S.—McCourt v. Singers-Bigger, 145 Fed. 103, 76 C. C. A. 73. **Ala.** Decatur Mineral, etc. Co. v. Palm, 113

Ala. 531, 21 So. 315, 59 Am. St. Rep. 140. **Mont.**—Forrester v. Boston, etc. Min. Co., 29 Mont. 397, 74 Pac. 1088, 76 Pac. 211.

Fees How Determined.—In a stockholders' suit, where plaintiffs are entitled to reasonable attorneys' fees, such fees may be fixed by the court as an incident of the litigation and generally not until it has been concluded. The practice may be for the court, upon motion and notice to those concerned, to hear evidence or to refer the matter to the court's commissioner to take and report the evidence. Phillips v. Phillips, 81 Ky. 328; Louisville Bridge Co. v. Dodd, 27 Ky. L. Rep. 454, 85 S. W. 683; Louisville, etc. Sem. v. Botts, 25 Ky. L. Rep. 2140, 80 S. W. 177.

Criterion of Successful Issue.—If stockholders accomplished the purpose for which the suit was instituted, their efforts were successful, however, many intermediate orders or rulings may have been made against them; and reasonable fees might be recovered for the services in the unsuccessful intermediate rulings. Forrester v. Boston, etc. Min. Co., 29 Mont. 397, 74 Pac. 1088, 76 Pac. 211.

95. U. S.—Second Nat. Bank v. New York Silk Mfg. Co., 11 Fed. 532. **Compare** Sprague-Brimmer Mfg. Co. v. Murphy Furnishing Goods Co., 26 Fed. 572. **D. C.**—United States, etc. Co. v. Leiter, 8 Mack. 575. **Ind.**—De Camp v. Alward, 52 Ind. 468. **Mo.**—Ready v. Smith, 170 Mo. 163, 70 S. W. 484; Oxley Stave Co. v. Butler Co., 121 Mo. 614, 26 S. W. 367. **N. H.**—Parsons v.

it is unable to proceed with the purposes of its incorporation.⁹⁶

By force of statute, however, insolvency may be a ground for either voluntary,⁹⁷ or involuntary⁹⁸ dissolution.

B. CAPACITY TO SUE.—The capacity of a corporation to sue is not affected by the mere fact of its insolvency.⁹⁹

C. CAPACITY TO BE SUED.—Likewise, an action may be brought against an insolvent corporation.¹

Eureka Powder Works, 48 N. H. 66. N. J.—*State v. Board of Railroad Comrs.*, 41 N. J. L. 235. N. Y.—*Bradt v. Benedict*, 17 N. Y. 93. Pa.—*In re Worsted Mills*, 9 Montg. Co. L. Rep. 23. Tex.—*Moseby v. Burrow*, 52 Tex. 396. Va.—*Shenandoah Val. R. Co. v. Griffith*, 76 Va. 913.

Property Not Essential.—The possession of property is not essential to the existence of a corporation. Its insolvency cannot, therefore, extinguish its legal existence. 2 Kent's Com., 249; *The Boston Glass Manufactory v. Langdon*, 24 Pick. (Mass.) 49, 35 Am. Dec. 292. And see further, U. S. *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 16 Sup. Ct. 439, 40 L. ed. 595; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54, 26 L. ed. 693. Mo.—*Heatch v. Missouri, K. & T. R. Co.*, 83 Mo. 617. Ohio.—*State v. Merchant*, 37 Ohio St. 251. Wis.—*Stolze v. Manitowoc Terminal Co.*, 100 Wis. 208, 75 N. W. 987.

96. The mere insolvency of the corporation, the sale of the larger portion of its assets, and its inability to proceed with the purposes of its incorporation, would not necessarily work a dissolution. *Ready v. Smith*, 170 Mo. 163, 70 S. W. 484; *Oxley Stave Co. v. Butler County*, 121 Mo. 614, 26 S. W. 367; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279; *State Nat. Bank v. Robidoux*, 57 Mo. 446.

Allegations of Insolvency Not Equivalent to Dissolution.—"The statements in a petition that an incorporated bank has long since ceased to transact business, is insolvent, and has no property or assets of any description out of which the money alleged to be due can be collected by execution or other process of law, are not equivalent to an allegation that the corporation is dissolved." *Valley Bank v. Ladies, etc. Society*, 28 Kan. 423, per Horton, C. J.

97. Under the various statutes, a hopeless insolvency, or a condition where the assets will not afford a reasonable security for those who may deal with the corporation, may be a ground for a voluntary dissolution. See *In re Lenox Corp.*, 167 N. Y. 623, 60 N. E. 1115.

A Wisconsin statute provides that whenever any corporation shall have remained insolvent or shall have neglected or refused to pay and discharge its notes or other evidence of debt, "or shall have suspended its ordinary and lawful business for one whole year, it shall be deemed to have surrendered the rights, privileges and franchises granted or acquired under any law, and shall be adjudged to be dissolved." This does not operate *ipso facto* to dissolve the corporation, but simply declares an efficient cause for adjudging a dissolution in a proper action. *Combes v. Keyes*, 89 Wis. 297, 62 N. W. 89; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335; *Strong v. McCagg*, 55 Wis. 624, 13 N. W. 895.

98. Thus, the Michigan statute authorizes a judgment of dissolution where a corporation remains insolvent for more than one year. *Attorney General v. Grand Rapids, etc., Co.*, 144 Mich. 221, 107 N. W. 1119. And see *State Sav. Assn. v. Kellogg*, 52 Mo. 583; *Denike v. New York & R. Lime, etc. Co.*, 80 N. Y. 599; *Bradt v. Benedict*, 17 N. Y. 93.

99. *Lyman v. Bank of United States*, 12 How. (U. S.) 225, 13 L. ed. 965.

1. *First Nat. Bank of Bethel v. Nat., etc. Bank*, 14 Wall. (U. S.) 383, 20 L. ed. 840; *Second Nat. Bank v. New York Silk Mfg. Co.*, 11 Fed. 532.

Insolvent Corporation May Appeal. *Stolze v. Manitowoc Terminal Co.*, 100 Wis. 208, 75 N. W. 987.

Voluntary Liquidation of Bank. Where a bank went into voluntary liquidation the period for which the bank was chartered not having expired,

D. APPOINTMENT OF RECEIVER.—1. **Effect of.**—The general law of procedure relating to receivers should be consulted elsewhere in this work.² The mere fact, however, that an insolvent corporation is in the hands of a receiver does not, in itself, dissolve a corporation, nor render it incapable of suing³ or being sued.⁴

The appointment of a receiver does not, moreover, abate or bar a pending action, brought by,⁵ or, against the corporation.⁶

While no decree or judgment, after the appointment of a receiver, will constitute a lien,⁷ or operate to disturb the custody of the receiver,⁸ the decree or judgment will, nevertheless, be binding between the parties.⁹

no forfeiture having been suffered and no judgment of dissolution having been rendered against it, the corporation was still in existence. *Wilson v. First State Bank of Jetmore*, 77 Kan. 589, 95 Pac. 404.

Effect of Statute.—Statutes, especially in the case of insolvent banks, may provide that ordinary actions can not be maintained against an insolvent bank in process of liquidation under the provisions of the statutes. See *Argues v. Union Savings Bank*, 133 Cal. 139, 65 Pac. 307. And see, in general the title "**Banks and Banking**," Vol. IV.

2. See the title "**Receivers**."

3. **U. S.**—*Lyman v. Bank of United States*, 12 How. 225, 13 L. ed. 965; *Atlas Ry. Supply Co. v. Lake*, etc. R. Co., 134 Fed. 503; *Johnson v. Southern*, etc. Assn., 99 Fed. 646. **Colo.**—*Steinhauer v. Colmar*, 11 Colo. App. 494, 55 Pac. 291. **Ill.**—*St. Louis*, etc. Co. v. *Sandoval*, etc. Co., 111 Ill. 32; *People v. Barnett*, 91 Ill. 422. **Ind.**—*Hasselman v. Japanese Dev. Co.*, 2 Ind. App. 180, 27 N. E. 318, 28 N. E. 207. **Mont.** *State v. District Court*, etc., 22 Mont. 220, 56 Pac. 219. **N. Y.**—*Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194; *Phoenix Warehousing Co. v. Badger*, 6 Hun 293. **N. C.**—*Pinchback v. Bessemer Min. & Mfg. Co.*, 137 N. C. 171, 49 S. E. 106. **Pa.**—*Com. v. Overholt*, 23 Pa. Super. Ct. 199.

4. **U. S.**—*Northern Pac. R. Co. v. Heffin*, 83 Fed. 93, 27 C. C. A. 460. **Colo.**—*Paddock v. Staley*, 13 Colo. App. 363, 58 Pac. 363. **Ill.**—*Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199, Toledo, etc. R. Co. v. *Beggs*, 85 Ill. 80. **Ia.**—*Weigen v. Council Bluffs Ins. Co.*, 104 Iowa 410, 73 N. W. 862. **Kan.**—*Warner v. Imbeau*, 63 Kan. 415, 65 Pac. 648. **N. J.**—*Taylor v. Gray*, 59 N. J. Eq. 621, 44 Atl. 668. **N. Y.**—*Pringle v.*

Woolworth, 90 N. Y. 502; *Parry v. Am. Opera Co.*, 12 Civ. Proc. 194. **Ohio.** *Monnet v. Columbus*, etc. Ry. Co., 26 Ohio C. C. 469. **Wash.**—*Allen v. Olympia Light & Power Co.*, 13 Wash. 307, 43 Pac. 55.

5. *People v. Barnett*, 91 Ill. 422; *Sigua*, etc. Co. v. *Brown*, 171 N. Y. 488, 64 N. E. 194; *Phoenix Warehousing Co. v. Badger*, 6 Hun (N. Y.) 293.

6. *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199; Toledo, etc. Ry. v. *Beggs*, 85 Ill. 80.

7. **No Lien Acquired by Judgment.**

An insolvent corporation in the hands of a receiver is within the control of the court for the purpose of administering its assets. A creditor who reduces to judgment a claim against such an insolvent corporation acquires no more lien, legal or equitable, on the property of the corporation, than he had before the reduced claim to judgment. *Hollins v. Brierfield*, etc. Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. ed. 864; *Clark v. Bacorn*, 116 Fed. 617, 54 C. C. A. 73; *Mercantile Trust Co. v. Southern*, etc. Co., 86 Fed. 711, 30 C. C. A. 349.

On void appointment of receiver of an insolvent corporation, the corporation is liable to be sued by a creditor and such creditor might garnish the property in the possession of the receiver, even though the property had been placed in the possession of the creditor so suing by the receiver. *Smith v. Ely*, etc. Co., 79 Miss. 266, 30 So. 653.

8. *Monnett v. Columbus*, etc. R. Co., 26 Ohio C. C. 469.

9. *Monnett v. Columbus*, etc. R. Co., 26 Ohio C. C. 469.

2. Intervention by Receiver.—It is entirely within the discretion of the appointing court to permit a receiver to intervene in a pending suit,¹⁰ and a suit against a corporation may continue till final judgment without the intervention of the receiver.¹¹

3: Actions By or Against.—After the appointment of a receiver, actions are, however, as a rule, brought by or against him as receiver,¹² and as a general proposition a receiver may sue in all cases in which the corporation might have sued.¹³

A receiver, however, should obtain permission from the court before commencing a suit,¹⁴ unless the statutes authorize him to bring suits;¹⁵ and unless otherwise provided by statute a receiver cannot be sued without the permission of the court.¹⁶

10. *St. Louis, etc. R. Co. v. Holladay*, 131 Mo. 440, 33 S. W. 49. And see next section.

11. *St. Louis, etc. R. Co. v. Holladay*, 131 Mo. 440, 33 S. W. 49.

12. *U. S.*—*Frankle v. Jackson*, 30 Fed. 398. *Ky.*—*Industrial Mut. Deposit Co.'s Receiver v. Taylor*, 118 Ky. 851, 82 S. W. 574. *Mo.*—*Gill v. Balis*, 72 Mo. 424. *Neb.*—*Williams v. Turner*, 63 Neb. 575, 88 N. W. 668. *N. J.*—*McMaster v. Drew*, 70 N. J. Eq. 6, 62 Atl. 559; *Minchin v. Second Nat. Bank*, 36 N. J. Eq. 436. *N. Y.*—*Hubbell v. Syracuse Iron Works*, 42 Hun 182, 4 N. Y. St. 690; *Nathan v. Whitlock*, 9 Paige 152. *N. C.*—*Gray v. Lewis*, 94 N. C. 392.

Right To Sue Suspended.—The right of the company to sue may be suspended as long as there is an acting receiver. *Davis v. Ladoga Creamery Co.*, 128 Ind. 222, 27 N. E. 494; *Griffin v. Long Island R. Co.*, 102 N. Y. 449, 7 N. E. 735.

Mere Custodian of Property.—It has been held, under the law of Pennsylvania, that a receiver is the mere custodian of the property of the corporation. By virtue of his appointment as receiver no title to letters patent passed from the corporation to him and he has no title upon which to maintain a suit thereon as receiver. *Dick v. Struthers*, 25 Fed. 103.

Cured by Amendment.—Where the action should be brought in the name of a receiver, if it be brought, however, in the name of the corporation, the defect may be cured by amendment. *Philadelphia & Reading Coal & Iron Co. v. Butler*, 181 Mass. 468, 63 N. E. 949.

13. See, in general, the title "**Receivers.**"

14. *Cal.*—*Bishop v. McKillican*, 124 Cal. 321, 57 Pac. 76. *Ga.*—*Screven v. Clark*, 48 Ga. 41. *Ind.*—*Gainey v. Gilson*, 149 Ind. 58, 48 N. E. 633; *Rhodes v. Hilligoss*, 16 Ind. App. 478, 45 N. E. 666. *Neb.*—*Darner v. Gatewood*, 2 Neb. (Unof.) 561, 89 N. W. 603. *N. Y.*—*Chapin v. Thompson*, 4 Hun 779. *Tenn.*—*Simmons v. Taylor*, 106 Tenn. 729, 63 S. W. 1123.

Alleging Authority To Sue.—In some jurisdictions, a receiver must allege that he was authorized by the court to sue. *Darner v. Gatewood*, 2 Neb. (Unof.) 561, 89 N. W. 603. Upon failure to so allege, demurrer will lie. *Rhodes v. Hilligoss*, 16 Ind. App. 478, 45 N. E. 666.

15. See the local statutes. See, also *Ind.*—*Harmon v. Perkins*, 45 Ind. App. 83, 88 N. E. 961. *Md.*—*Hayes v. Brotzman*, 46 Md. 519. *Mich.*—*McBryan v. Universal Elevator Co.*, 130 Mich. 111, 89 N. W. 683, 97 Am. St. Rep. 453.

16. *U. S.*—*Texas, etc. R. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829; *Werner v. Murphy*, 60 Fed. 769; *Kennedy v. I. C. & L. R. Co.*, 3 Fed. 97. *Ala.*—*Montgomery v. Enslen*, 126 Ala. 654, 28 So. 626. *Ga.*—*De Graffenried v. Brunswick, etc. R. R. Co.*, 57 Ga. 22. *Mich.*—*Earle v. Humphrey*, 121 Mich. 518, 80 N. W. 370. *Mo.*—*Smith v. St. Louis, etc. R.*, 151 Mo. 391, 52 S. W. 378. *Ohio.*—*Meara's Admr. v. Holbrook*, 20 Ohio St. 137, 5 Am. Rep. 633. *Va.*—*Melendy v. Barbour*, 78 Va. 544.

Vermont; Negligence of Receiver. Prior to suit against a receiver for negligently constructing a crossing, it

However, a court of equity in appointing a receiver may authorize him to sue in his own name,¹⁷ or the rules of court may authorize him to sue without obtaining special permission.¹⁸

In case a suit brought by or against the corporation is pending, a receiver may intervene and continue the suit in the name of the corporation,¹⁹ or he may be substituted as a party defendant,²⁰ or he may, in a proper case, be joined as a defendant.²¹

4. Foreign Receivers.—A foreign receiver of a foreign corporation will generally be permitted to sue by the doctrine of comity.²²

The appointment, however, of a receiver in a foreign state, of a corporation domiciled there, will not prevent a corporation from suing in its own name in another state.²³

is not necessary to obtain the permission of the court. *Roxbury v. Central Vt. R. R.*, 60 Vt. 121, 14 Atl. 92.

Contempt of Court.—Suits brought, or attachments or executions levied, without first obtaining such permission is contempt of court. **U. S.**—*Mercantile Trust Co. v. Baltimore*, etc. R. Co., 79 Fed. 389; *Kennedy v. I. C. & L. R. Co.*, 3 Fed. 97. **Ga.**—*De Graffenreid v. Brunswick*, etc. R. Co., 57 Ga. 22. **Mich.**—*Citizens' Bank v. Bay Circuit Judge*, 110 Mich. 633, 68 N. W. 649. **N. Y.**—*In re Christian Jenson Co.*, 128 N. Y. 550, 28 N. E. 665. **Va.**—*Melendy v. Barbour*, 78 Va. 544.

Action at Law Distinguished from Suit in Equity.—It has been held, however, that where there is no attempt to interfere with the actual possession of property which a receiver holds under an order of a court of equity, but the attempt is only to obtain a judgment at law on a claim for damages, it is not essential to the jurisdiction of the court of law that leave to prosecute should first be obtained of the court appointing the receiver. *Allen v. The Central R. Co.*, 42 Iowa 683. And see *Little v. Dusenbury*, 46 N. J. L. 614, 50 Am. Rep. 445; *Kinney v. Crocker*, 18 Wis. 74.

Statutory Provisions.—The federal statutes authorize suits against receivers appointed by federal courts, and there are similar statutes in some of the states regulating suits against such officers appointed by state courts. **U. S.**—*Texas*, etc. R. Co. v. *Johnson*, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. ed. 81; *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. ed. 796. **Mo.**—*Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 537, 42 Am. St. Rep. 516. **Ohio.**

Meara's Admr. v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633. See also, the local statutes.

17. *Harland v. Bankers'*, etc. Tel. Co., 33 Fed. 199; *Gill v. Balis*, 72 Mo. 424.

18. *Rockwell v. Merwin*, 45 N. Y. 166.

Party in Interest.—A provision that the party in interest shall sue, authorizes a receiver to sue in his own name. *Gray v. Lewis*, 24 N. C. 392.

19. *Andrews v. Steele City Bank*, 57 Neb. 173, 77 N. W. 342; *United States Vinegar Co. v. Spamer*, 143 N. Y. 676, 38 N. E. 731; *Phoenix Warehousing Co. v. Badger*, 6 Hun 293.

Discretion of the Court.—Where an action has been begun by the corporation before the appointment of a receiver, the court may, in its discretion, permit the receiver to intervene in the action. *St. Louis, C. G. & Ft. S. R. Co. v. Holladay*, 131 Mo. 440, 33 S. W. 49.

20. *Steinhauer v. Colmar*, 11 Colo. App. 494, 55 Pac. 291; *Fuller v. Webster Fire Ins. Co.*, 12 How. Pr. (N. Y.) 293.

21. **Ill.**—*Buda Foundry*, etc. Co. v. *Columbian Celebration Co.*, 55 Ill. App. 381. **Ind.**—*Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290. **N. J.**—*Smith v. Trenton Delaware Falls Co.*, 4 N. J. Eq. 505. **Wash.**—*Flynn v. Furth*, 25 Wash. 105, 64 Pac. 904.

22. **Kan.**—*Winans v. Gibbs*, etc. Co., 48 Kan. 777, 30 Pac. 163. **N. J.**—*Hurd v. Elizabeth*, 41 N. J. L. 1. **Ohio.**—*Bank v. McLeod*, 38 Ohio St. 174.

23. *Winans v. Gibbs*, etc. Co., 48 Kan. 777, 30 Pac. 163.

5. Receivers Appointed by Federal Courts.—By virtue of statute, a federal receiver may be sued in the federal court, or in any state court, without permission of the court,²⁴ and a receiver appointed by a federal court may, regardless of the amount involved, file his actions in the federal court.²⁵

A federal receiver, however, cannot remove a case from a state court to a federal court merely because he was appointed by a federal court.²⁶ He may, however, remove a cause irrespective of diverse citizenship if the amount involved is two thousand dollars or more.²⁷

E. UNPAID SUBSCRIPTIONS.—Unpaid subscriptions to the capital stock of an insolvent corporation are a part of its assets, for the benefit of creditors, and they should be collected in an action for that purpose brought by the receiver,²⁸ or trustee in insolvency.²⁹

If a call has been made prior to the appointment of the receiver, he may sue forthwith,³⁰ but, regularly, the authority of the directors to make a call passes to a receiver,³¹ and a call may be issued by him under order, usually, of the court.³²

A creditor cannot, when the insolvent corporation is in the hands of a receiver maintain an action for unpaid subscriptions.³³ Should

24. *Texas, etc. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829; *Central Trust Co. v. East Tennessee, etc. R. Co.*, 59 Fed. 523; *The St. Nicholas*, 49 Fed. 671; *Central Trust Co. v. St. Louis, etc. R. Co.*, 40 Fed. 426; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766.

25. *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. ed. 67; *Bowman v. Harris*, 95 Fed. 917; *Myers v. Hettinger*, 94 Fed. 370, 37 C. C. A. 369; *Keihl v. South Bend*, 76 Fed. 921, 22 C. C. A. 618.

26. *Gableman v. Peoria R. Co.*, 179 U. S. 335, 21 Sup. Ct. 171, 45 L. ed. 220.

27. *Tompkins v. MacLeod*, 96 Fed. 927.

28. **U. S.**—*Maxwell v. Akin*, 89 Fed. 178. **La.**—*City, etc. Co. v. Phoenix, etc. Concern*, 108 La. 258, 32 So. 469. **Md.**—*Stillman v. Dougherty*, 44 Md. 380. **Me.**—*Hewett v. Adams*, 50 Me. 271. **Minn.**—*Basting v. Ankeny*, 64 Minn. 133, 66 N. W. 266. **Miss.**—*Campbell v. Chapman*, 31 So. 101. **Mo.**—*Berry v. Rood*, 168 Mo. 316, 67 S. W. 644. **Neb.**—*Wyman v. Williams*, 53 Neb. 670, 74 N. W. 48. **N. J.**—*Cumberland Lumb. Co. v. Clinton, etc. Co.*, 57 N. J. Eq. 627, 42 Atl. 585. **N. Y.**—*Dayton v. Borst*, 31 N. Y. 435; *Rankine v. Elliott*, 16 N. Y. 377. **Ohio.**—*Umsted v. Buskirk*, 17 Ohio St. 113. **Tex.**

Showalter v. Laredo Imp. Co., 83 Tex. 162, 18 S. W. 491. **Wash.**—*Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089. **Wis.**—*Coleman v. White*, 14 Wis. 700, 70 Am. Dec. 797.

29. *Gaslight & Banking Co. v. Haynes*, 7 La. Ann. 114.

30. *Wyman v. Williams*, 53 Neb. 670, 74 N. W. 48.

31. *Maxwell v. Akin*, 89 Fed. 178.

32. *Barkalow v. Totten*, 53 N. J. Eq. 573, 32 Atl. 2.

33. **Ga.**—*Branch v. Knapp*, 61 Ga. 614. **Ind.**—*First Nat. Bank v. Dove-tail, etc. Co.*, 143 Ind. 534, 42 N. E. 924; *Voorhees v. Indianapolis, etc. Co.*, 140 Ind. 220, 39 N. E. 738. **La.**—*New Orleans Gaslight Co. v. Bennett*, 6 La. Ann. 456. **Minn.**—*Merchants Nat. Bank v. N. W., etc. Co.*, 48 Minn. 361, 51 N. W. 119. **Mo.**—*Franklin v. Mennown*, 11 Mo. App. 592. **Wash.**—*Wilson v. Book*, 13 Wash. 676, 43 Pac. 939.

Creditor Suing With Consent of Assignee.—A creditor may maintain an action against a stockholder on his statutory liability and also on unpaid subscriptions, even though an assignment had been made by the corporation for the benefit of creditors, this providing the assignee is present and consents to the trying of both issues. *Painesville Nat. Bank v. King Varnish Co.*, 8 Ohio C. C. 563.

the receiver refuse to sue, the creditors may apply for an order compelling him to sue, or may petition for his removal.³⁴ Likewise, when there is an assignment, creditors are not the proper parties to collect the assets, but the assignee.³⁵

Should, however, the assignee neglect or refuse to sue, a creditor may, thereupon, bring an action in his own name,³⁶ and it has been held that creditors may enforce the payment with the consent of the assignee.³⁷

Form of Action.—The remedy for the recovery of unpaid subscriptions due to an insolvent corporation, is, regularly, at law.³⁸ It has been held, however, that creditors, when permitted to sue, may, after exhausting their remedy at law, proceed in equity.³⁹

F. PROCEEDINGS TO ENFORCE OFFICIAL LIABILITY.—An action to enforce the liability of the officers and directors of a corporation for fraudulent or negligent conduct, upon the insolvency of the corporation, as a general rule, should be brought by the receiver,⁴⁰ or in the

Trust Fund Doctrine.—Some cases, however, have held that stock subscriptions are to be regarded, in equity, as a trust fund for the payment of corporate debts, and that it is not the proper course for a receiver to bring an action against a delinquent stockholder, and that he could not maintain one, but that the action may be maintained by a judgment creditor. *Mann v. Pentz*, 3 N. Y. 415; *Alder v. Milwaukee, etc. Mfg. Co.*, 13 Wis. 57.

34. *Links v. Conn. Riv. Banking Co.*, 66 Conn. 277, 33 Atl. 1003.

35. *Lane v. Nickerson*, 99 Ill. 284; *Bouton v. Dement*, 22 Ill. App. 619; *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806.

36. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

37. *Painesville Nat. Bank v. King Varnish Co.*, 8 Ohio C. C. 563.

38. *Ga.*—*Robison v. Carey*, 8 Ga. 527. *Md.*—*Stillman v. Dougherty*, 44 Md. 380. *Minn.*—*Basting v. Ankeny*, 64 Minn. 133, 66 N. W. 266. *N. J.* *Barkalow v. Totten*, 53 N. J. Eq. 573, 32 Atl. 2. *N. Y.*—*Dayton v. Borst*, 31 N. Y. 435. *Wash.*—*Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

A court of equity will not authorize or direct the receiver of a business corporation to sue for and collect unpaid stock subscriptions when it appears that there is no existing creditor who has unsatisfied debt against the corporation, and that the only purpose for which such authority is sought is to provide a fund for meeting obliga-

tions, on the part of the corporation, which it is altogether probable will arise in the future, and at a time when the corporation will have no solvent stockholder. *Tichenor v. Williams, etc. Co.*, 116 Ga. 303, 42 S. E. 505.

39. *U. S.*—*Hollins v. Brierfield, etc. Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113. *Cal.*—*Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158. *N. M.*—*Albright v. Texas, etc. R. Co.*, 8 N. M. 110, 442, 42 Pac. 73, 46 Pac. 448.

40. *Ill.*—*Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530. *La.*—*Raymond v. Palmer*, 35 La. Ann. 276. *Md.*—*Fisher v. Parr*, 92 Md. 245, 48 Atl. 621. *Mass.*—*Parker v. Nickerson*, 137 Mass. 487. *N. J.* *Hayes v. Pierson*, 65 N. J. Eq. 353, 58 Atl. 728, 45 Atl. 1091. *N. Y.*—*Bank of Niagara v. Johnson*, 8 Wend. 645; *Kimball v. Ives*, 30 Hun 568; *Rudd v. Robinson*, 54 Hun 339, 7 N. Y. Supp. 535. *Pa.*—*Miller v. Doyle*, 211 Pa. 59, 60 Atl. 496. *R. I.*—*Hayes v. Kenyon*, 7 R. I. 136.

Suit Barred by Laches.—Where a receiver failed for ten years to institute proceedings against the directors of a building association for their negligence, which caused loss to stockholders and meanwhile death had removed several of the directors and their estates had been wound up; and after such receiver had been discharged and a second receiver appointed, the second receiver immediately brought suit against the surviving executors, it was held that laches barred the suit and

event of an assignment, by the assignee for the benefit of creditors.⁴¹

Thus a receiver may sue to recover dividends paid, after the insolvency of the corporation, to a director;⁴² also to set aside a mortgage of corporate property made by the directors to themselves in order to secure a preference;⁴³ likewise to recover funds misappropriated by the officers or directors.⁴⁴

Receivers may also bring, when necessary, suits against the officers and directors for a discovery and an accounting.⁴⁵

In some jurisdictions, however, the creditors, as being the actual parties interested, may enforce against the officials their liability for misconduct.⁴⁶

Pleading.—To show that there are unpaid claims, a general allegation of insolvency is usually sufficient, in connection with suits for damages against officials for their negligence.⁴⁷

G. STATUTORY LIABILITY OF STOCKHOLDERS.—The statutory liability of stockholders, or their liability over and above their corporate stock, is designed for the protection of creditors, and, as a rule, is not regarded as a corporation asset.⁴⁸ In accordance with this view, the creditors themselves are the proper parties to institute suits to enforce the liability, and a receiver cannot bring the action.⁴⁹ In some juris-

that the bill must be dismissed. *Ex parte Baker*, 67 S. C. 74, 45 S. E. 143.

41. *Walker v. Reister*, 102 U. S. 467, 26 L. ed. 220; *In re Brockway Mfg. Co.*, 89 Me. 121, 35 Atl. 1012, 56 Am. St. Rep. 401.

42. *Davenport v. Lines*, 72 Conn. 118, 44 Atl. 17.

43. *Taylor v. Mitchell*, 80 Minn. 492, 83 N. W. 418.

44. *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. ed. 815; *Mills v. Hendershot*, 70 N. J. Eq. 258, 62 Atl. 542.

45. *Mabon v. Miller*, 81 App. Div. 10, 80 N. Y. Supp. 979.

46. **U. S.**—*Foster v. Abingdon Bank*, 88 Fed. 604; *Mutual Bldg. Fund, etc., Bank v. Bosseix*, 3 Fed. 817. **Cal.**—*Winchester v. Howard*, 136 Cal. 432, 69 Pac. 77, 64 Pac. 692. **Ill.**—*Delano v. Case*, 121 Ill. 247, 12 N. E. 676. **Ky.**—*United Society v. Underwood*, 9 Bush. 609. **Ohio**—*Bartholomew v. Bentley*, 15 Ohio 659. **Pa.**—*Warner v. Hopkins*, 111 Pa. 328, 332, 2 Atl. 83. **Tex.**—*Seale v. Baker*, 70 Tex. 283, 7 S. W. 742. **Va.**—*Marshall v. Farmers', etc. Bank*, 85 Va. 676, 8 S. E. 586. **Wis.**—*Gores v. Field*, 109 Wis. 408, 85 N. W. 411; *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 536.

Statute May Give Action To Creditor.—Where a statute made the officers and directors of a bank directly liable to a depositor for receiving deposits, knowing the bank to be insolvent, and an officer of a bank had indorsed and guaranteed payment of certain notes and the notes were not yet due, an action could not have been brought against the bank till the notes were due; therefore, an action to recover under the statute against the officers could not be maintained until the primary liability of the bank had accrued. *Wichita Nat. Bank v. Weeks*, 5 Kan. App. 694, 49 Pac. 105.

47. *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567.

48. See *supra*, p. 689.

49. **U. S.**—*Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. ed. 380; *Fidelity Trust, etc. Co. v. Archer*, 179 Fed. 32, 103 C. C. A. 16; *Fidelity Ins. Trust, etc. Co. v. Mechanics' Sav. Bank*, 97 Fed. 297, 38 C. C. A. 193, 56 L. R. A. 228. **Md.**—*Colton v. Mayer*, 90 Md. 711, 45 Atl. 874, 78 Am. St. Rep. 456, 47 L. R. A. 617. **N. Y.**—*Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839. **Utah.**—*McLaughlin v. Kimball*, 20 Utah 254, 58 Pac. 685, 77 Am. St. Rep. 908.

dictions, however, the statutes may expressly authorize receivers to enforce the liability.⁵⁰

XX. FOREIGN CORPORATIONS.—A. ACTIONS BY FOREIGN CORPORATIONS.—1. Authority To Sue.—It was at one time the theory that a corporation had no existence outside the jurisdiction of the sovereignty that created it, and consequently could not sue in a foreign state.⁵¹ It is now well settled, however, that a foreign corporation has capacity to sue in the courts of any jurisdiction that extends its comity.⁵²

Although a corporation created by a foreign nation is an alien,⁵³

50. *Waller v. Hamer*, 65 Kan. 168, 69 Pac. 185. And see, *Evans v. Nellis*, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. ed. 173.

51. *Dutch West India Co. v. Van Moses*, 1 Str. 612, 93 Eng. Reprint 733.

52. U. S.—*Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274. Ala. *Lucas v. Bank of Ga.*, 2 Stew. 147. Ill. *Bank of Washtenaw v. Montgomery*, 3 Ill. 422. Ky.—*Pendleton v. Bank of Ky.*, T. B. Mon. 171. Me.—*Savage Mfg. Co. v. Armstrong*, 17 Me. 34, 35 Am. Dec. 227. Mass.—*British American Land Co. v. Ames*, 6 Metc. 391. N. Y.—*Silver Lake Bank v. North*, 4 Johns. Ch. 370. Va.—*Rees v. Conococheague Bank*, 5 Rand. 326, 16 Am. Dec. 755. Eng.—*Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1532, 92 Eng. Reprint 494, 1 Str. 612, 93 Eng. Reprint 733.

In England, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts since the case of *Henriques v. Dutch West India Co.*, decided in 1729 (2 Ld. Raym. 1532, 1 Str. 612). Suit was brought by a Dutch corporation, and it was objected that a foreign corporation could not maintain a suit in an English court. The right of the corporation to sue was sustained, however, both in the King's Bench, and in the House of Lords.

Unless Prohibited by Statute.—By comity between the states, corporations of one state may sue in the courts of another state, just as may a domestic corporation, unless prohibited by legislative enactment. *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20, 82 N. W. 99.

Citizens.—The term "citizen" as used in the federal constitution securing to the "citizens" of each state "all the privileges and immunities of

citizens in the several states." (Art. 4, §2), does not include corporations. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. ed. 552; *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. ed. 432; *Ducat v. Chicago*, 10 Wall. (U. S.) 410, 19 L. ed. 972. The right of a "citizen" of another state to sue and defend in the courts of a state is one of the privileges and immunities comprehended by the constitutional provision cited above, and such a right does not depend upon comity between the states. *Chambers v. Baltimore & Ohio R. Co.*, 207 U. S. 142, 148, 28 Sup. Ct. 34, 52 L. ed. 143. In the case of *International Text-Book Co. v. Gillespie*, 229 Mo. 397, 129 S. W. 922, it would seem, however, that the court had applied this meaning of citizen to a foreign corporation.

Within Exclusive Control of State Court.—Aside from a federal question, whether or not the courts of a state should sustain an action by a foreign corporation upon principles of comity between the states, is a matter within the exclusive jurisdiction of the state court. *Allen v. Alleghany Co.*, 196 U. S. 458, 25 Sup. Ct. 311, 49 L. ed. 551.

53. U. S.—*Terry v. Imperial Fire Ins. Co.*, 3 Dill. 408, 23 Fed. Cas. No. 13,838. N. Y.—*Barrowcliffe v. La Caisse Generale*, 58 How. Pr. 131. Wash.—*State v. Hudson Land Co.*, 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430.

Federal Judiciary Act.—A corporation created by the laws of Great Britain is an alien within the meaning of the federal judiciary act, and when such a corporation is sued by a citizen of the United States in a state court, it may have the suit removed to the federal court. *Terry v. Imperial Fire Ins. Co.*, *supra*. And see § 12, Judiciary Act of 1789.

yet it is familiar doctrine that alien friends may, by comity, sue in the courts of a state to the same extent as citizens.⁵⁴ There is no difference between the case of a citizen and that of an alien friend where his rights are openly violated.⁵⁵

In some states, moreover, the statutes expressly provide that foreign corporations may sue and be sued like domestic corporations.⁵⁶

2. Conditions Precedent.—Since a foreign corporation sues only through comity, that is, by favor rather than by right, the state may require foreign corporations to comply with certain conditions before they are authorized to sue.⁵⁷

Such conditions are frequently met with in connection with the doing of business within the state, and each jurisdiction prescribes the terms or conditions upon which a foreign corporation may do business within its borders.⁵⁸ Some jurisdictions expressly bar such corporations from maintaining suits in their courts unless such conditions are complied with.⁵⁹

54. **U. S.**—The Passenger Cases, 7 How. 283, 12 L. ed. 702; *La Croix v. May*, 15 Fed. 236; *Taylor v. Carpenter*, 2 Woodb. & M., 1, 23 Fed. Cas. No. 13,785. **N. Y.**—*Silver Lake Bank v. North*, 4 Johns. Ch. 370. **Eng.**—*King of Spain v. Hullet*, 1 Cl. & F. 333.

55. *Taylor v. Carpenter*, 3 Story 458, 23 Fed. Cas. No. 13,784.

Alien Enemy.—During public hostilities between two nations, a corporation chartered in one of the belligerent countries would bear towards the other the relation of an alien enemy. See *New York Ins. Co. v. Davis*, 95 U. S. 425, 24 L. ed. 453. See, also, *Conn. Mut. Life Ins. Co. v. Hall* (superior court of Chicago), 7 Am. L. Reg. (U. S.) 606, holding that, during a war, contracts between citizens of the opposing belligerents are completely suspended and cannot be enforced even in a proceeding *in rem*.

56. Consult the various statutes.

May Give Right To Sue Conditionally. See *Portland Co. v. Hall & Grant Const. Co.*, 121 App. Div. 779, 106 N. Y. Supp. 649; *Flynn v. White*, 122 App. Div. 780, 107 N. Y. Supp. 860; *In re Rosenblatt's Estate*, 52 Misc. 659, 103 N. Y. Supp. 1016. And see following paragraph.

57. **Ala.**—*Alabama Western R. Co. v. Talley-Bates Const. Co.*, 162 Ala. 396, 50 So. 341. **Idaho.**—*Katz v. Herrick*, 12 Idaho 1, 86 Pac. 873. **Mass.**—*National Tel., etc. Co. v. Du Bois*, 165 Mass. 117, 42 N. E. 510, 30 L. R. A. 628, 52 Am. St. Rep. 503. **Mich.**—*Hartford, etc. Co. v. Raymond*, 70 Mich. 485,

38 N. W. 474. **Tex.**—*Chapman v. Hallwood, etc. Co.*, 32 Tex. Civ. App. 76, 73 S. W. 969.

58. See the statutes of the respective states.

"Doing Business."—As to what constitutes "doing business," the substantive law must be consulted. It is held, for example, that the taking of orders by a traveling salesman representing a foreign corporation constitutes the doing of business. *Ryerson v. Wayne Circuit Judge*, 114 Mich. 352, 72 N. W. 131.

See on this point the following cases: **Kan.**—*State v. Amer. Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A. N. S. 1041, holding that negotiations with the state school commission resulting in supplying text-books to the schools is not "doing business" in the state. **Mich.**—*Neyens v. Worthington*, 150 Mich. 580, 114 N. W. 404, 18 L. R. A. (N. S.) 142 (and annotation), holding that establishing a permanent agent with authority to look after old customers and to take orders from new ones, is "doing business." **N. Y.** *Penn. Collieries Co. v. McKeever*, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. N. S. 127. **N. D.**—*Sucker State Drill Co. v. Wirtz*, 115 N. W. 844, 18 L. R. A. N. S. 134, annotated. **R. I.**—*Berger v. Pennsylvania R. Co.*, 27 R. I. 583, 65 Atl. 261, 9 L. R. A. N. S. 1214, annotated. **Utah.**—*A. Booth & Co. v. Weigand*, 30 Utah 135, 83 Pac. 734, 10 L. R. A. N. S. 693, annotated.

59. See the statutes of the several states.

All jurisdictions hold, however, that the mere bringing of an action does not constitute "doing business,"⁶⁰ and in the absence of other statutory restrictions a foreign corporation may sue on contracts entered into outside of the jurisdiction.⁶¹

On the other hand, although a foreign corporation is not engaged in business within the state, nevertheless some restriction may be imposed upon its right to sue.⁶² The local statutes may, for example,

California.—Thus it is provided, for example, in California, that "no foreign corporation . . . which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort, until it has complied with this act." Stats. 1901, ch. 93, §1.

New York.—In the state of New York, actions on contracts *made within the state* are forbidden unless prior to the making of such contract the foreign corporation shall have complied with the conditions imposed by statute. New York Gen. Corp. L., §15, amended 1901, ch. 96, and ch. 538 (ch. 23 Consol. Laws).

60. **Ark.**—*Alley v. Bowen-Merrill Co.*, 76 Ark. 4, 88 S. W. 838, 113 Am. St. Rep. 73; *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87. **Alaska.**—*First Nat. Bank of Seattle v. Fish*, 2 Alaska 344. **Idaho.**—*Bonham Nat. Bank of Fairbury v. Grimes Pass Placer Min. Co.*, 18 Idaho 629, 111 Pac. 1078. **Ill.**—*McCarthy v. Alphons Custodis Chimney Const. Co.*, 219 Ill. 616, 76 N. E. 850; *Havens & Geddes Co. v. Diamond*, 93 Ill. App. 557. **Mo.**—*United Shoe Machinery Co. v. Bamlose*, 231 Mo. 508, 132 S. W. 1133. **Utah.**—*Barse Live-Stock Co. v. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. 630. **Wash.**—*Lilly-Brackett Co. v. Sonnemann*, 50 Wash. 487, 97 Pac. 505. **Wis.**—*Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940.

An Isolated Transaction.—The authorities are practically unanimous that a single isolated transaction, commercial or otherwise, between a foreign corporation domiciled in one state and a citizen of another state, is not a doing or carrying on of business by the foreign corporation within the latter state. **U. S.**—*Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. ed. 336. **Colo.**—*Miller v. Williams*, 27 Colo. 34,

59 Pac. 740. **Ia.**—*Ware Cattle Co. v. Anderson*, 107 Iowa 231, 77 N. W. 1026. **Minn.**—*W. H. Lutes Co. v. Wysong*, 100 Minn. 112, 110 N. W. 367. **Mo.**—*Meddis v. Kenney*, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496. **N. J.**—*Delaware & H. Canal Co. v. Mahlenbrock*, 63 N. J. L. 281, 43 Atl. 978. **N. Y.**—*Penn Collieries Co. v. McKeever*, 93 App. Div. 303, 87 N. Y. Supp. 869. **Ore.**—*Commercial Bank v. Sherman*, 28 Ore. 573, 43 Pac. 658, 52 Am. St. Rep. 811. **Pa.**—*Delaware, etc. Co. v. Bethlehem, etc. Co.*, 204 Pa. 22, 53 Atl. 533. **Wash.**—*Keene, etc. Bank v. Lawrence*, 32 Wash. 572, 73 Pac. 680. *Contra.*—*Dundee Mortg. Co. v. Nixon*, 95 Ala. 318, 10 So. 311; *John Deere Plow Co. v. Wyland*, 69 Kan. 255, 76 Pac. 863.

61. **Ala.**—*Ginn v. New England Mortg. Sec. Co.*, 92 Ala. 135, 8 So. 388. **Colo.**—*Kephart v. People*, 28 Colo. 73, 62 Pac. 946. **Ia.**—*Ware Cattle Co. v. Anderson*, 107 Iowa 231, 77 N. W. 1026. **Minn.**—*Mason v. Edward Thompson Co.*, 94 Minn. 472, 103 N. W. 507. **Mo.**—*Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co.*, 221 Mo. 7, 120 S. W. 31. **N. J.**—*Slaytor-Jennings Co. v. Specialty Paper Box Co.*, 69 N. J. L. 214, 54 Atl. 247; *Faxon Co. v. Lovett Co.*, 60 N. J. L. 128, 36 Atl. 692. **N. Y.**—*Great Northern Moulding Co. v. Bone-wur*, 128 App. Div. 831, 113 N. Y. Supp. 60; *American Case & Register Co. v. Griswold*, 68 Misc. 379, 125 N. Y. Supp. 4. **Tex.**—*Texas, etc. Co. v. Davis*, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562. *Contra.*—*Tenn. Packing & Provision Co. v. Fitzgerald*, 140 Ill. App. 430.

62. This restriction may be by statute, as illustrated in the following notes, or it may result from discretionary powers exercised by the courts. Thus, in a Massachusetts case, it was said that the courts of equity in that state were not open to a foreign corporation, as plaintiff, as a matter of strict right, but as matter of comity. See *National Tel. Mfg. Co. v. Dubois*,

prescribe what actions may or may not be brought by foreign corporations,⁶³ and they may also restrict the actions of foreign corporations to causes of actions arising within the state.⁶⁴

3. Failing To Comply With Conditions.—a. *Consideration of Statutes.*—Whether a foreign corporation can sue when it has failed to comply with the local laws, depends upon the language of the statutes and the constructions placed thereon by the court.⁶⁵ In some states the statute expressly prohibits actions until the corporation complies with the law.⁶⁶ When, however, the statute contains no such prohibition the decisions are conflicting.⁶⁷

Many cases hold that a statute forbidding a foreign corporation from doing business without complying with the laws of the state, makes such business illegal and void, and that no action can be maintained by such a corporation to enforce such illegal contracts.⁶⁸ Other

165 Mass. 117, 42 N. E. 510, 52 Am. St. Rep. 503, 30 L. R. A. 628; *Smith v. Insurance Co.*, 14 Allen (Mass.) 336, 339.

No Absolute Right To Sue.—The maintaining of an action by a foreign corporation cannot, in any sense, be claimed as a right. The states are independent, and can open their courts or not to foreigners or foreign corporations. *State ex rel. Baltimore & Ohio Tel. Co. v. Delaware & Atlantic Tel. Co.*, 7 Houst. (Del.) 269, 31 Atl. 714.

As to Federal Courts.—The prohibition, however, placed by a state upon actions by a foreign corporation in its own courts, cannot affect the right of such corporations to sue in a federal court. *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 58 C. C. A. 79.

63. A distinction is sometimes made between actions arising out of contract and actions arising out of tort. Thus, the New York statute provides that no foreign stock corporation shall maintain any action in that state upon contract made in the state unless it shall have procured a certificate. Gen. Corp. L., §15, amended 1901, ch. 96 and ch. 538.

64. U. S.—*Delaware & A. T. & T. Co. v. Pensauken*, 116 Fed. 910. Mass. *Portsmouth Livery Co. v. Watson*, 10 Mass. 91. N. Y.—*Joseph Schlitz Brew. Co. v. Ester*, 86 Hun 22, 33 N. Y. Supp. 143; *Anglo-American Provision Co. v. Davis Provision Co.*, 50 App. Div. 273, 63 N. Y. Supp. 987.

65. *Garratt Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 37 Atl. 948, 7 Am. & Eng. Corp. Cas. (N. S.) 171.

66. *United Lead Co. v. J. W. Reedy*

Elevator Mfg. Co., 222 Ill. 199, 78 N. E. 567; *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1106; *Bradley-Metcalf & Co. v. Armstrong*, 9 S. D. 267, 68 N. W. 733.

67. *Garratt Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 37 Atl. 948, 7 Am. & Eng. Corp. Cas. (N. S.) 171.

68. U. S.—*Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310, 97 C. C. A. 144; *McCanna & Fraser Co. v. Citizen's Trust & Surety Co.*, 74 Fed. 597. Ill.—*Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85. Minn. *Sherman Nursery Co. v. Aughenbaugh*, 93 Minn. 201, 100 N. W. 1101; *Helleman Brew. Co. v. Piemeisl*, 85 Minn. 121, 88 N. W. 441. Ore.—*Bank of British Columbia v. Page*, 6 Ore. 431. Pa. *Lasher v. Stimson*, 145 Pa. 30, 23 Atl. 552. S. D.—*American Copying Co. v. Eureka Bazaar*, 20 S. D. 526, 108 N. W. 15, 9 L. R. A. (N. S.) 1176. Tenn. *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743. Vt.—*Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526.

Foreign Insurance Company.—It is held in Michigan, that where a foreign insurance company has not complied with the laws of the state, it cannot maintain an action upon a policy insuring property in such state. Although the contract was made by mail, in another state, nevertheless the object of the statute is to protect the citizens of the state against irresponsible companies and to prevent insurance by unauthorized companies. The courts of the state are not open to such an offending company, and the doctrine of comity cannot be invoked in its behalf. Sea-

cases hold, however, that where the statute imposes a penalty for non-compliance with the local law, but is silent as to the validity of the corporation's act, the legislature intended the penalty as a sufficient safeguard,⁶⁹ and that the foreign corporation may sue, in such cases, in absence of positive statutory prohibition.⁷⁰

b. *Protection of Property.*—There may be instances, however, where a foreign corporation although barred, in general, from bringing actions on any demand growing out of its business in the state, because of failure to comply with the statutory conditions, may, nevertheless, bring necessary suits for the preservation and protection of its property rights.⁷¹ Thus, it is held that it may sue upon a tort

mans v. Temple Co., 105 Mich. 400, 63 N. W. 408, 55 Am. St. Rep. 457, 28 L. R. A. 430.

69. **U. S.**—*Chattanooga, etc. R. Co. v. Evans*, 66 Fed. 809, 14 C. C. A. 116, 31 U. S. App. 432. **Ala.**—*Cook v. Rome Brick Co.*, 98 Ala. 409, 12 So. 918. **Ark.**—*State Mut., etc. Co. v. Brinkley, etc. Co.*, 61 Ark. 1, 31 S. W. 157; *St. Louis, etc. R. Co. v. Fire Assn.*, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83. **Wash.**—*State v. Superior Court of Pierce County*, 42 Wash. 675, 85 Pac. 669; *Edison General Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 36 Pac. 260, 24 L. R. A. 315. **W. Va.**—*Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925.

Right To Litigate in the Courts.—It is held under some of the statutes that foreign corporations have a right to litigate in the courts of the state, without complying with the constitutional and statutory provisions which regulate their rights to do business there. It is said that the right to sue and be heard is one thing, but the right to have contracts enforced upon trial is another and a quite distinct matter. By exercising the right to sue, the plaintiff does not seek to "transact business," but to enforce alleged rights springing from past business transactions. *Christian v. American, etc. Mortg. Co.*, 89 Ala. 198, 7 So. 427; *Cooper v. Ft. Smith & W. R. Co.*, 23 Okla. 139, 99 Pac. 785.

New York.—The New York statute provides that no foreign corporation shall do business in that state without first having obtained the certificate required by the act, and that no foreign corporation doing business in that state shall maintain any action upon it in that state, unless prior to the making

of such contract it shall have procured such a certificate. It is held, however, that the only penalty in the event of non-compliance is the suspension of the remedy. See *Neuchatel Asphalte Co. v. The Mayor*, 155 N. Y. 373, 49 N. E. 1043. It is also held, in New Jersey, that a contract entered into in New York state by a foreign corporation failing to comply with the law, does not deprive the contract of a suable quality in New Jersey. See *Alleghany Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724.

70. *Utley v. Clark-Gardner Lode-Min. Co.*, 4 Colo. 369.

Whether Assignee Can Sue.—If the corporation is unable to sue, it is held generally that an assignee of the chose in action is likewise unable to maintain the suit. *Kinney v. Reid I. C. Co.*, 57 App. Div. 206, 68 N. Y. Supp. 325; *Texas & P. R. Co. v. Davis* (Tex. Civ. App.), 54 S. W. 381. But see *Lindheim v. Sitt*, 33 Misc. 62, 68 N. Y. Supp. 145.

71. **Ark.**—*Jones v. Southern Cooper-age Co.*, 94 Ark. 621, 127 S. W. 704; *St. Louis, etc. R. Co. v. Fire Assn.*, 60 Ark. 325, 30 S. W. 350. **Colo.**—*Craig v. A. Leschen & Sons Rope Co.*, 38 Colo. 115, 87 Pac. 1143. **Mo.**—*Frick Co. v. Marshall*, 86 Mo. App. 463. **Mont.**—*Uihlein v. Caplice Commercial Co.*, 39 Mont. 327, 102 Pac. 564. **Pa.**—*Julius King Optical Co. v. Royal Ins. Co.*, 24 Pa. Super. 527. **S. D.**—*Pech Mfg. Co. v. Groves*, 6 S. D. 504, 62 N. W. 109. **Tex.**—*Texas Land & Mortg. Co. v. Worsham*, 76 Tex. 556, 13 S. W. 384.

Ceasing To Do Business.—When a foreign corporation makes a contract within a state, such contract is not tainted and rendered unenforceable by the fact that the statute has not been

committed against it in the state,⁷² as, for example, in trespass,⁷³ or in trover,⁷⁴ and may seek to recover its property in replevin.⁷⁵ It may also bring a foreclosure suit,⁷⁶ and an action, arising outside the state, for goods sold and delivered.⁷⁷

c. *Interstate Commerce Suits.*—In the carrying on of interstate commerce, corporations are entitled to the same rights as individuals, and such commerce being exclusively within the control of congress, cannot be molested by state burdens or impediments.⁷⁸ Consequently, a foreign corporation may sue on actions arising from interstate commerce regardless of state laws declaring contracts void unless the requirements of the local statutes have been fulfilled.⁷⁹

complied with. The foreign corporation is precluded, however, from bringing an action by reason of its non-compliance with the law. If it assigns the claim, its own incapacity to sue will not prevent the assignee from suing, and when it ceases to do business in the state it is no longer under the bar of the statute. Its violation of law having ceased, it has the same rights as a litigant as any other foreign corporation which is not carrying on business in the state. Its former disregard of the statute is not a ground for denying it access to the courts. *Boggs v. O. S. Kelly Mfg. Co.*, 76 Kan. 9, 90 Pac. 765; *State v. American Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N. S.) 167.

72. *Ind.*—*United States Exp. Co. v. Lucas*, 36 Ind. 361; *Pittsburg, C., C. & St. L. R. Co. v. German Ins. Co.*, 44 Ind. App. 268, 87 N. E. 995. *Mass.* *Portsmouth Livery Co. v. Watson*, 10 Mass. 91. *N. Y.*—*American Typefounders Co. v. Conner*, 6 Misc. 391, 26 N. Y. Supp. 742.

Foreign Corporation; Injury to Property.—A statute prohibiting a foreign corporation from transacting business in the state until the corporation has complied with its provisions, does not subject its property to wanton destruction for failure to comply with such statute, and despite such non-compliance a corporation may bring an action for malicious injury to its property in such state. *Delaware & A. Tel. & Tel. Co. v. Pensauken Tp.*, 116 Fed. 910.

73. *Fla.*—*Indian River, etc. Co. v. Wooten*, 55 Fla. 745, 46 So. 185. *Idaho.* *War Eagle, etc. Co. v. Dickie*, 14 Idaho 534, 94 Pac. 1034. *Tex.*—*Eskridge v. Louisville Trust Co.*, 29 Tex. Civ. App. 571, 69 S. W. 987.

74. *Portsmouth Livery Co. v. Watson*, 10 Mass. 91.

75. *Mo.*—*United Shoe Machinery Co. v. Ramlose*, 231 Mo. 508, 132 S. W. 1133. *Pa.*—*United States Circle Swing Co. v. Reynolds*, 224 Pa. 577, 73 Atl. 982; *National Cash Register Co. v. Shurber*, 41 Pa. Super. 187.

76. *Kan.*—*Stewart's Estate v. Falkenberg*, 82 Kan. 576, 109 Pac. 170. *N. J.* *Manhattan, etc. Assn. v. Massarelli* (N. J. Eq.), 42 Atl. 284. *Tex.*—*Western Supply & Mfg. Co. v. United States & Mexican Trust Co.*, 41 Tex. Civ. App. 478, 92 S. W. 986. *Wash.* *Brown v. Elwell*, 17 Wash. 442, 49 Pac. 1068.

77. *Ark.*—*A. H. Andrews Co. v. Delight Special School Dist.*, 128 S. W. 361. *Colo.*—*Kindel v. Beck & Pauli, etc. Co.*, 19 Colo. 310, 35 Pac. 538. *Ill.* *Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048. And see following paragraph.

78. *U. S.*—*International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. ed. 678; *Philadelphia, etc. S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. ed. 1200; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. ed. 158; *McBath v. Jones Cotton Co.*, 149 Fed. 383, 79 C. C. A. 203; *Stockton v. Baltimore & N. Y. Co.*, 32 Fed. 9. *Mo.*—*International Text-Book Co. v. Gillespie*, 229 Mo. 397, 129 S. W. 922. *Tex.*—*Texas, etc. R. Co. v. Davis*, 93 Tex. 378, 55 S. W. 562, 54 S. W. 381; *Miller v. Goodman*, 91 Tex. 41, 40 S. W. 718; *Geiser Mfg. Co. v. Gray* (Tex. Civ. App.), 126 S. W. 610.

79. *U. S.*—*International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. ed. 678; *Atlas Engine Works v. Parkinson*, 161 Fed. 223. *Mo.*—*In-*

d. *May Appeal*.—Although a foreign corporation may not be entitled to sue, yet it may appeal from a judgment against it.⁸⁰

4. *Subsequent Compliance With Statute*.—Where a foreign corporation complies with the local law subsequently to the formation of a contract, it is permissible in many jurisdictions to sue thereon.⁸¹

5. *Statutes Not Retroactive*.—Statutes providing for the performance of conditions precedent to the bringing of actions by foreign

ternational Text-Book Co. v. Gillespie, 229 Mo. 397, 129 S. W. 922. **Mont.** Zion Co-operative Merc. Co. v. Mayo, 22 Mont. 100, 55 Pac. 915; McNaughton Co. v. McGirl, 20 Mont. 124, 49 Pac. 851. **Tex.**—Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804; Texas & P. R. Co. v. Davis, 93 Tex. 378, 54 S. W. 381, 55 S. W. 381.

80. Swift & Co. v. Platte, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635.

81. **U. S.**—Simplex Dairy Co. v. Cole, 86 Fed. 739. **Cal.**—Ward Land & Stock Co. v. Mapes, 147 Cal. 747, 82 Pac. 426; Cal. Sav. & L. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525; Black v. Vermont Marble Co., 1 Cal. App. 718, 82 Pac. 1060. **Ind.**—Singer Mfg. Co. v. Effinger, 79 Ind. 264; American Ins. Co. v. Wellman, 69 Ind. 413. **Kan.** Ryan Live Stock & Feeding Co. v. Kelly, 71 Kan. 874, 81 Pac. 470; Hamilton v. Reeves & Co., 69 Kan. 844, 76 Pac. 418. **Mass.**—National Fertilizer Co. v. Fall River, etc. Bank, 196 Mass. 458, 82 N. E. 671, 14 L. R. A. (N. S.) 561; Angur Steel Axle & Gearing Co. v. Whittier, 117 Mass. 451; National Mut., etc. Co. v. Pursell, 10 Allen 231. **N. Y.**—Davis Provision Co. v. Fowler Bros., 163 N. Y. 580, 57 N. E. 1108. **R. I.**—Swift & Co. v. Little, 28 R. I. 108, 65 Atl. 615. **Wash.**—Edison Gen. Elect. Co. v. Can. Pac. Nav. Co., 8 Wash. 370, 36 Pac. 260, 40 Am. St. Rep. 910, 24 L. R. A. 315; Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073.

Contra.—**Ill.**—Erie & Mich. R. & N. Co. v. Central R. Equipment Co., 152 Ill. App. 278. **Minn.**—G. Heilman, etc. Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441. **Mo.**—Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 120 S. W. 31. **Pa.**—Delaware River Quarry & Const. Co. v. Bethlehem & N. Pass. R. Co., 204 Pa. 22, 53 Atl. 533.

Between Service and Answer.—Compliance with the statute between the

service of the complaint and answer is insufficient. Halsey v. Henry Jewett Dramatic Co., 114 App. Div. 420, 93 N. Y. Supp. 1122, reversed on another point, 190 N. Y. 231, 83 N. E. 25.

Under statutes making unauthorized acts criminal it has been held that such action cannot be maintained. See American Copying Co. v. Eureka Bazaar, 20 S. D. 526, 108 N. W. 15, 9 L. R. A. N. S. 1176, where the corporate articles were filed and an agent appointed after commencement of suit upon the contract. This case contains a valuable discussion, as does the annotation in 4 L. R. A. N. S. 688. The decision on this question may be affected by other language in the statute. That such a clause as is referred to at the head of this paragraph does not prevent suit see **Ala.**—Dudley v. Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. Rep. 55. **Ark.**—State Mut. Fire Assn. v. Brinkley Stove, etc. Co., 61 Ark. 1, 31 S. W. 157, 54 Am. St. Rep. 191, 29 L. R. A. 712. **Mo.**—Tri-State Amus. Co. v. Forest Park, etc. Co., 192 Mo. 404, 90 S. W. 1020, 4 L. R. A. 688. **Tenn.**—Cary-Lombard Lumb. Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743. **Utah.**—A. Booth & Co. v. Weigand, 28 Utah 372, 79 Pac. 570. **W. Va.**—Thompson v. Nat. Mut., etc. Assn., 57 W. Va. 551, 50 S. E. 756; Toledo Tie, etc., Co. v. Thomas, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925.

Suit Begun Before Passage of Law.

Where a foreign corporation instituted a suit before the passage of the statute regulating the right of doing business within the state, and during the pendency of the suit, although not till six months after the act became a law, complied with its conditions, it was held that the act complied with, the plaintiff had the right to prosecute the suit until it was finally disposed of in due course of law. Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87.

corporations, do not apply to actions upon contracts entered into prior to the passage of the statute.⁸²

6. Statutes Do Not Affect Federal Courts.—Statutes regulating the right of foreign corporations to sue are in subordination to the constitution of the United States, and do not bar corporations from suing in the federal courts.⁸³

B. ACTIONS AGAINST FOREIGN CORPORATIONS.—1. Theory of No Jurisdiction.—Since a corporation exists only in the state of its creation,⁸⁴ it was at one time held that a corporation could not be "found" outside of such state, or in a foreign state, and consequently could not be served with process and thus brought under the jurisdiction of a foreign tribunal.⁸⁵ Although some courts have refused to accept this conclusion,⁸⁶ yet the objection proved so insuperable

82. Colo.—*Edward Malley Co. v. Londoner*, 41 Cpl. 436, 93 Pac. 488. **Ill.**—*Richardson v. U. S. Mortgage & Trust Co.*, 194 Ill. 259, 62 N. E. 606; *DeWitt v. Flint & Walling Mfg. Co.*, 132 Ill. App. 356. **N. J.**—*Faxon v. Lovett Co.*, 60 N. J. L. 128, 36 Atl. 692. **N. Y.**—*McNamara v. Keene*, 49 Misc. 452, 98 N. Y. Supp. 860. **Okla.**—*Cooper v. Ft. Smith & W. R. Co.*, 23 Okla. 139, 93 Pac. 785. **W. Va.**—*Billmyer Lumb. Co. v. Merchants' Coal Co. of W. Va.*, 66 W. Va. 696, 66 S. E. 1073.

83. Hunt v. New York Cotton Exch., 205 U. S. 322, 27 Sup. Ct. 529, 51 L. ed. 821; *Home Insurance Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 58 C. C. A. 79; *Sloss-Sheffield Steel & Iron Co. v. Tacony Iron Co.*, 133 Fed. 645; *Richmond Cedar Works v. Buckner*, 181 Fed. 424; *United States Light & Heating Co. of Maine v. United States L. & H. Co.*, 181 Fed. 182; *Colby v. Cleaver*, 169 Fed. 206; *Vitagraph Co. of America v. Twentieth Century Optiscope Co.*, 157 Fed. 699; *Groton Bridge & Mfg. Co. v. American Bridge Co.*, 151 Fed. 871; *Robinson v. American Linseed Co.*, 147 Fed. 885. *Contra*, *Cyclone Min. Co. v. Baker Light & Power Co.*, 165 Fed. 996.

84. See p. 576. See also, Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853; *Germania Ins. Co. v. Francis*, 11 Wall. (U. S.) 210, 20 L. ed. 77.

85. U. S.—*Myers v. Dorr*, 13 Blatch. 22, 17 Fed. Cas. No. 9,988; *Hume v. Pittsburg, etc. R. R.*, 8 Bliss 31, 12 Fed. Cas. No. 6,865. **Conn.**—*Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301. **Ga.**—*King v. Sullivan*, 93 Ga. 621, 20 S. E. 76. **Mass.**—*Peckham v. North*

Parish, etc., 16 Pick. 274, 286. **Minn.**—*Sullivan v. LaCross, etc. Co.*, 10 Minn. 386. **N. J.**—*Moulin v. Trenton, etc. Co.*, 24 N. J. L. 222. **N. Y.**—*McQueen v. Middleton Mfg. Co.*, 16 Johns. 5. **Vt.**—*Hall v. Vt. & M. R. R.*, 28 Vt. 401.

New Hampshire.—In an early New Hampshire case it was said that if service can be made, or the corporation appears and submits to the jurisdiction, or if the corporation have property in the state liable to an attachment, a foreign corporation is liable to be sued in a state. *Libbey v. Hodgdon*, 9 N. H. 394.

The Doctrine Inconvenient and Unjust.—"Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the State by which it was chartered. . . . This doctrine was the cause of much inconvenience, and often of manifest injustice. . . . To meet and obviate this inconvenience and injustice the legislatures of several states interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation." Mr. Justice Field, in *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222.

86. Miss.—*New Orleans, etc. Co. v. Wallace*, 50 Miss. 244. **Mo.**—*St. Louis,*

to other courts that they persistently declined to take jurisdiction of suits against foreign corporations, until such jurisdiction was expressly conferred by the statutes of the state.⁸⁷

2. Jurisdiction by Consent.—Although a corporation cannot change its legal home, yet it may do business away from home, and may "consent" to be found in such foreign state for the purpose of being sued.⁸⁸

Further, a corporation may do business in a foreign state only with such state's consent and the state may as a condition to such consent impose upon the corporation the liability of being sued.⁸⁹ This condition may be expressly stated in the statute,⁹⁰ or it may be implied,⁹¹ and a foreign corporation that engages in such business will be presumed to have consented to such liability.⁹²

Consequently, it is now everywhere agreed that suits *in personam* may be brought against a foreign corporation doing business within the state of the forum, by service of process on its officers or agents within the jurisdiction.⁹³

etc. Co. v. Cohen, 9 Mo. 421. N. Y. New York, etc. Co. v. New Jersey Oil Co., 3 Duer 648. Vt.—Day v. Essex County Bank, 13 Vt. 97.

87. U. S.—Boston, etc. Co. v. Electric Gas, etc. Co., 23 Fed. 838. Mass. Desper v. Continental, etc. Co., 137 Mass. 252; Larkin v. Wilson, 103 Mass. 120; Danforth v. Penny, 3 Met. 564; Gold v. Housatonic R. R., 1 Gray 424. N. Y.—Robinson v. Oceanic, etc. Co., 112 N. Y. 315, 19 N. E. 625.

88. U. S.—Baltimore & O. R. v. Koontz, 104 U. S. 5, 11, 26 L. ed. 643; *Ex parte* Schollenberger, 96 U. S. 369, 24 L. ed. 853. Conn.—Middlebrooks v. Springfield, etc. Co., 14 Conn. 301. Mass.—Peckham v. North Parish, 16 Pick. 274. N. Y.—Hann v. Barnegat, etc. Co., 7 Civ. Proc. 222; McQueen v. Middleton Mfg. Co., 16 Johns. 5. N. J. Moulin v. Trenton, etc. Co., 24 N. J. L. 222.

89. U. S.—Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451. Ill. Fireman's Ins. Co. v. Thompson, 155 Ill. 204, 40 N. E. 488. Mass.—Reyer v. Odd Fellows, etc., 157 Mass. 367, 32 N. E. 469, 34 Am. St. Rep. 288.

90. Quade v. New York, etc. R. R., 39 N. Y. St. 157, 14 N. Y. Supp. 875.

91. Barrow S. S. Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964; North Missouri R. Co. v. Akers, 4 Kan. 388, 96 Am. Dec. 183.

92. U. S.—Smith v. Empire, etc. Co., 127 Fed. 462. Ala.—Western Union T.

Co. v. Pleasants, 46 Ala. 641. Ga. Alabama, etc. R. R. v. Fulghum, 87 Ga. 263, 13 S. E. 649; City Fire Ins. Co. v. Carrugi, 41 Ga. 660. La.—Milwaukee T. Co. v. Germania Ins. Co., 106 La. 669, 31 So. 298. N. J.—National, etc. Co. v. Brandenburg, 40 N. J. L. 112. Utah.—Walker v. Continental Ins. Co., 2 Utah 331.

93. U. S.—Barrow S. S. Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964. Kan.—North Missouri R. v. Akers, 4 Kan. 388. N. H.—March v. Eastern Railroad Co., 40 N. H. 548, 579. N. J.—Moulin v. Trenton Ins. Co., 25 N. J. L. 57. Neb.—Council Bluffs Co. v. Omaha Tinware Mfg. Co., 49 Neb. 537, 68 N. W. 929. Pa.—Bushel v. Commonwealth Ins. Co., 15 Serg. & R. 173. Vt.—Day v. Essex County Bank, 13 Vt. 97. Eng.—Newby v. Von Oppen, L. R. 7 Q. B. 293; Haggin v. Comptoir d'Escompte de Paris, 23 Q. B. D. 519.

Ground of Jurisdiction.—"Suits by or against foreign corporations are not maintained on the theory that the corporation litigant is present in person, or that the corporate entity attends its officers in their migrations from one state to another, or that it is itself present wherever its property may be, or its business may be transacted. The jurisdiction, as I understand, rests upon the ground that as a corporation must act by agents, it may, through its agents, subject itself to the jurisdiction of a foreign tribunal." Judge

Ceasing To Do Business.—It has been held in some cases that where a corporation ceases to do business within the state, and withdraws all its agents therefrom, it can no longer be sued, under the theory that it has revoked its consent.⁹⁴

To meet such an objection, the statutes of some states require, as a condition precedent to the transaction of business within the state, that a foreign corporation shall designate some state official to accept service for it.⁹⁵

3. Not Doing Business in State.—A foreign corporation, however, which does not engage in business within the state cannot be sued *in personam*, since in such a case there is no way by which the state can get jurisdiction.⁹⁶

Andrews in *Plimpton v. Bigelow*, 93 N. Y. 592.

Three Prerequisites of Federal Jurisdiction.—"In the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the state in which the court is held, viz: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign state or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition—express or implied, of doing business in the state. When the local law, expressly or by comity, permits foreign corporations to do business in the state; when it also provides for suit against them in a reasonable and proper manner, and within the just limits of the state's power and authority; and when a foreign corporation thereafter enters the state, and transacts its corporate business by means of resident agents coming within the terms of the local statute—it may be *found*, and is liable to suit there in either state or federal courts, by service of process on such agent." *United States v. Am. Bell Tel. Co.*, 29 Fed. 17, *citing* *New England Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. ed. 379; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Railroad Co. v. Harris*, 12 Wall. 65;

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; *Boston Electric Co. v. Electric Gas-Lighting Co.*, 23 Fed. 838.

94. U. S.—*Conley v. Mathieson, etc. Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. ed. 1113; *Geer v. Mathieson, etc. Works*, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. ed. 1122; *Cady v. Associated Colonies*, 119 Fed. 420; *Friedman v. Empire L. I. Co.*, 101 Fed. 535. **Idaho.** *Thum v. Pyke*, 6 Idaho 359, 55 Pac. 864. **Ia.**—*Winney v. Sandwich Mfg. Co.*, 50 N. W. 565. And see *infra*, p. 737.

95. *Mutual R. F. L. Assn. v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. ed. 987. See *infra*, p. 737.

96. U. S.—*Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222; *Earle v. Chesapeake & O. R.*, 127 Fed. 235; *Boardman v. S. S. McClure Co.*, 123 Fed. 614; *Doe v. Springfield R. & M. Co.*, 104 Fed. 684, 44 C. C. A. 128; *Reifsnider v. Am. I. P. Co.*, 45 Fed. 433. **Ark.**—*Crane v. Hibbard*, 66 Ark. 282, 50 S. W. 503. **Cal.**—*Eureka Merc. Co. v. Cal. Ins. Co.*, 130 Cal. 153, 62 Pac. 393. **D. C.**—*Lathrop v. Union Pac. R. R.*, 7 D. C. 111. **Ga.**—*King v. Sullivan*, 93 Ga. 621, 20 S. E. 76. **Ia.**—*Greaves v. Posner*, 111 Iowa 651, 82 N. W. 1022. **Kan.**—*Watkins L. M. Co. v. Elliott*, 62 Kan. 291, 62 Pac. 1004, 84 Am. St. Rep. 385. **Md.**—*Crook v. Girard Iron Co.*, 87 Md. 138, 39 Atl. 94, 67 Am. St. Rep. 325. **Mo.** *Zelnicker Supply Co. v. Mississippi C. O. Co.*, 103 Mo. App. 94, 77 S. W. 321. **N. J.**—*Camden R. M. Co. v. Swede Iron Co.*, 32 N. J. L. 15. **S. C.**—*Tillinghast v. Boston, etc. Co.*, 38 S. C. 319, 17 S. E. 33. **Tex.**—*Bradley v. Bur-*

Proceedings *in rem*, however, may be conducted against any property the corporation may have within the state.⁹⁷

4. Doing Business Without Compliance With the Law.—If a foreign corporation does business within the state without previously complying with the law authorizing it to transact business, it cannot take advantage of its wrong and avoid an action against it.⁹⁸

A statute, however, which prohibits merely the maintaining of an action by a foreign corporation, does not forbid the corporation to defend an action.⁹⁹

5. Liable to What Actions.—As a general rule, a foreign corporation may be sued upon all causes of actions, the same as a domestic corporation.¹ In some jurisdictions, however, the cause of action must have arisen within the state.²

nett (Tex. Civ. App.), 40 S. W. 170. Wis.—Northwestern Iron Co. v. Central Trust Co., 90 Wis. 570, 63 N. W. 752, 64 N. W. 323.

97. Ga.—Peo. Nat. Bank, etc. v. Cleveland, 117 Ga. 908, 44 S. E. 20. Md.—Hodgson v. So. Bldg. & Loan Assn., 91 Md. 439, 46 Atl. 971. Minn.—Strom v. Montana Cent. R. Co., 81 Minn. 346, 84 N. W. 46. N. Y.—Miller v. Jones, 67 Hun 281, 22 N. Y. Supp. 86. S. C.—Chitty v. Pennsylvania R. Co., 62 S. C. 526, 40 S. E. 944. Tex.—Am. B. & L. Assn. v. Matthews, 13 Tex. Civ. App. 425, 35 S. W. 690.

Incorporeal Rights.—Proceedings *in rem* are not usually held maintainable to reach incorporeal rights of a foreign corporation. Non-Magnetic Watch Co. v. Assn. Horlogere, 44 Fed. 6.

Mr. Justice Story, in the case of *Clarke v. New Jersey Steam Nav. Co.*, 1 Story 531, 5 Fed. Cas. No. 2,859, remarked: "If a foreign corporation may sue, it may also be sued in another jurisdiction, at least to the extent of subjecting its property, found within the jurisdiction, to the process and decrees of the courts thereof, upon the acknowledged principle, that all persons and all property found within the territorial limits of any sovereignty, are subject to its authority and laws. . . . Upon the whole, I find no sufficient authority upon principles of general law, or maritime law, or admiralty law, to maintain the distinction contended for between the cases of an attachment of the property of a foreign corporation, and that of a private person, so far as the process of the admiralty is concerned."

98. U. S.—Funk v. Anglo-Amer. Ins.

Co., 27 Fed. 336; *Moch v. Va., etc. Ins. Co.*, 10 Fed. 696; *Ehrman v. Teutonia Ins. Co.*, 1 McCr. 123, 1 Fed. 471. Alaska.—Am., etc. Co. v. Giant Powder Co., 1 Alaska 664. Ark.—Mason's, etc. Assn. v. Riley, 60 Ark. 578, 31 S. W. 148. Cal.—Thomas v. Placerville, etc. Co., 65 Cal. 600, 4 Pac. 641. Kan.—St. Louis, etc. R. v. De Ford, 38 Kan. 299, 16 Pac. 442. Pa.—Hagerman v. Empire Slate Co., 97 Pa. 534.

See, further, p. 737, *et seq.*

99. U. S.—Blodgett v. Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79, a case arising in Kansas. Cal.—American De F. Wireless, etc. Co. v. Superior Court, 153 Cal. 533, 96 Pac. 15, 17 L. R. A. N. S. 1117. Kan.—Swift & Co. v. Platte, 68 Kan. 1, 72 Pac. 271. And see *Turcott v. Yazoo, etc. R. Co.*, 101 Tenn. 102, 45 S. W. 1067, 70 Am. St. Rep. 661, 40 L. R. A. 768; *Home Forum v. Jones*, 20 Tex. Civ. App. 68, 48 S. W. 219.

1. U. S.—Barrow S. S. Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964; *Smith v. Empire, etc. Co.*, 127 Fed. 462. Miss.—New Orleans, etc. R. v. Wallace, 50 Miss. 244. Neb.—Insurance Co. of North America v. McLimans, 28 Neb. 653, 44 N. W. 991. N. Y.—Flynn v. Central R. R., 51 N. Y. St. 84, 22 N. Y. Supp. 383. Pa.—Knight v. West Jersey R. R., 108 Pa. 250, 56 Am. St. Rep. 200. W. Va.—Humphreys v. Newport News, etc. Co., 33 W. Va. 135, 10 S. E. 39.

2. Ala.—Central R. R., etc. Co. v. Carr, 76 Ala. 388, 52 Am. Rep. 339. Ga.—Bawknicht v. Liverpool, etc. Co., 55 Ga. 194. Mich.—Grand Trunk R. Co. v. Hosmer, 106 Mich. 248, 64 N. W. 17. Md.—Cromwell v. Royal, etc. Co.,

6. Limitation of Actions.—Many cases hold that a foreign corporation being a "non-resident" may not set up the statute of limitations.³

On the other hand, it is held that where a foreign corporation has been subject to service within the jurisdiction, it may plead the statute in bar.⁴

7. Venue.—*a. Constitutional or Statutory Provisions.*—The venue of actions against foreign corporations is controlled either by constitutional,⁵ or statutory provisions.⁶

49 Md. 366, 33 Am. Rep. 258. **N. Y.** Palmer v. Phoenix, etc. Co., 84 N. Y. 63; Watson v. Boston, etc. Co., 75 Hun 115, 25 N. Y. Supp. 1101. **N. C.**—Bryan v. Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938. **S. C.**—Correll v. Georgia, etc. Co., 32 S. C. 319, 11 S. E. 192. **Vt.**—Sawyer v. North American L. Ins. Co., 46 Vt. 697.

Nonresident Plaintiff.—An action by a non-resident plaintiff against a foreign corporation cannot be maintained in some states unless the court have jurisdiction of the subject-matter of the action. "Jurisdiction of the action cannot be conferred upon the court by any consent or stipulation of the parties." Robinson v. Oceanic S. N. Co., 112 N. Y. 315, 19 N. E. 625.

New York.—By the provisions of the New York Code of Civil Procedure an action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action. An action, however, by a non-resident or by another foreign corporation can be maintained against a foreign corporation only in case (a) of the recovery of damages for breach of contract made within the state, or relating to property situated within the state, at the time of the making thereof; (b) to recover real or personal property within the state; (c) where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state. N. Y. Code Civ. Proc., §1780.

3. U. S.—Tioga R. R. v. Blossburg & C. R. R., 20 Wall 137, 22 L. ed. 331; Kirby v. Lake Shore, etc. R. R., 14 Fed. 261; Blossburg, etc. Co. v. Tioga, etc. Co., 5 Blatchf. 387, 3 Fed. Cas. No. 1,563. **Ark.**—Bank of Tenn. v. Armstrong, 12 Ark. 602. **Kan.**—North Mo. R. R. v. Akers, 4 Kan. 453, 96 Am.

Dec. 183. **Nev.**—State v. Cent. Pac. R. Co., 10 Nev. 47; Robinson v. Imperial S. M. Co., 5 Nev. 44. **N. Y.** Boardman v. Lake Shore, etc. R., 84 N. Y. 157; Olcott v. Tioga R. R., 20 N. Y. 210, 75 Am. Dec. 393; Robeson v. Central R. Co., 76 Hun 444, 28 N. Y. Supp. 104. **Okla.**—Johnson, etc. Co. v. Cornell, 4 Okla. 412, 46 Pac. 860. **Wis.**—State v. National Acc. Soc., 103 Wis. 208, 79 N. W. 220; Larson v. Aultman, etc. Co., 86 Wis. 281, 56 N. W. 915, 39 Am. St. Rep. 893.

In New York when an action is brought against a foreign corporation for causing death, the special statute of limitations may be pleaded in bar. Londrigan v. New York, etc. R. Co., 12 Abb. N. C. (N. Y.) 273, 5 Civ. Proc. 76.

4. U. S.—Taylor v. Union Pacific R., 123 Fed. 155; McCabe v. Illinois Cent. R. R., 13 Fed. 827. **Ala.**—Huss v. Cent. R. R., etc. Co., 66 Ala. 472. **Cal.**—Lawrence v. Ballou, 50 Cal. 258. **Ill.**—Pa. Co. v. Sloan, 1 Ill. App. 364. **Ia.**—Wall v. Chicago & N. W. R., 69 Iowa 498, 29 N. W. 427. **Mont.**—King v. Natl., etc. Co., 4 Mont. 1, 1 Pac. 727. **Neb.** O'Connor v. Aetna L. I. Co., 67 Neb. 122, 99 N. W. 845, 93 N. W. 137. **N. Y.** Faulkner v. Del. & R., etc. Co., 1 Denio 441. **Tenn.**—Turcott v. Yazoo, etc. R., 101 Tenn. 102, 45 S. W. 1067. **Tex.** Thompson v. Tex., etc. Co. (Tex. Civ. App.), 24 S. W. 856. **Va.**—Conn., etc. Co. v. Duerson, 28 Gratt. 630. **W. Va.** Abell v. Penn Mut., etc. Co., 18 W. Va. 400.

5. Alabama.—Thus, in Alabama, the constitution provides, §232, that the venue may be in "any county." See Sullivan v. Sullivan Timber Co., 103 Ala. 371, 15 So. 941, 25 L. R. A. 543.

6. Consult the various statutes.

Federal Courts.—In a suit arising under the laws of the United States, as, for example, under the Interstate

In some jurisdictions, such a corporation may be sued in any county in which it does business.⁷ In other jurisdictions, suits may be brought in any county within the state;⁸ in the county where its principal office is;⁹ or in any county where it has an agent.¹⁰

Commerce Act, suit can be brought only in the district and state in which a defendant corporation is incorporated. The federal statute provides that no civil suit shall be brought before a District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. Consequently where a Tennessee corporation files, in a federal court in Tennessee a bill to restrain an Illinois railroad corporation from putting into effect certain increased freight rates, a plea to the jurisdiction must be sustained, since the suit can be brought only in the state in which the defendant was incorporated. *Memphis Cotton Oil Co. v. Illinois Cent. R. Co.*, 164 Fed. 290.

7. **U. S.**—*Estill v. New York*, etc. Co., 41 Fed. 849; *Angerhoefer v. Bradstreet Co.*, 22 Fed. 305. **Ala.**—*Sullivan v. Sullivan Timber Co.*, 103 Ala. 371, 15 So. 941, 25 L. R. A. 543. **La.**—*State v. Western Union Tel. Co.*, 48 La. Ann. 81, 18 So. 910.

Garnishment.—In some states the venue of garnishments proceedings is of narrower limits than the venue of actions in general. Thus, in Georgia, a foreign corporation, the same as a domestic corporation, is not subject to garnishment except in the county where suit can be brought on the debt it is charged to owe. *Western R. R. v. Thornton*, 60 Ga. 300; *Clark v. Chapman*, 45 Ga. 486; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 671.

"Doing Business."—Where the venue is placed in any county in which the corporation is "doing business," it is important, at times, to determine what constitutes the doing of business. Thus, in an Alabama case it is held, under a constitutional provision fixing the venue of suits in any county where a foreign corporation does business, that the words "does business" do not include

the appointing of agents by a railroad company to solicit traffic in a county where the railroad has no part of its line. *Abraham Bros. v. Southern Ry. Co.*, 149 Ala. 547, 42 So. 837. See *supra*, p. 725.

8. *Thomas v. Placerville, etc. Min. Co.*, 65 Cal. 600, 4 Pac. 641; *Bishop v. Silver Lake Min. Co.*, 62 N. H. 455.

9. **Idaho.**—*Easley v. New Zealand Ins. Co.*, 4 Idaho 205, 38 Pac. 405. **Ohio.**—*Swan v. Mansfield, etc. R. Co.*, 4 Ohio Dec. 71. **W. Va.**—*Humphreys v. Newport News, etc. Co.*, 33 W. Va. 135, 10 S. E. 39.

10. **Mo.**—*Roberts v. State Ins. Co.*, 26 Mo. App. 92. **N. Y.**—*People v. Justices*, 33 N. Y. St. 147, 11 N. Y. Supp. 773. **Pa.**—*Gardner Shingle Co. v. Nicla*, 25 Pa. Co. Ct. 303. **Tex.**—*St. Louis, etc. Ry. Co. v. Whitley*, 77 Tex. 126, 13 S. W. 853; *Bradstreet Co. v. Gill*, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405; *Mut. Life Ins. Co. v. Nichols* (Tex. Civ. App.), 24 S. W. 910.

"Legal Residence."—A foreign corporation has a legal residence in any county in which it operates or exercises corporate powers or privileges. The keeping of an office or agent for the transaction of their usual and customary business is such an exercise of corporate powers and privileges. **Ill.** *Bristol v. Chicago, etc. R. Co.*, 15 Ill. 436. **Ia.**—*Baldwin v. Mississippi & M. R. R. Co.*, 5 Iowa 518. **Me.**—*Harding v. Chicago, etc. R. R. Co.*, 80 Mo. 659; *McNichol v. United States M. R. Agency*, 74 Mo. 457.

Georgia.—A foreign corporation doing business in this state may for purposes of suit be treated as a resident of this state and of any county therein in which it has an agent upon whom service can be perfected. *Williams v. East Tennessee R. Co.*, 90 Ga. 519, 16 S. E. 303; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660. A foreign corporation, however, with agents in the state upon whom service can be perfected cannot be subjected to suit in a county in which there is no such agent. *Saffold*

b. *Change of Venue.*—In suits by or against a foreign corporation, the statutes may provide for a change of venue upon a proper showing of the existence of the statutory grounds for such a change.¹¹

8. *Process.*—a. *Regulated by Statute.*—The service of process upon foreign corporations is regulated by the statutes of the various states, and such statutes must be strictly followed in order to confer jurisdiction.¹²

Moreover, a statute authorizing service upon "any officer, member, clerk, or agent" of a foreign corporation, means a corporation doing business within the state, and does not apply to a corporation whose officer is accidentally within the jurisdiction of such state.¹³

b. *Who May Be Served.*—The statutes, generally, require that as a prerequisite to the doing business by a foreign corporation, such corporation shall designate some person upon whom service of process may be made.¹⁴ Accordingly, when, in compliance with such a

v. Scottish American Co., 98 Ga. 787, 27 S. E. 208.

11. *Thomas v. Placerville, etc. Co.*, 65 Cal. 600, 4 Pac. 641; *International Life Assur. Co. v. Sweetland*, 14 Abb. Pr. (N. Y.) 240; *New Haven Clock Co. v. Hubbard*, 61 Hun 625, 16 N. Y. Supp. 125; *Gorman v. South Boston Iron Co.*, 32 Hun (N. Y.) 71.

12. *U. S.*—*New River Mineral Co. v. Seeley*, 120 Fed. 193, 56 C. C. A. 505; *Sobrio v. Manhattan Life Ins. Co.*, 72 Fed. 566; *Farmer v. Nat. Life Assn.*, 50 Fed. 829. *Ark.*—*So. B. & L. Assn. v. Hallum*, 59 Ark. 583, 28 S. W. 420; *Union, etc. Co. v. Craddock*, 59 Ark. 593, 28 S. W. 424. *Colo.*—*Venner v. Denver, etc. Co.*, 15 Colo. App. 495, 63 Pac. 1061. *Md.*—*Wagner v. Shank*, 59 Md. 313. *Nev.*—*Loukey v. Keyes, etc. Co.*, 21 Nev. 312, 31 Pac. 57. *N. Y.* *Coolidge v. American Realty Co.*, 92 App. Div. 622, 87 N. Y. Supp. 1130.

13. *U. S.*—*St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222. *Mich.* *Newell v. Gt. West. Ry. Co.*, 19 Mich. 336, 344. *N. J.*—*Moulin v. Trenton Ins. Co.*, 24 N. J. L. 222, 234.

Temporarily Within the State.—Service upon an officer or agent temporarily or casually within the state does not bind the corporation. *U. S.* *Fitzgerald C. Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 137, 34 L. ed. 608; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222; *Scott v. Stockholders Oil Co.*, 122 Fed. 835; *Reilly v. Philadelphia & R. R.*, 109 Fed. 349; *Eirich v. Donnelly Contracting Co.*, 104 Fed. 1; *United States Graphite Co.*

v. Pacific Graphite Co., 68 Fed. 442. *Cal.*—*Fox v. Hale, etc. Mining Co.*, 108 Cal. 369, 41 Pac. 308. *Ill.*—*Midland P. Ry. v. McDermid*, 91 Ill. 170. *Mich.* *Newell v. Gt. W. Ry.*, 19 Mich. 336. *Minn.*—*State v. District Court*, 26 Minn. 233. *Mo.*—*Latimer v. Union Pac. R.*, 43 Mo. 105, 97 Am. Dec. 378. *Ore.* *Aldrich v. Anchor C. & D. Co.*, 24 Ore. 32, 32 Pac. 756, 41 Am. St. Rep. 831. *Pa.*—*Phillips v. Burlington Library Co.*, 141 Pa. 462, 21 Atl. 640, 23 Am. St. Rep. 304. *Wash.*—*Carstens, etc. r. Leidigh, etc. Co.*, 18 Wash. 450, 51 Pac. 1051, 63 Am. St. Rep. 906, 39 L. R. A. 548.

Inveigled Into the State.—Service upon one inveigled into the state for the specific purpose of service is void. *Fitzgerald, etc. Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. ed. 608.

14. Consult the local statutes. Nearly every state, if not all, has such a provision.

For example, in California, the statute provides that a foreign corporation doing business in the state shall "designate some person residing in this state, upon whom process issued by authority by or under any law of this state may be served, and within the time aforesaid, shall file such designation in the office of the secretary of state, and a copy of such designation duly certified to by the secretary of state shall be sufficient evidence of such appointment and of the due incorporation of such corporation, and it shall be lawful to serve on such person so designated, or

requirement, the corporation has designated such a person, and no other mode of service is pointed out, the service can be made only upon such person.¹⁵

Among the various classes of persons, under the different statutes, held competent to receive service may be mentioned agents;¹⁶ general agent;¹⁷ managing agent;¹⁸ agent, cashier, or secretary;¹⁹ local agent;²⁰ traveling salesman;²¹ officer or director;²² officer or agent;²³ and some designated state official.²⁴

The statutes, moreover, frequently provide for an alternative service where the principal officers or managing agents cannot be found.²⁵

Failing To Comply With the Law.—Where a foreign corporation fails to appoint, as required by law, an agent to accept process, it is held that process may be served upon the agent transacting the business;²⁶

in event that no such person is so designated, then on the secretary of state, any process issued as aforesaid." Stats., 1899, ch. 94, §1.

15. **Ark.**—So. Bldg. & Loan Assn. v. Hallum, 59 Ark. 533, 28 S. W. 420; Union, etc. Co. v. Craddock, 59 Ark. 593, 28 S. W. 424. **Colo.**—Venner v. Denver, etc. Co., 15 Colo. App. 495, 63 Pac. 1061. **Md.**—Oland v. Agricultural Ins. Co., 69 Md. 248, 14 Atl. 669. **Mass.**—Thayer v. Tyler, 10 Gray 164. **Mo.**—Baile v. Eq. F. I. Co., 68 Mo. 617. **Pa.**—Niblong v. Kansas F. I. Co., 82 Pa. 413.

16. **Norton v. Atchison, T. & S. F. R.**, 61 Fed. 618; **Brown v. Chicago, etc. R.**, 12 N. D. 61, 95 N. W. 153.

17. **U. S.**—*In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. ed. 1121; *Societe, etc. Unis v. Milliken*, 135 U. S. 304, 10 Sup. Ct. 823, 34 L. ed. 208; *Denver, etc. R. R. v. Roller*, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77. **Neb.**—*Fremont, etc. R. v. New York, etc. R. R.*, 66 Neb. 159, 92 N. W. 131. **Pa.**—*National Bank, etc. v. New York, etc., R. R.*, 8 W. N. C. 252.

18. *Tuchband v. Chicago, etc. R. R.*, 115 N. Y. 437, 22 N. E. 360; *Palmer v. Pennsylvania Co.*, 35 Hun (N. Y.) 369; *Taylor v. Granite, etc. Assn.*, 20 N. Y. Supp. 135.

19. *Ganebin v. Phelan*, 5 Colo. 83; *McColloh v. Paillard, etc. Co.*, 14 N. Y. Supp. 491.

20. **U. S.**—*Societe Fonciere v. Milliken*, 135 U. S. 304, 10 Sup. Ct. 823, 34 L. ed. 208; *Bragdon v. Perkins Campbell Co.*, 82 Fed. 338. **D. C.**—*Howard v. Chesapeake & O. R. Co.*, 11 App. Cas. 300. **Idaho.**—*Vt., etc. Co. v. McGregor*, 5 Idaho 320, 51 Pac. 102. **Kan.**

Southwestern M. B. Assn. v. Swenson, 49 Kan. 449, 30 Pac. 405. **Minn.**—*Baldinger v. Rockford Ins. Co.*, 80 Minn. 147, 82 N. W. 1083.

21. *Ryerson v. Steere*, 114 Mich. 352, 72 N. W. 131; *Abbeville, etc. Co. v. Western Electrical Supply Co.*, 61 S. C. 361, 39 S. E. 559, 85 Am. St. Rep. 890, 55 L. R. A. 146.

22. *American Locomotive Co. v. Dickson Mfg. Co.*, 117 Fed. 972; *Revens v. Southern Mo., etc. Co.*, 114 Fed. 982; *Meyer v. Pennsylvania, etc. Co.*, 108 Fed. 169; *Devere v. Del., etc. Co.*, 60 Fed. 886; *Farrell v. Ore., etc. Min. Co.*, 31 Ore. 463, 49 Pac. 876.

23. *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660.

24. *Mutual R. F. L. Assn. v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. ed. 937.

25. **Colo.**—*Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 25 Pac. 325. **Ind.**—*Memphis, etc. Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527; *Rehm v. German, etc. Inst.*, 125 Ind. 135, 25 N. E. 173. **Kan.**—*Southwestern Mut. Ben. Assn. v. Swenson*, 49 Kan. 449, 30 Pac. 405. **N. Y.**—*Porter v. Sewall, etc. Co.*, 7 N. Y. Supp. 186, 23 Abb. N. C. 233, 17 Civ. Proc. 386; *McCulloh v. Paillard, etc. Co.*, 60 Hun 578, 14 N. Y. Supp. 491, 20 Civ. Proc. 386. **Utah.**—*Saunders v. Sioux City, etc. Co.*, 6 Utah 431, 24 Pac. 532.

26. **U. S.**—*Funk v. Anglo-Am. Ins. Co.*, 27 Fed. 336. **N. Y.**—*Clews v. Rockford, etc. R. R.*, 49 How. Pr. 117. **Pa.**—*Hagerman v. Empire Slate Co.*, 97 Pa. 534. **S. D.**—*Foster v. Chas. Betcher Lumb. Co.*, 5 S. D. 57, 58 N. W. 9, 23 L. R. A. 490.

or upon any of the corporation's agents within the state;²⁷ or upon the state officer designated by the statute under a special provision to cover such cases.²⁸ This latter form of service has been held, however, to be insufficient.²⁹

Death or Removal of Agent.—The death or removal of the particular agent alone authorized by the statute to receive service, may leave the corporation without any person upon whom service can be made.³⁰ It is consequently provided in some states that service may be made upon some state official.³¹

Statute may also provide that a foreign corporation cannot avoid an action against it by revoking the authority of its agent,³² and, even in the absence of such a statute, a fraudulent revocation of an agency, merely for the purpose of avoiding service, has been held ineffectual.³³

27. **U. S.**—Funk v. Anglo-Am. Ins. Co., 27 Fed. 336; Moch v. Va., etc. Ins. Co., 10 Fed. 696. **Alaska.**—Am., etc. Co. v. Giant Powder Co., 1 Alaska 664. **Cal.**—Thomas v. Placerville, etc. Co., 65 Cal. 600, 4 Pac. 641. **Kan.**—St. Louis, etc. R. v. De Ford, 38 Kan. 299, 16 Pac. 442. **Pa.**—Hagerman v. Empire Slate Co., 97 Pa. 534.

28. **Masons, etc. Assn. v. Riley**, 60 Ark. 578, 31 S. W. 148.

Must Be Made Upon Such Officer.—A statute provided "If any such company shall fail to appoint such . . . agent, then it shall be lawful to serve such company with any and all legal process by delivering a copy to the secretary of state." Service was made on the deputy secretary of state in the absence of the secretary of state. Service held invalid since when the statute prescribes a particular mode of service, that mode must be followed. **U. S.**—Amy v. Watertown, 130 U. S. 320, 9 Sup. Ct. 537, 32 L. ed. 953. **Nev.**—Lonkey v. Keyes, etc. Co., 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351. **Wis.**—City of Watertown v. Robinson, 69 Wis. 230, 34 N. W. 139.

29. **Rothrock v. Dwelling House Ins. Co.**, 161 Mass. 423, 37 N. E. 206, 42 Am. St. Rep. 418, 23 L. R. A. 863. In this case, the defendant was incorporated in Massachusetts, and action was brought against it in Arkansas, service being made upon the auditor of the latter state. No stipulation consenting to service upon the auditor had been filed by the foreign corporation as required by the Arkansas statute. The action in Massachusetts was brought upon the judgment obtained in Arkansas. The supreme court of Massachusetts

held that in its opinion unless the stipulation was filed, the foreign corporation had no right to do business in Arkansas, and, "if it violated the law in that respect, no service could be made upon the auditor, and no jurisdiction could be obtained there on which to found a judgment against it." The court refused to follow the doctrine laid down in *Ehrman v. Teutonia Ins. Co.*, 1 Fed. 471, that the defendant was estopped to deny the jurisdiction.

30. **U. S.**—Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. ed. 1113; Cady v. Associated Colonies, 119 Fed. 420. **Idaho.**—Thum v. Pyke, 6 Idaho 359, 55 Pac. 864. **Ia.**—Winney v. Sandwich Mfg. Co., 86 Iowa 608, 53 N. W. 421.

31. **Mutual, etc. Assn. v. Phelps**, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. ed. 987.

32. **U. S.**—Mutual, etc. Assn. v. Phelps, 190 U. S. 147, 47 L. ed. 987; Davis v. Kans., etc. Co., 129 Fed. 149; Collier v. Mut., etc. Assn., 119 Fed. 617. **Ia.**—Green v. Equitable, etc. Assn., 105 Iowa 628, 75 N. W. 635. **Ky.**—Home Benefit Soc. v. Muehl, 22 Ky. L. Rep. 1378, 59 S. W. 520. **Mass.**—Gibson v. Manufacturers, etc. Co., 144 Mass. 81, 10 N. E. 729. **Minn.**—Magoffin v. Mutual, etc. Assn., 87 Minn. 260, 91 N. W. 1115, 94 Am. St. Rep. 699. **N. Y.**—Johnston v. Mut., etc. Co., 87 N. Y. Supp. 438.

33. **Michael v. Mut. Ins. Co.**, 10 La. Ann. 737.

Contempt Proceedings; Avoiding Service.—Where a foreign corporation is ordered to appear and show cause why it should not be punished for contempt, ordinarily a corporation has in such a

c. *Mode of Service*.—The mode of service authorized by the statute must be observed. Consequently, service by mail will not be sufficient when the statute requires personal service.³⁴

d. *Return of Process*.—The return should show that service has been made as authorized by the statute,³⁵ including the designation of the person served.³⁶

9. **Attachment and Garnishment.**—a. *Existence of the Remedies*. Under the provisions of many of the local statutes an attachment may be issued against the property of a foreign corporation,³⁷ and, likewise, in most states they are subject to garnishment.³⁸

b. *Property Subject To Seizure*.—The property subject to the provisional remedy of attachment is such tangible property as may be found within the state,³⁹ and, in some jurisdictions, the aid of equity may be invoked to reach property not attachable under legal process.⁴⁰

case a right to service of an order to show cause upon some officer or agent, but if its officers or agents keep themselves out of the way for the express purpose of avoiding such a service, it cannot justly complain if service on its attorney is made the equivalent of that which its agents by their wrongful acts have made impossible. *Eureka Lake, etc. Co. v. Superior Ct., etc.*, 116 U. S. 410, 418, 6 Sup. Ct. 429, 29 L. ed. 671.

34. *Farmer v. Nat. Life Assn.*, 50 Fed. 829.

35. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222; *Adkins v. Globe, etc. Co.*, 45 W. Va. 384, 32 S. E. 194.

36. *Md.*—*Northern Cent. Ry. v. Rider*, 45 Md. 24. *Mo.*—*Gates v. Tusten*, 89 Mo. 13. *Miss.*—*Continental Ins. Co. v. Mansfield*, 45 Miss. 311. *Pa.* *Liblong v. Kansas, etc. Co.*, 82 Pa. 413.

37. *D. C.*—*Barbour v. Paige Hotel Co.*, 2 App. Cas. 174. *Ga.*—*South Carolina R. Co. v. People's Sav. Inst.*, 64 Ga. 18; *Wilson v. Danforth*, 47 Ga. 676. *Ill.*—*Wabash R. Co. v. Dougan*, 41 Ill. App. 543. *Mass.*—*Ocean Ins. Co. v. Portsmouth, etc. Co.*, 3 Metc. 420. *Mo.* *Farnsworth v. Terre Haute, etc. Co.*, 29 Mo. 75. *N. Y.*—*Crosby v. Lumberman's Bank*, 1 Clarke Ch. 234. *Pa.*—*Bushel v. Com. Ins. Co.*, 15 Serg. & R. 173. *S. C.*—*Correll v. Georgia, etc. Co.*, 32 S. C. 319, 11 S. E. 192. *Tenn.*—*Union Bank v. United States Bank*, 4 Humph. 369. *Va.*—*Cowardin v. Universal, etc. Co.*, 32 Gratt. 445. *W. Va.*—*Hall v. Bank of Va.*, 14 W. Va. 584.

Contra.—*Del.*—*Vogle v. New Granada,*

etc. Co., 1 Houst. 294. *N. J.*—*Phillipsburgh Bank v. Lackawanna R. Co.*, 27 N. J. L. 206. *Ohio.*—*Stickney v. Bank of Mo.*, 1 Ohio Dec. (Reprint) 80, 1 West L. J. 563.

38. *U. S.*—*Rainey v. Maas*, 51 Fed. 580. *Ga.*—*Cathcart v. Cincinnati, etc. Ry.*, 108 Ga. 253, 33 S. E. 875. *Ill.* *Hannibal, etc. R. R. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581. *Ia.*—*Greaves v. Posner*, 111 Iowa 651, 82 N. W. 1022. *Mass.*—*National Bank, etc. of Huntington*, 129 Mass. 444. *Mich.*—*Shafer Iron Co. v. Iron Circuit Judge*, 88 Mich. 464, 50 N. W. 339. *Mo.*—*McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214. *N. Y.*—*India Rubber Co. v. Katz*, 65 App. Div. 349, 72 N. Y. Supp. 658. *Ohio.* *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537. *Pa.*—*Kennedy v. Agricultural Ins. Co.*, 165 Pa. 179, 30 Atl. 724. *R. I.* *Moshassuck Felt Mill v. Blanding*, 17 R. I. 297, 21 Atl. 538. *Vt.*—*Weed, etc. Co. v. Boutelle*, 56 Vt. 570. *Wash.* *Dittenhoefer v. Coeur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660. *Wis.* *Brauser v. N. Eng., etc. Co.*, 21 Wis. 506.

39. *Ga.*—*South Carolina R. Co. v. McDonald*, 5 Ga. 531. *N. Y.*—*Dunlop v. Paterson, etc. Co.*, 12 Hun 627. *Pa.* *Bushel v. Com. Ins. Co.*, 15 Serg. & R. 173.

Shares of Stock.—Stock of a foreign corporation is not liable to attachment. *Winslow v. Fletcher*, 53 Conn. 390, 4 Atl. 250, 55 Am. Rep. 122; *Ireland v. Globe, etc. Co.*, 19 R. I. 180, 32 Atl. 921, 29 L. R. A. 429.

40. *Silloway v. Columbia Ins. Co.*, 8 Gray (Mass.) 199.

Debts owing to a foreign corporation may be attached in some states;⁴¹ and, under the laws of many jurisdictions, debts owed by such corporations may be made the subject of garnishment.⁴²

c. *Procedure.*—In some jurisdictions, the writ may be sued out by any creditor, either resident or non-resident,⁴³ while in other jurisdictions the remedy may not extend to the benefit of a foreign creditor,⁴⁴ unless, as may be provided, the cause of action arose within the state in which the writ is issued.⁴⁵

The affidavit prerequisite to the issuance of the writ must show that the case falls within the provisions of the statute,⁴⁶ and the writ must be served upon such officer or agent of the foreign corporation as the statute designates.⁴⁷

The answer of the person legally served may, under the statute, be received as the answer of the corporation.⁴⁸

10. *Appearance.*—As in the case of domestic corporations, a general appearance by a foreign corporation waives the question of jurisdiction,⁴⁹ and validates a judgment against it.⁵⁰

41. *Hazard v. Agricultural Bank*, 11 Rob. (La.) 326.

42. See the various statutes.

What Exemption Law Governs.—A corporation, coming into the state of Kansas, leasing property and transacting business, becomes liable to garnishee proceedings, and a creditor of a non-resident employe of such a corporation may garnish the employer, though such wages are exempt under the laws of the state of residence of the employe, provided such wages are not exempt under the laws of the state of Kansas. *Burlington, etc. Co. v. Thompson*, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497.

43. *Schindelholz v. Cullum*, 55 Fed. 885, 5 C. C. A. 293, 12 U. S. App. 242; *John Ray Clark Co. v. Toby, etc. Co.*, 14 Pa. Co. Ct. 344.

44. *Merchants' Nat. Bank v. Pennsylvania Steel Co.*, 57 N. J. L. 336, 30 Atl. 545.

Priority of Resident Creditors.—In some states the policy of the law secures to creditors resident in the state, if they avail themselves of it by proper legal steps, a priority as against foreign creditors on the assets there situated and belonging, or debts there owing to the estate of a foreign insolvent. See *Heyer v. Alexander*, 108 Ill. 385; *Webster v. Judah*, 27 Ill. App. 294, 298.

45. *Myer v. Liverpool, etc. Co.*, 40 Md. 595; *Western Bank v. City Bank, etc.*, 7 How. Pr. (N. Y.) 238.

46. *Foster v. Electric, etc. Co.*, 16 Misc. 147, 37 N. Y. Supp. 1063, 25 Civ. Proc. 223; *Seiser Bros. Co. v. Potter Produce Co.*, 30 N. Y. Supp. 294, 23 Civ. Proc. 348; *Oliver v. Walter Heywood, etc. Co.*, 57 Hun 588, 10 N. Y. Supp. 771.

47. *Mich.*—*Shafer Iron Co. v. Iron Circuit Judge*, 88 Mich. 464, 50 N. W. 389. *Mo.*—*McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214. *N. Y.*—*Wright v. Douglass*, 10 Barb. 97. *Pa.*—*Liblong v. Kans., etc. Co.*, 82 Pa. 413. *R. I.*—*Moshassuck Felt-Mill v. Blanding*, 17 R. I. 297, 21 Atl. 538.

48. *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Lorman v. Phoenix Ins. Co.*, 33 Mich. 65.

49. *Mass.*—*Pierce v. Equitable Life, etc. Soc.*, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 435. *N. Y.*—*Dart v. Farmers Bank*, 27 Barb. 337; *De Bemer v. Drew*, 39 How. Pr. 466; *McCormick v. Pennsylvania R. Co.*, 49 N. Y. 303; *Root v. Great Western R. Co.*, 65 Barb. 619. *Wis.*—*Congar v. Galena, etc. Co.*, 17 Wis. 477.

50. *Ia.*—*Moffitt v. Chicago, etc. Co.*, 107 Iowa 407, 78 N. W. 45. *Kan.*—*North Missouri R. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183. *Md.*—*Fairfax, etc. Co. v. Chambers*, 75 Md. 604, 23 Atl. 1024. *Mass.*—*Wineburgh v. United States Steam, etc. Co.*, 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261. *Miss.*—*New Orleans, etc. R. R. v. Wallace*, 50 Miss. 244. *N. J.*—*Albert v. Clarendon, etc. Co.*, 53 N. J. Eq. 623,

A foreign corporation may appear specially, however, for the purpose of pleading to the jurisdiction, without subjecting itself to the consequences of a general appearance.⁵¹

11. Pleadings.—*a. Actions by Foreign Corporations.*—In an action brought by a foreign corporation the plaintiff should allege its incorporation,⁵² although it need not allege its capacity to sue,⁵³ nor, as a rule, its compliance with the statutory provisions authorizing it to do business within the state.⁵⁴ Some jurisdictions, however, hold

23 Atl. 8. **N. Y.**—*McCormick v. Pennsylvania, etc. R.*, 49 N. Y. 303. **N. C.** *Shields v. Union, etc. Co.*, 119 N. C. 380, 25 S. E. 951. **Wis.**—*Congar v. Galena, etc. R. R.*, 17 Wis. 477.

51. *De Castro v. Compagnie Francaise*, 76 Fed. 425; *Farmer v. Nat., etc. Assn.*, 50 Fed. 829; *Elgin Canning Co. v. Atchison, Topeka & S. F. R.*, 24 Fed. 866; *First Nat. Bank v. Burch*, 76 Mich. 608, 43 N. W. 453.

Service Without the State; Appearance.—See, however, *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Brooks v. New York, etc. Co.*, 30 Hun 47; *St. Louis, etc. Co. v. Whitley*, 77 Tex. 126, 13 S. W. 853; and *Western Union Tel. Co. v. Russell*, 12 Tex. Civ. App. 82, 33 S. W. 708, which hold that an appearance by a non-resident defendant served with citation without the state, even though such appearance is expressly declared to be for the sole purpose of presenting a plea to the jurisdiction of the court over his person, is a waiver of his immunity from the jurisdiction of the courts of the state by reason of his non-residence and substituted service without the state, and has the effect to perfect such service.

52. **Minn.**—*Becht v. Harris*, 4 Minn. 504. **Miss.**—*Continental Ins. Co. v. Mansfield*, 45 Miss. 311. **N. M.**—*Meyer & Sons Co. v. Black*, 4 N. M. 190, 16 Pac. 620. **N. Y.**—*Conn. Bank v. Smith*, 17 How. Pr. 487, 9 Abb. Pr. 168. **Tex.** *Bank, etc. of Ala. v. Simonton*, 2 Tex. 531.

53. **Md.**—*Whyte v. Betts Mach. Co.*, 61 Md. 172. **N. J.**—*Bennington Iron Co. v. Rutherford*, 13 N. J. L. 105, 35 Am. Dec. 528. **N. Y.**—*Marine, etc. Bank v. Jauncey*, 1 Barb. 486. **Ohio.** *Smith v. Weed, etc. Co.*, 26 Ohio St. 562. **Va.**—*Taylor v. Bank of Alexandria*, 5 Leigh 471.

54. **U. S.**—*New Eng., etc. Co. v. Vader*, 28 Fed. 265. **Ala.**—*Nelms v.*

Edinburgh, etc. Co., 92 Ala. 157, 9 So. 141; *Christian v. American etc. Mortgage Co.*, 89 Ala. 198, 7 So. 427. **Ark.** *St. Louis, etc. Ry. v. Fire Assn., etc.*, 55 Ark. 163, 18 S. W. 43. **Dak.**—*Am., etc. Co. v. Moore*, 2 Dak. 280, 8 N. W. 131. **Ind.**—*Sprague v. Cutler, etc. Co.*, 106 Ind. 242, 6 N. E. 335. **Minn.**—*Langworthy v. Garding*, 74 Minn. 325, 77 N. W. 207. **Mo.**—*N. Y. Life Ins. Co. v. Stone*, 42 Mo. App. 383. **Mont.**—*Am., etc. Co. v. O'Rourke*, 23 Mont. 530, 59 Pac. 910. **N. Y.**—*Chas. Rooms Parmele Co. v. Haas*, 171 N. Y. 579, 64 N. E. 440. **Ohio.**—*Smith v. Weed, etc. Co.*, 26 Ohio St. 562. **Okla.**—*Keokuk F. I. Co. v. Kingsland, etc. Co.*, 5 Okla. 32, 47 Pac. 484. **S. D.**—*Acme, etc. Agency v. Rochford*, 10 S. D. 203, 72 N. W. 466, 65 Am. St. Rep. 714. **S. C.**—*Ober & Sons Co. v. Blalock*, 40 S. C. 31, 18 S. E. 264. **Va.**—*Nickells v. People's, etc. Assn.*, 93 Va. 330, 25 S. W. 8.

Compliance Presumed.—The weight of authority is in favor of the doctrine that the presumption of compliance with the law applies to foreign corporations doing business within the state. Consequently a foreign corporation need not aver, and especially where the question is not raised by the answer, need not prove compliance with a statute requiring it to appoint a resident agent. **Ind. Ter.**—*T. H. Rogers Lumb. Co. v. McRae*, 1 Ind. Ter. 468, 104 S. W. 803. **Ia.**—*McKinley Lanning, etc. Co. v. Gordon*, 113 Iowa 481, 85 N. W. 816. **Mich.**—*Amer. Ins. Co. v. Cutler*, 36 Mich. 261. **Minn.**—*Lehigh Valley Coal Co. v. Gilmore*, 93 Minn. 432, 101 N. W. 796, 106 Am. St. Rep. 443. **Mo.**—*Amer. Ins. Co. v. Smith*, 73 Mo. 368. **Mont.**—*Zion Co-operative Assn. v. Mayo*, 22 Mont. 100, 55 Pac. 915. **Neb.** *Northern Assur. Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226. **S. W.**—*Acme Merc. Co. v. Rockford*, 10 S. D. 203, 72 N. W. 466, 66 Am. St. Rep. 714.

that it is necessary to allege compliance with the statutory requirements.⁵⁵

Failing To Comply With Statute.—The objection that the plaintiff has not complied with the provisions of the statute, and, consequently, cannot maintain its action under the laws of the state, is generally raised by the defendant in a plea.⁵⁶ Demurrer is not the proper procedure,⁵⁷ unless the failure to comply is apparent on the face of the pleadings.⁵⁸

The nature of the plea varies in different jurisdictions, being a plea in abatement in some states,⁵⁹ while in others an answer or plea in bar.⁶⁰

55. **Tenn.**—*Cumberland Land Co. v. Canter Lumber Co.*, 35 S. W. 886. **Tex.** *Taber v. Interstate Bldg., etc. Assn.*, 91 Tex. 92, 40 S. W. 954; *Huffman v. West, etc. Co.*, 13 Tex. Civ. App. 169, 36 S. W. 306; *Peters v. Anheuser-Busch, etc. Assn.* (Tex. Civ. App.), 55 S. W. 516; *Southern, etc. Assn. v. Skinner* (Tex. Civ. App.), 42 S. W. 320.

Idaho.—Under the laws of Idaho, "a foreign corporation, in order to maintain an action in the courts of this state, must allege a compliance with the Constitution and statutes in regard to designating an agent upon whom service of process may be had, and in filing its articles of incorporation as required by law," and a complaint failing to so allege is subject to demurrer. *Valley Lumb. & Mfg. Co. v. Drissel*, 13 Idaho 662, 93 Pac. 765, per Sullivan, J.

Texas—Must Allege and Prove.—A foreign corporation cannot sue without alleging and proving that it had complied with the statute. *Southern Building & Loan Assn. v. Skinner* (Tex. Civ. App.), 42 S. W. 320.

56. It is not incumbent upon a foreign corporation in order to maintain an action brought by it to show that it has complied with the statute. Non-compliance with the law is a matter of defense to be pleaded in bar. **Minn.** *Langworthy v. Gauding*, 74 Minn. 325, 77 N. W. 207. **Mo.**—*Parlin & Orendorff Co. v. Boatman*, 84 Mo. App. 67. **N. Y.**—*Halsey v. Henry Jewett Dramatic Co.*, 190 N. Y. 231, 83 N. E. 25.

Not Estopped To Plead.—"The fact that the defendants knew the plaintiff was a foreign corporation at the time the contract in question was made does not estop them to plead non-compliance with the statute regulating foreign corporations." *D. M. Osborne & Co. v. Shilling*, 74 Kan. 675, 88 Pac. 258, per Johnston, C. J.

Action Against Agent.—In an action by a foreign corporation against its agent to recover money received by the agent for its use, the agent is not estopped to show that the corporation has not complied with the statute. *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989.

57. **U. S.**—*Friezen v. Allemania, etc. Co.*, 30 Fed. 349. **Ala.**—*Nelms v. Edinburgh Am., etc. Co.*, 92 Ala. 157, 9 So. 141. **N. Y.**—*O'Reilly, etc. Co. v. Greene*, 17 Misc. 302, 40 N. Y. Supp. 360.

58. *Christian v. Am., etc. Mort. Co.*, 89 Ala. 198, 7 So. 427; *Smith v. Weed, etc. Co.*, 26 Ohio St. 562.

New York.—Complaint held demurrable on ground that it appeared from the face thereof that the plaintiff by failure to plead compliance with the law did not have the legal capacity to sue. *Welsback Co. v. Norwich Gas. & Electric Co.*, 96 App. Div. 52, 89 N. Y. Supp. 284.

Idaho.—Likewise, in Idaho, if the complaint merely alleges that plaintiff is a foreign corporation, but fails to allege its capacity to sue by alleging that it has complied with the law of the state, the complaint is demurrable on the ground of legal capacity to sue. *Valley Lumber & Mfg. Co. v. Drissel*, 13 Idaho 662, 93 Pac. 765.

59. *Wetzel & T. R. Co. v. Tennis Bros. Co.*, 145 Fed. 458, 75 C. C. A. 266; *New Eng., etc. Co. v. Vader*, 28 Fed. 265.

California.—"The failure of the plaintiff to file a copy of its articles of incorporation in the office of the county clerk, being mere matter of abatement, should be specially pleaded by the defendants, otherwise it will be waived." *Ontario State Bank v. Tibbitts*, 80 Cal. 68, 22 Pac. 66.

60. **Minn.**—*Langworthy v. Gauding*, 74 Minn. 325, 77 N. W. 207. **N. Y.**

b. *Actions Against Foreign Corporations.*—(I.) *What Should Be Alleged.*—In an action brought against a foreign corporation, the plaintiff should allege that the defendant is a foreign corporation.⁶¹

It is not necessary, however, to allege the state of its incorporation,⁶² nor that it has complied with the provisions of the statute authorizing it to do business within the state.⁶³ An allegation, however, that it is doing business in the state should be made.⁶⁴

(II.) *Defenses.*—That the defendant is not a foreign corporation may be shown by plea or answer.⁶⁵

If defendant is not doing business within the state, a plea to the jurisdiction may be raised.⁶⁶

(III.) *Execution of Judgment.*—A judgment against a foreign corporation can be executed against any property of the corporation found within the state.⁶⁷

Moreover, where a foreign corporation has tangible property within the state, such property may be subjected to execution in connection

Halsey v. Henry Jewett Dramatic Co., 190 N. Y. 231, 83 N. E. 25; *O'Reilly, etc. Co. v. Greene*, 17 Misc. 302, 40 N. Y. Supp. 360. *Ohio.*—*Smith v. Weed, etc. Co.*, 26 Ohio St. 562.

California.—In the case of *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69, 18 Pac. 886, a case brought under section 299 of the Civil Code of California, the court held that the noncompliance of the railway corporation to file its articles of incorporation should be raised by answer, and unless specifically set up therein, want of proof of noncompliance with the law was not fatal to the verdict.

Waived When.—The question must be raised, however, by the pleadings in some way, either by plea in abatement, answer, or demurrer, and if not so raised, it is waived. The defendant cannot raise it for the first time in the appellate court. *U. S.*—*Dahl v. Montana Copper Co.*, 132 U. S. 264, 10 Sup. Ct. 97, 33 L. ed. 325; *Wetzel & T. R. Co. v. Tennis Bros. Co.*, 145 Fed. 458, 75 C. C. A. 266 (statute of West Virginia). *Cal.*—*Ontario State Bank v. Tibbitts*, 80 Cal. 68, 22 Pac. 66; *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451. *Idaho.*—*Valley Lumb. & Mfg. Co. v. Driessel*, 13 Idaho 662, 93 Pac. 765.

61. *Continental Ins. Co. v. Mansfield*, 45 Miss. 311.

62. *Machen v. Western Union T. Co.*, 63 S. C. 363, 41 S. E. 448.

63. *Home, etc. Order v. Jones*, 20 Tex. Civ. App. 68, 48 S. W. 219.

64. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222.

65. *Mo.*—*McAllister v. Pa. Ins. Co.*, 28 Mo. 214. *N. Y.*—*Steele v. Gilmour Mfg. Co.*, 77 App. Div. 199, 78 N. Y. Supp. 1078; *De Maio v. Standard Oil Co.*, 68 App. Div. 167, 74 N. Y. Supp. 165.

66. *Benwood Ironworks v. Hutchinson*, 101 Pa. 359.

California.—A foreign corporation, when sued for work and labor filed an answer traversing all the material allegations of the complaint, but did not allege in such answer that a copy of its articles of incorporation had been duly filed in the office of the county clerk as required by law. Plaintiff moved for judgment upon the pleadings on the ground that the answer did not state facts sufficient to constitute a defense. The judgment was rendered as asked for, but was reversed by the supreme court on the ground that the code provision prohibiting foreign corporations from making defense to actions "in relation to their property, its rents, issues, or profits," unless they have previously filed their articles of incorporation, did not extend to defenses to other actions, and consequently, in an action such as this, for work and labor, no such allegation is required in the answer. *Weeks v. Garibaldi South Gold Min. Co.*, 73 Cal. 599, 15 Pac. 302.

67. *Gravely v. Southern Ice-Machine Co.*, 47 La. Ann. 389, 16 So. 866.

with proceedings, *in rem*, although the corporation may not be doing business within the state.⁶⁸ Service upon the corporation by publication is sufficient in such a case.⁶⁹

68. **Ga.**—*People's Nat. Bank, etc. v. Cleveland*, 117 Ga. 908, 44 S. E. 20. **Md.**—*Hodgson v. Southern, etc. Assn.*, 91 Md. 439, 46 Atl. 971. **Minn.**—*Strom v. Montana, etc. Co.*, 81 Minn. 346, 84 N. W. 46. **N. Y.**—*Miller v. Jones*, 67 Hun 281, 22 N. Y. Supp. 86. **S. C.**—*Chitty v. Pennsylvania R. Co.*, 62 S. C. 526, 40 S. E. 944.

69. *King v. Sullivan*, 93 Ga. 621, 20 S. E. 76; *Wilson v. Danforth*, 47 Ga. 676.

Full Faith and Credit.—Where a corporation appears and defends in a foreign state it is bound by the judgment. Likewise, where it has consented to service upon some designated agent in a foreign state, a judgment rendered against it is entitled to full faith and credit in other states. **U. S.**—*Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20 L. ed. 354; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451. **Mass.**—*Gillespie v. Commercial Ins. Co.*, 12 Gray 201, 71 Am. Dec. 743. **N. Y.**—*Cook v. The Champlain Transportation Co.*, 1 Denio 91.

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Of the Virginia Bar.

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CROSS-REFERENCES:

Agreed Case;	Payment;
Arrest of Judgment;	Probate Proceedings;
Compromise and Settlement;	Security for Costs;
Demurrer;	Set-Off, Recoupment and Counterclaim;
Mandamus;	Stipulations;
New Trials;	Tender.

As to costs in pauper suits, see the title "**Paupers.**"

Payment of costs as condition to allowance of amendments, see the title "**Amendments and Jeofails,**" Vol. I, p. 899.

As to costs in election contests, see the title "**Elections.**"

As to costs of taking depositions and interrogatories, see the title "**Depositions.**"

I. COSTS IN CRIMINAL CASES.—A. DEFINITION AND DISTINCTIONS.—The term costs in criminal cases has no fixed legal signification, but it usually embraces all items of expense prescribed by statute which are necessarily incurred in prosecuting or defending a criminal offense.¹ The word "costs" as used in criminal statutes is usually synonymous with "expenses."² Costs in criminal cases partake of the nature of a fine.³

Distinctions.—At common law costs and fees are essentially different in their nature. The former is an allowance to a party for expenses incurred in prosecuting or defending the proceeding; the latter, a compensation to an officer for services rendered in the proceeding.⁴ But all modern statutes in reference to costs in criminal cases, do not observe the distinction between costs and fees.⁵

B. OBJECT OR PURPOSE.—Costs in a criminal case are not intended as a part of the punishment. That object is accomplished by the fine, or imprisonment, or both. Costs are awarded in order that the state may prosecute the guilty at their own expense.⁶

C. RIGHT TO AND LIABILITY FOR COSTS.—1. **Statutory Basis.**—In the absence of statutes providing therefor, there is no right to or liability for costs in criminal cases.⁷ Accordingly such laws are strict-

1. Colo.—Ayres v. People, 3 Colo. App. 117, 32 Pac. 77. Mo.—City of Carterville v. Cardwell, 152 Mo. App. 32, 132 S. W. 745. N. H.—State v. A. B. C., 68 N. H. 441, 40 Atl. 1065. Ohio.—State v. Guilbert, 77 Ohio St. 333, 83 N. E. 80. Tenn.—Ex parte Griffin, 88 Tenn. 547, 13 S. W. 75.

2. Hempstead v. Royston, 58 Ark. 113, 23 S. W. 650. But this is not necessarily so in Ohio. State v. Guilbert, 77 Ohio St. 333, 83 N. E. 80.

Costs in Ohio Practice.—Costs, in the sense in which the word is generally used in Ohio, "may be defined as being the statutory fees to which officers, witnesses, jurors, and others are entitled for their services in an action or prosecution, and which the statutes authorize to be taxed and included in the judgment or sentence." State v. Guilbert, 77 Ohio St. 333, 83 N. E. 80.

3. City of Charleston v. Beller, 45 W. Va. 44, 30 S. E. 152. Contra, Edwards v. State, 12 Ark. 122.

4. Tillman v. Wood, 58 Ala. 578; Musser v. Good, 11 Serg. & R. (Pa.) 247.

In Ohio costs are distinguishable from fees and disbursements. State v. Guilbert, 77 Ohio St. 333, 83 N. E. 80.

5. Dawson v. Matthews, 105 Ala.

485, 17 So. 19; State v. Brewer, 59 Ala. 130, 134.

6. Fanning v. State, 47 Ark. 442, 2 S. W. 70.

7. U. S.—Phillips v. Gaines, 131 U. S. clxix, 25 L. ed. 733. Ala.—City of Montgomery v. Foster, 54 Ala. 62. Conn.—State v. Anderson, 82 Conn. 392, 73 Atl. 751. D. C.—District of Columbia v. Lyon, 7 Mackey 222. Ga.—Leonard v. Eatonton, 126 Ga. 63, 54 S. E. 963. Ill.—Galpin v. Chicago, 249 Ill. 554, 94 N. E. 961. Kan.—State v. Jones, 19 Kan. 481. Mont.—State v. Stone, 40 Mont. 88, 105 Pac. 89. N. H.—State v. Kinne, 41 N. H. 238. N. Y.—Tillotson v. Smith, 12 N. Y. St. 331. Pa.—County of Franklin v. Conrad, 36 Pa. 317. Tenn.—Mooney v. State, 2 Yerg. 578. W. Va.—City of Charleston v. Beller, 45 W. Va. 44, 30 S. E. 152. Eng.—Encyc. Laws, 2d ed. Vol. 4, p. 97.

For this reason the United States is not liable for costs. Henry v. United States, 15 Ct. Cl. 162.

Costs on appeal dependent upon statutory authority. U. S.—United States v. Gaines, 131 U. S. clxix, 25 L. ed. 733. Colo.—Boykin v. People, 23 Colo. 183, 46 Pac. 635. Conn.—State v. Anderson, 82 Conn. 392, 73 Atl. 751. Pa.—Com. v. Buccieri, 153

ly construed, and the officer or other person claiming costs or fees in such proceedings must be able to point out a statute authorizing their taxation.⁸

2. Particular Parties and Persons Considered. — a. The Accused.
(L) Bearing of Statutes. — It is well settled that the courts have no power to impose costs on a defendant in a criminal prosecution in the absence of statutory authority.⁹ And it is equally well settled that a court has no power to award them in favor of a defendant in a criminal action unless the statute has expressly conferred such power.¹⁰

(II.) When Convicted. — (A.) GENERAL STATEMENT. — In many jurisdictions, the accused, on conviction, is liable for the costs incurred in the proceeding against him for the crime,¹¹ and the affirmance of a judg-

Pa. 570, 26 Atl. 245. S. D.—City of Yankton v. Douglass, 8 S. D. 590, 67 N. W. 630.

8. Banks v. State, 96 Ala. 41, 11 So. 469; State v. Union Trust Co., 70 Mo. App. 311.

The law of fees and costs, in criminal cases, is a penal law, and must be strictly construed. Board of Revenue & Road Comrs. v. State (Ala.), 54 So. 995.

Fees of Officers.—No other or greater fees can be paid to officers in criminal cases than are expressly allowed by law. Ala.—Board of Revenue v. State, 54 So. 995. Ga.—Officers of Court v. Wyatt, 62 Ga. 172. N. J. Board of Chosen Freeholders v. Freeman, 44 N. J. L. 631. Tenn.—Donaldson v. Walker, 101 Tenn. 236, 47 S. W. 417; Henby v. State, 98 Tenn. 665, 41 S. W. 352, 39 L. R. A. 126; Johnson v. State, 94 Tenn. 499, 29 S. W. 963; Duff v. State, 3 Shann. Cas. 785.

9. Kan.—Lincoln v. Linker, 7 Kan. App. 282, 53 Pac. 787, prosecuting attorney's fees. Ky.—Rowe v. Reneer, 99 S. W. 250. Mont.—State v. Stone, 40 Mont. 88, 105 Pac. '89. N. Y.—Tillotson v. Smith, 12 N. Y. St. 331. Wis. Faust v. State, 45 Wis. 273.

10. Boykin v. People, 23 Colo. 183, 46 Pac. 635; Eisen v. Multnomah Co., 31 Ore. 134, 49 Pac. 730.

11. U. S.—In re Swan, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. ed. 1207. Ala.—Michael v. State, 40 Ala. 361. Colo.—Parker v. People, 7 Colo. App. 56, 42 Pac. 472; Branson v. Board of Comrs., 5 Colo. App. 231, 37 Pac. 957; Board of Comrs. v. Wilson, 3 Colo. App. 492, 34 Pac. 265. Ill.—Galpin v. Chicago, 249 Ill. 554, 94 N. E. 961; Cor-

bin v. People, 52 Ill. App. 355. Ind. Ex parte Harrison, 112 Ind. 329, 14 N. E. 225; State v. Sauvaine, 14 Ind. 21 (holding that the jury cannot acquit the accused of such liability upon conviction); Cameron v. State, 37 Ind. App. 381, 76 N. E. 1021. Ia.—Hayes v. Clinton Co., 118 Iowa 569, 92 N. W. 860. Kan.—State v. Granville, 26 Kan. 158, 160; Board of Comrs. v. Whiting, 4 Kan. 273. La.—State v. Chapman, 38 La. Ann. 348. Mo.—State v. Williams, 92 Mo. App. 443. Neb. Speers v. State, 64 Neb. 77, 89 N. W. 624. Nev.—State v. District Court, 16 Nev. 76. N. M.—Comp. Laws, §3448. Ore.—State v. Munds, 7 Ore. 80. Tenn.—State v. Odom, 93 Tenn. 446, 25 S. W. 105. Tex.—Ex parte Sykes, 46 Tex. Crim. 51, 79 S. W. 538. Va.—Com. v. McCue's Exrs., 109 Va. 302, 63 S. E. 1066; Anglea v. Cox, 10 Gratt. 696. Wash.—State v. Armstrong, 29 Wash. 57, 69 Pac. 392. W. Va. Code, 1899, ch. 50, §227; City of Charleston v. Beller, 45 W. Va. 44, 30 S. E. 152. Eng.—11 and 12 Vict., ch. 43, §18.

The costs of the prosecuting attorney and of the defendant's own witnesses in criminal cases are payable out of the defendant's property in case of conviction. Hall v. Doyle, 35 Ark. 445.

In Indiana the court or jury, on conviction may relieve defendant from payment of costs. State v. Sevier, 117 Ind. 338, 20 N. E. 245, construing Rev. St., 1881, §1838. This discretion is not a mere arbitrary one. Welsh v. State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; Cameron v. State, 37 Ind. App. 381, 76 N. E. 1021.

The costs incurred before the grand

ment of conviction on appeal is a conviction within the meaning of these statutes so as to put the costs on the defendant.¹²

In the event of the prisoner's death this liability is a claim against his estate.¹³

Doctrine of Included Offenses. — If a defendant is tried for one offense and acquitted, but convicted of a lesser offense, the costs of the former proceeding cannot be assessed against him.^{13a} For example, when a prosecution is for a felony and the defendant is convicted thereunder for a misdemeanor only, he is liable for such costs only as would be taxable in a prosecution for the misdemeanor.^{13b}

(B.) **ITEMS TAXABLE.** — But not all costs which the person having charge of the prosecution may see fit to make can be properly taxed against the defendant, but only such as there was actual, apparent or probable necessity for incurring.¹⁴ But in determining what costs

jury are properly included in the costs which the defendant is required to pay. *State v. Fife* (Me.), 3 Atl. 461.

Under the United States Revised Statutes, the accused upon his conviction in a prosecution for any fine or forfeiture is liable for the costs, and on every conviction for every offense other than capital offenses, it is discretionary with the court to award costs against the accused. *In re Swan*, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. ed. 1207.

In Pennsylvania, in all cases of conviction of any crime, whether a felony or misdemeanor, all costs must be paid by the party convicted. *Com. v. Edwards*, 135 Pa. 474, 19 Atl. 1064.

What Courts Have the Power. — This power to award costs against the defendant in a criminal case is given to inferior (*State v. Schmail*, 25 Minn. 370), as well as superior courts (*State v. Locust*, 63 N. C. 574).

Liability of Infant Defendant. — An infant may be adjudged to pay the costs for prosecution against him, and his property may be taken to satisfy the judgment. *Dial v. Wood*, 9 Baxt. (Tenn.) 296; *Beasley v. State*, 2 Yerg. (Tenn.) 481.

12. *Peoples v. Com.*, 88 Ky. 174, 10 S. W. 642.

Dismissal by Agreement. — A dismissal of a proceeding at defendant's cost by agreement between the defendant and prosecuting attorney is not equivalent to a conviction. *State v. Foss*, 52 Mo. 416; *State v. Narramore*, 52 Mo. 27.

13. **Claims Against Decedents.** — A claim by the state for its costs against

the estate of an accused who has been executed in accordance with the mandate of law may be asserted at any time before the assets of the estate have been disbursed, according to settled equity practice. *Com. v. McCue's Exrs.*, 109 Va. 302, 63 S. E. 1066.

13a. *Ind.* — *Burch v. Dooley*, 123 Ind. 288, 24 N. E. 110. *Neb.* — *Biester v. State*, 65 Neb. 276, 91 N. W. 416, holding state liable for fees of witness called in unsuccessful effort to prove a felony, the conviction being only for a misdemeanor. *Pa.* — *Com. v. Peiffer*, 80 Pa. 191. *Tenn.* — *State v. Arnold*, 100 Tenn. 307, 47 S. W. 221, holding the state liable for the costs incident to the unsuccessful prosecution for the greater offense.

While in Tennessee the state is not liable for costs in a misdemeanor case (*State v. Davidson County* (Tenn.), 52 S. W. 477; *Aiken v. State*, 99 Tenn. 657, 42 S. W. 927) it is liable in case of felonies, although the conviction is only for a misdemeanor (*State v. Arnold*, 100 Tenn. 307, 47 S. W. 221).

13b. *State v. Granville*, 26 Kan. 153; *State v. O'Kane*, 23 Kan. 244.

But in Iowa the accused is nevertheless liable though convicted of an offense of a lesser grade than that for which he was indicted. *State v. Belle*, 92 Iowa 253, 60 N. W. 525.

14. Neither costs incurred in pressing an accusation shown to be groundless, nor costs made by the state in a futile effort to prove that an assault was felonious can be taxed against defendant. *Biester v. State*, 65 Neb. 276, 91 N. W. 416.

Costs of preliminary examination are

may be thus described, the trial court is vested with a large discretion, which will not be interfered with if fairly exercised.¹⁵

The right to tax costs on appeal against the accused is entirely dependent on the statutes of the different jurisdictions.¹⁶ There are,

taxable against the defendant in some states (*Kan.*—*State v. Granville*, 26 *Kan.* 158. *Mo.*—*State v. Williams*, 92 *Mo. App.* 443. *Wash.*—*State v. McFadden*, 42 *Wash.* 1, 84 *Pac.* 401), but not in others (*Ala.*—*Sasnett v. Weathers*, 21 *Ala.* 673. *Ind.*—*State v. Thurston*, 7 *Blackf.* 148. *Pa.*—*Com. v. Freeth*, 5 *Pa. Law. J.* 455. *Tex.*—*Huizar v. State* (*Tex. Crim.*), 63 *S. W.* 329; *Wade v. State*, 48 *Tex. Crim.* 512, 90 *S. W.* 503), especially where the evidence does not warrant the magistrate in holding him (*In re Scott*, *Kirby* (*Conn.*) 362).

Under the Colorado statute (§23), the allowance of costs of preliminary examination by the county commissioners is discretionary with them, and the exercise of the discretion cannot be reviewed. *Weld County v. Camp*, 43 *Colo.* 61, 108 *Pac.* 972; *Sargent v. LaPlata Co.*, 21 *Colo.* 158, 40 *Pac.* 366; *Arapahoe County v. Graham*, 4 *Colo.* 201.

Railroad Fare.—In Georgia a sheriff is not entitled for any services as costs unless payment for the same is expressly and specifically provided by statute, provision being expressly made as to the amounts to which sheriffs are entitled in criminal cases (*Clark v. Clark* [*Ga.*] 73 *S. E.* 15); and it has been held that a sheriff is entitled to charge "mileage" but not "railroad fare." *Peters v. State*, 9 *Ga.* 109.

In Federal practice, a party cannot be held for costs accruing during an examination before a commissioner, if he be discharged, although on the same charge the jury may subsequently find a true bill. *United States v. Leopold*, 43 *Fed.* 785.

Effect of Substitution of New Information on Loss of Original.—Where the original information is lost and the court substitutes a new one therefor, it is not error to tax against the defendant the costs of the original proceeding and the costs of the preliminary examination, on which the first information was based, because the filing of the second information is not the institution of a new proceeding, but a mere continuation of the or-

iginal cause. *State v. McFadden*, 42 *Wash.* 1, 84 *Pac.* 401.

In Tennessee the state tax upon litigation is not costs in criminal cases for which the convicted defendant is liable. *Johnson v. State*, 85 *Tenn.* 325, 2 *S. W.* 802, reviewing many cases. But in Arkansas this is a valid exaction. *Wellington v. State*, 52 *Ark.* 447, 13 *S. W.* 134.

15. *Biester v. State*, 65 *Neb.* 276, 91 *N. W.* 416.

In Colorado, it is held that there is no limit to the costs in criminal prosecutions, except the discretion of the sworn officers in charge. *Parker v. People*, 7 *Colo. App.* 56, 42 *Pac.* 172.

In Georgia, it is discretionary with the committing magistrate, on discharging the accused, to impose costs on him subject to review in case of abuse. *Keith v. State*, 27 *Ga.* 483.

16. **In Utah**, in criminal appeals, no costs can be taxed against the accused for clerk's fees, but he can be taxed with the costs of printing briefs unless he has shown himself pecuniarily unable to do so. *Salt Lake City v. Robinson* (*Utah*), 116 *Pac.* 442.

Notwithstanding dismissal on appeal on account of a defective recognizance, the court may adjudicate the costs against the principal and sureties on the recognizance. *Roberts v. State* (*Tex. Crim.*), 68 *S. W.* 989, citing *Bonn v. State*, 12 *Tex. App.* 100.

Affirmance of Conviction.—**In Texas**, where a judgment of conviction is affirmed, a \$10 fee for the clerk, \$10 for the attorney general, as well as costs for issuing the writ of execution and return thereon, are legitimate items of costs taxable against the accused and his sureties. *Prater v. State*, 54 *Tex. Crim.* 16, 111 *S. W.* 735, following *Arbuthnot v. State*, 38 *Tex. Crim.* 509, 34 *S. W.* 269, 43 *S. W.* 1024.

And in Arkansas the cost of printing the state's brief may be taxed against the accused on affirmance of a judgment of conviction. *Wellington v. State*, 52 *Ark.* 447, 13 *S. W.* 134.

In Minnesota the district court, on appeals from judgments of conviction

however, certain classes of fees such as officers' fees,¹⁷ jury fees,¹⁸ and

by a justice, where the judgment of the justice is affirmed may impose, as part of the sentence, the whole or any part of the costs of both the justice and the district court. *State v. McKinley* (Minn.), 131 N. W. 369.

17. Clerk's and sheriff's fees may be taxed against the accused on conviction (*Cohen v. Coleman*, 71 Ala. 496; *State v. Armstrong*, 29 Wash. 57, 69 Pac. 392), and they cannot be collected from the state or county simply because the defendant's estate is insolvent (*Kitchell v. Madison*, 5 Ill. 163). But if the writ was without authority of law, sheriff's fees cannot be taxed against the prisoner. *Ex parte Sykes*, 46 Tex. Crim. 51, 79 S. W. 538.

A defendant cannot be taxed with the expenses of the sheriff in going after him and bringing him to the county jail, if he is denied the privilege of furnishing bail. *Buzan v. State*, 59 Tex. Crim. 213, 128 S. W. 388.

Jailer's fees are included in the costs. Code (W. Va.) 1899, ch. 50, §227.

Reporter's Fees.—In California, the fees of the reporter are not taxable as costs against the defendant. *Petty v. San Joaquin County Court*, 45 Cal. 245.

Attorney's Fees.—In some states a reasonable fee may be allowed the district or prosecuting attorney (*Ala. Murphy v. State*, 71 Ala. 15. *Ark. Wellington v. State*, 52 Ark. 447, 13 S. W. 134. *Ia.*—*State v. Arnold*, 98 Iowa 253, 67 N. W. 252), or a city attorney to be taxed as costs against the defendant in the police court (*City of Carterville v. Cardwell*, 152 Mo. App. 32, 132 S. W. 745).

But in others the prosecuting attorney's fee cannot be taxed against the defendant in a case prosecuted by the county attorney. *Hornberger v. State*, 47 Neb. 40, 66 N. W. 23.

And in still others no such fee can be assessed at all, because there is no statute authorizing such fee to be assessed as costs. *City of Lincoln Center v. Linker*, 7 Kan. App. 282, 53 Pac. 787.

In case of a conviction in the court below, and on appeal, and a conviction

in the latter court on such appeal, only one prosecuting attorney's fee can be taxed and not a separate fee for the conviction in each court. *Banks v. State*, 96 Ala. 41, 11 So. 469.

In *Kentucky*, the attorney's fee is for the benefit of the attorney general and goes into the state treasury; a city attorney is not entitled to it. *Com. v. Bottoms*, 141 Ky. 730, 133 S. W. 952.

In *Texas*, upon trial and conviction in a misdemeanor case, the county attorney is not entitled to a fee taxed in the county court as well as in the justice court. *Huizar v. State* (Tex. Crim.), 63 S. W. 329.

In *Virginia*, upon the conviction of the accused for felony, the ordinary fees of the clerk, sheriff and commonwealth's attorney for services in court on behalf of the commonwealth, are not to be paid by or taxed to the prisoner. And the same rule applies in the appellate court as to the fees of the clerk and attorney general, where a judgment of conviction is affirmed. *Finch v. Com.*, 14 Gratt. 643; *Anglie v. Com.*, 10 Gratt. 696.

Docket Fee.—In *Indiana*, on an indictment against two or more each is chargeable with a separate docket fee on conviction. *State v. Kinneman*, 39 Ind. 36.

18. Jury fees may be taxed against the defendant in some jurisdictions. (*Alaska.*—*United States v. Madigan*, 3 Alaska 72. *Mo.*—*State v. Wright*, 13 Mo. 243. *Neb.*—*Shaw v. State*, 17 Neb. 334, 22 N. W. 772. *Wash.*—*State v. Armstrong*, 29 Wash. 57, 69 Pac. 392; *State ex rel. Thurston Co. v. Grimes*, 7 Wash. 445, 35 Pac. 361), but not in *Michigan* (*People v. Kennedy*, 58 Mich. 372, 25 N. W. 318), or *Ohio* (*State v. Board of Comrs.*, 7 Ohio Dec. 35, 14 Ohio C. C. 26, *affirming* 6 Ohio Dec. 240).

Statutes requiring a defendant to pay jury fees are constitutional. *State v. Verwayne*, 44 Iowa 621; *State v. Wright*, 13 Mo. 243.

In *Alaska*, mileage and cost of summoning the jury may be taxed against the defendant on conviction. *United States v. Madigan*, 3 Alaska 72.

In *Virginia*, the accused on conviction may be taxed with the costs of a

witness fees,¹⁹ which may be taxed against the accused on conviction, by statute in many jurisdictions. But costs cannot be taxed against him until he has been convicted in accordance with established procedure.²⁰

(III.) *Prosecutions on Separate Counts or Indictments.*—If a defendant is prosecuted on separate counts for several violations of a law, and is found guilty under some counts and not guilty under others, he is not liable for costs accruing under the counts under which he was acquitted.²¹ But if he is tried under different indictments for several

jury without respect to the place from whence they came. The only difference in the case of resident and non-resident jurors, is that the non-resident is entitled to mileage, the resident is not. *Souther v. Com.*, 7 Gratt. 673.

If the defendant pleads guilty there is no warrant in law for taxing these fees as costs. *State v. Williams*, 92 Mo. App. 443.

19. Witnesses for the state as well as his own, in case of conviction. *Corbin v. People*, 52 Ill. App. 355; *Schlicht v. State*, 56 Ind. 173. See *Encyc. Laws of Eng.* 2nd ed., Vol. 4, p. 98.

Nor is there any distinction so far as the convicted defendant's liability goes, between the fees of resident or non-resident witnesses. *Corbin v. People*, 52 Ill. App. 355.

And witness fees may be taxed against the defendant, although some of the witnesses subpoenaed and attending were not used (*Cameron v. State*, 37 Ind. App. 381, 76 N. E. 1021; *State v. Granville*, 26 Kan. 158), or their names were not indorsed on the indictment as required by law (*Cameron v. State*, *supra*), and although they did not attend in obedience to a summons (*Barrett v. State*, 24 Ala. 74).

But the accused is not liable for the fees or mileage of an unnecessary number of witnesses summoned by the state (Ala.—*Murphy v. State*, 71 Ala. 15. Neb.—*Biester v. State*, 65 Neb. 276, 91 N. W. 416. Tex.—*Manuel v. State*, 45 Tex. Crim. 96, 74 S. W. 30), though in Colorado there is no limit to the number of witnesses; it is discretionary with the law officers of the commonwealth (*Parker v. People*, 7 Colo. App. 56, 42 Pac. 172).

In Georgia, the accused cannot be charged with the costs of any witness of the state who was not subpoenaed and examined. *Herrington v. Flanders*, 115 Ga. 823, 42 S. E. 222.

In New Jersey, there is no statute which allows a *per diem* to a witness

detained in custody in default of security for his appearance, to be taxed against a convicted defendant. *State v. Walsh*, 44 N. J. L. 470.

Costs of Attaching Witnesses.—The defendant, upon conviction, is liable for the costs of attachment proceedings to compel the attendance of witnesses, if not adjudged against the witnesses. *State v. Reinhart*, 92 Tenn. 270, 21 S. W. 524.

20. *Speer v. State*, 64 Neb. 77, 89 N. W. 624.

Action on Due Bill Given Clerk.—"A due bill given by the defendant in a criminal case to the clerk of a court in Georgia, in settlement of a bill for costs rendered by the clerk before there had been any conviction of the accused, who was eventually acquitted, was without legal consideration; and, upon the trial of an action by the clerk on the due bill, had before the judge, without a jury, where these facts were admitted, judgment should have been rendered for the defendant." *Wells v. Potter*, 120 Ga. 889, 48 S. E. 354.

21. *State v. Plum*, 49 Kan. 679, 31 Pac. 308; *State v. Brooks*, 33 Kan. 708, 7 Pac. 591; *Com. v. Ewers*, 4 Gray (Mass.) 21.

Witness Fees.—The defendant is only bound to pay for the costs of those witnesses who attended for the purpose of testifying in reference to the counts upon which he was convicted. *Com. v. Ewers*, 4 Gray (Mass.) 21.

"Where two are joined in an indictment for a misdemeanor, and one is convicted and the other is acquitted, the jury have no power to order that the costs, or any portion of them, shall be paid by the county, the acquitted defendant, or the prosecutor, and that it makes no difference whether the conviction is by plea or by verdict." *Com. v. Edwards*, 135 Pa. 474, 19 Atl. 1064.

violations of a law, costs may be included in each of the several judgments rendered in accordance with the several verdicts, though the indictments were all tried at the same time.²²

(IV.) **Proceedings To Exact Peace Bond.**—In the absence of statute, the costs of proceedings to exact a peace bond may not be assessed against the party against whom the proceeding is instituted, especially if he is discharged.²³ But there are statutes in some jurisdictions expressly providing that where a person is required to give security to keep the peace or for his good behavior, the magistrate may tax the costs against him.²⁴

(V.) **Joint Defendants.**—(A.) **LIABILITY OF EACH.**—When two or more persons jointly indicted for a felony are jointly tried and convicted, whether a joint judgment is rendered against all, or a separate judgment against each, each is liable for the entire costs, though but one payment can be enforced, and in the event of unequal payments, contribution will be allowed.²⁵

22. *Krutz v. State*, 4 Ind. 647.

23. *Ia.*—*State v. Leathers*, 16 Iowa 406. *Mass.*—*Com. v. Morey*, 8 Mass. 78. *Pa.*—*Com. v. Rice*, 3 Pa. Dist. 259. *Tenn.*—*Mooney v. State*, 2 Yerg. 578.

In *Louisiana* a justice of the peace is without authority to require the payment of costs in addition to giving the peace bond required. *Babin v. Foster*, 109 La. 587, 33 So. 611.

Criminal Code of Nebraska, "§§500, 501, authorizes the taxation of costs only in cases where a crime has been charged and there has been a conviction in accordance with established procedure." Hence, "the defendant in a proceeding for the prevention of crime may be taxed with costs only (1) where he is held to bail by the district court, and (2) where, for want of bail, he is sent to prison." *Speer v. State*, 64 Neb. 77, 89 N. W. 624.

In *Tennessee*, such costs may be charged to the prosecutor, but cannot be collected from the state or county upon a return of an execution *nulla bona*. *State v. Wormick*, 1 Lea (Tenn.) 559.

24. *Minn.*—*State ex rel. Beslow v. Sargeant*, 74 Minn. 242, 76 N. W. 1123. *Wash.*—*Clallam County v. Hall*, 23 Wash. 85, 62 Pac. 443. *Eng.*—42 and 43 Vict. ch. 49, §25.

In *Arkansas* it is held that persons rightfully placed under bonds to keep the peace may be assessed with the costs of prosecuting them, even in the absence of statute. *Collins v. State*, 57 Ark. 209, 21 S. W. 105.

And in *Kansas* and *Missouri* the same rule prevails. *State v. Arnold*, 56 Kan. 307, 43 Pac. 267; *State v. Hoffman*, 18 Mo. 329.

Enforcement in Texas.—The magistrate cannot imprison the parties for non-payment of these costs in Texas, because there is no statute authorizing it. *Landa v. State* (Tex. Crim.), 45 S. W. 713.

In *Michigan* such power is expressly given the justice. *People v. Weeks*, 99 Mich. 86, 57 N. W. 1091.

Under the *Iowa* statute, where one is bound over to keep the peace and to abide the orders of the district court, he is entitled, in said court, when the complainant does not appear, to show that the proceedings were instituted without probable cause, to the end that, if such be found to be the fact, costs may be taxed against the complainant. *State v. Steinkopf*, 94 Iowa 415, 62 N. W. 787.

25. *Newman v. State*, 160 Ala. 102, 49 So. 786; *Dawson v. Sayre*, 80 Ala. 444, 2 So. 479; *Fanning v. State*, 47 Ark. 442, 2 S. W. 70.

If two persons are jointly prosecuted, and one pleads guilty and the other goes to trial on a plea of not guilty and is convicted, the court may tax the costs of the cause up to the time of the severance against the one who pleads guilty, because if there had been no severance the conviction of both would have carried the entire costs. *Woodruff v. State*, 8 Ind. 521.

But inasmuch as the costs are merely incident to the judgment, joint defendants are severally liable for the costs incurred in procuring their respective convictions, if the conviction is not joint; and not for the costs of each other.²⁶

Where two or more persons are jointly indicted, and some are acquitted and others are convicted, the acquitted defendant can neither recover costs nor can he be ordered to pay them,²⁷ nor on the other hand, can the convicted defendants be required to pay the costs of prosecuting the acquitted defendant.²⁸

(B.) JOINT AND SEPARATE TRIALS.—Where several defendants are jointly indicted and jointly tried, only one fee can be taxed,²⁹ although they plead severally,³⁰ or demand separate trials, if this right is afterwards waived.³¹ In other words where there has been but one indictment, one plea, one legal proceeding of record, one judgment, and consequently but one conviction, the prosecuting attorney is entitled to but one fee, although several persons are included in the accusation and are affected by the proceeding and judgment.³²

But though several persons are jointly indicted and jointly convicted, yet if separate judgments are rendered against them, a fee should be taxed against each defendant for the prosecuting attorney.³³

(VI.) Taxation of Costs.—(A.) A MINISTERIAL ACT.—The taxation of costs in a criminal case implies an estimate and allowance of items, the amounts of which are fixed and certain, or capable of being rendered so by calculation or evidence. Such taxation is a ministerial rather than a judicial act, and in courts of record is usually entrusted to a ministerial officer.³⁴

(B.) ADVISABILITY OF FORMAL TAXATION.—It is laid down by some authorities that costs are incidental to a judgment in a criminal as well as in a civil case,³⁵ and follow or attend the conviction, whether

26. Colo.—*Murphy v. People*, 3 Colo. 147. Ill.—*Moody v. People*, 20 Ill. 316. Miss.—*White v. Englehart*, 2 Smed. & M. 38. Mo.—*State v. McO'Brien*, 21 Mo. 272.

27. Com. v. *Edwards*, 135 Pa. 474, 19 Atl. 1064; *Searight v. Com.*, 13 Serg. & R. (Pa.) 301.

28. *Kennedy v. People*, 122 Ill. 649, 13 N. E. 213.

29. Ark.—*Fanning v. State*, 47 Ark. 442, 2 S. W. 70. Ga.—*Officers of Court v. Wyatt*, 62 Ga. 172, clerk's fee. Ind. *Bunday v. State*, 6 Ind. 398. N. C. *State v. Gwyn*, 61 N. C. 445. Va.—*Com. v. Hooper*, 2 Va. Cas. 223.

Separate Fee for Judgment.—Although several defendants are included in the same indictment, yet if the judgment is a separate one against each, and not a joint one against all, the clerk may tax a fee for judgment against each defendant. *State v. Gwyn*, *supra*.

30. Com. v. *Sprinkles*, 4 Leigh (Va.) 650.

31. *State v. Granville*, 26 Kan. 153.

32. *Fanning v. State*, 47 Ark. 442, 2 S. W. 70.

Where defendants jointly indicted do not sever in their defenses, a prosecuting attorney's fee ought not to be taxed against each defendant. *Brown v. State*, 46 Ala. 148; *Com. v. Hooper*, 2 Va. Cas. 223, followed in *Com. v. Sprinkles*, 4 Leigh (Va.) 650.

33. *Penland v. State*, 1 Humph. (Tenn.) 383.

34. *Videto v. Board of Supervisors*, 31 Mich. 116, opinion of Cooley, J.

35. 3 Bl. Com. 399, and the following cases: Ark.—*Collins v. State*, 57 Ark. 209, 21 S. W. 105. Ill.—*Corbin v. People*, 52 Ill. App. 355. Kan.—*State v. Granville*, 26 Kan. 153. Me.—*In re Ricker* 32 Me. 37.

they are specially provided for and mentioned in the judgment or not.³⁶

But the common practice and the better practice is for the court to determine the costs which the accused will be required to pay and to state the amount thereof in the judgment.³⁷

(C.) **THE RULE OF CIVIL CASES FOLLOWED.** — Where there is no statute in the particular jurisdiction prescribing a rule for the taxation of costs in criminal cases, the court will adopt the rule established in civil cases,³⁸ and it is expressly provided by statute in others that costs in criminal cases shall be taxed as in civil cases.³⁹

(D.) **REQUISITES AND VALIDITY.** — (1.) *Certainty.* — The judgment taxing costs against the defendant in a criminal case should be certain and unambiguous.⁴⁰

(2.) *Notice of Taxation.* — The taxing of costs against the defendant in a criminal case is necessarily a summary proceeding and need not be delayed until notice is given the defendant.⁴¹

(E.) **COLLATERAL ATTACK.** — A judgment taxing costs against the convicted defendant cannot be collaterally attacked if it appears regular upon its face, and there is nothing to show that the costs imposed were more than were in fact incurred in the prosecution.⁴²

(F.) **COST BILL.** — Although it is the better practice to require the prosecution to make out a regular cost bill as in civil cases when taxing costs against the accused, yet in the absence of any statute requiring it the court may determine the amount of costs without any cost bill.⁴³ But in some jurisdictions cost bills are provided for by statute, and while they should show all that is necessary, a presumption of correctness is indulged in their favor.⁴⁴

Objections to the cost bill should be made by motion to retax. Such objections come too late if made for the first time on appeal.⁴⁵

36. Ark.—Patton v. State, 41 Ark. 486. Ind.—State v. Smith, 6 Blackf. 549. La.—State v. Brannon, 34 La. Ann. 942.

In *In re Boyd*, 34 Kan. 570, 9 Pac. 240, it was held that a judgment for costs in a criminal case is no part of the punishment of the offense.

37. Hendon v. Delvichio, 137 Ala. 594, 34 So. 830; *In re Johnson*, 104 Mich. 343, 62 N. W. 407.

38. Ia.—Hayes v. Clinton Co., 118 Iowa 569, 92 N. W. 860. Miss.—White v. State, 42 Miss. 635. N. D.—State v. Kruse, 124 N. W. 385.

39. State v. A. B. C., 68 N. H. 441, 40 Atl. 1065.

40. Johnson v. State, 29 N. J. L. 453.

It should contain the essentials required for valid judgments in other cases, such as a statement of the amount of the costs, etc. State v. Jameson, 13 Nev. 429; Harger v. Comrs., 12 Pa. 251.

41. *In re Johnson*, 104 Mich. 343, 62 N. W. 407. See Harger v. Comrs., 12 Pa. 251.

42. *In re Johnson*, 104 Mich. 343, 62 N. W. 407.

43. State v. District Court, 16 Nev. 76.

44. People v. Peacock, 5 Utah 237, 14 Pac. 332; Code (W. Va.) 1899, ch. 50, §227.

Bill for Witness Fees.—“If, on the face of the memorandum of costs, the names of witnesses, the number of days claimed, and the amounts appear, the court will, in the absence of any contrary showing, presume that the witnesses appeared within the statutory time and claimed their fees.” It is not necessary that the cost bill should show this fact. People v. Peacock, 5 Utah 237, 14 Pac. 332.

45. People v. Peacock, 5 Utah 237, 14 Pac. 332, objection that it was not filed in time.

(VII.) **Lien of Judgment.**—By statute in many jurisdictions, a judgment taxing the costs against the accused constitutes a lien on his property if filed and docketed as the statute directs.⁴⁶

(VIII.) **Relief From Erroneous or Illegal Taxation.**—(A.) **By APPEAL.** No appeal lies on behalf of the accused from an order taxing the costs of the proceeding against him, unless there is a statute expressly authorizing such appeal.⁴⁷

(B.) **By RETAXATION.**—The proper remedy for the convicted defendant to pursue to correct an erroneous taxation of costs against him is by motion to retax before the trial court,⁴⁸ and the action of inferior courts on motions to retax costs in criminal cases is reviewable.⁴⁹

46. **Ark.**—*Lawson v. Johnson*, 5 Ark. 168. **Colo.**—*Bransom v. Board of Comrs.*, 5 Colo. App. 231, 37 Pac. 957. **Ill.** *Hitchcock v. Roney*, 17 Ill. 231. **Mo.** *McKnight v. Spain*, 13 Mo. 534. **Mont.** *Silver Bow Co. v. Strumbaugh*, 9 Mont. 81, 22 Pac. 453. **Ore.**—*Knott v. Shaw*, 5 Ore. 482; *Whitley v. Murphy*, 5 Ore. 328, 20 Am. Rep. 741. **Wash.**—*Clallam County v. Hall*, 23 Wash. 85, 62 Pac. 443; *Lamey v. Coffman*, 11 Wash. 301, 39 Pac. 682.

See generally the title "Judgments."

In *Georgia*, "all the property of a person arrested and convicted upon a criminal charge, or who may escape from jail, or from any officer, owned by him at the time of the arrest, is bound for the costs of prosecution, by a statutory lien, which attaches also upon the proceeds of the property, when identified. This lien overrides a title to property made by him, upon sale for professional services, after his arrest and before conviction." *Morgan v. Collier*, 13 Ga. 493.

In a proceeding to prevent the commission of crime, the order for payment of costs made by the magistrate has the force of an order made in criminal prosecutions, and hence constitutes a lien on the prisoner's property. *Clallam County v. Hall*, 23 Wash. 85, 62 Pac. 443.

Docketing Judgment.—When a judgment is rendered in favor of the state imposing the payment of costs, the court must enter the judgment on the judgment lien docket, so that all persons desiring to purchase the land of the convict may have due notice of any incumbrance upon it. *State v. Munds*, 7 Ore. 80.

When Lien Attaches.—In some jurisdictions the mere arrest subjects the

real property of the accused to a lien dating from such arrest, and such statutes are constitutional. *Morgan v. Collier*, 13 Ga. 493; *Silver Bow Co. v. Strumbaugh*, 9 Mont. 81, 22 Pac. 453.

In others the lien attaches on the finding of the indictment or the arrest, whichever happens first. *Hitchcock v. Roney*, 17 Ill. 231; *McKnight v. Spain*, 13 Mo. 534.

A change of venue cannot affect any change in the operation of this lien. *Hitchcock v. Roney*, 17 Ill. 231.

Divestiture of Lien.—This lien cannot be divested by alienating the property after it has attached. *Morgan v. Collier*, 13 Ga. 493; *McKnight v. Spain*, 13 Mo. 534.

If the land is aliened after the lien attaches, it may be enforced against the alienee by action to enforce the lien as well as by execution. *Silver Bow Co. v. Strumbaugh*, 9 Mont. 81, 22 Pac. 453.

47. *State v. Arnold*, 56 Kan. 307, 43 Pac. 267, proceeding to exact peace bond.

But in *Missouri*, after a final judgment discharging the defendant, he may appeal from a mere order taxing costs. *State v. Krueger*, 69 Mo. App. 31.

48. **Ala.**—*Blankenship v. State*, 105 Ala. 128, 17 So. 99. **Kan.**—*State v. Ellern*, 51 Kan. 784, 33 Pac. 547. **Ore.** *Whitley v. Murphy*, 5 Ore. 328.

See, *infra*, I, E, 5.

In *Illinois*, the convicted defendant may question the correctness of the fee bill by motion to retax, or by replevin of the fee bill. *Corbin v. People*, 52 Ill. App. 355.

49. *Banks v. State*, 96 Ala. 41, 11 So. 469.

But while an erroneous taxation of costs in an inferior court may be corrected by an appellate court, if there is anything in the record to correct by, and if a motion has been made in the lower court to correct the taxation,⁵⁰ yet in the absence of a showing to the contrary, it will be presumed on appeal that the lower court rightly overruled the motion to retax.⁵¹

(C.) **RELIEF IN EQUITY.**—The accused may go into equity and show that a fraud has been practised on him in the taxation of the costs. And the allegations of his bill in this kind of a case must be the same as they would be in any other; that is to say, they must be specific in stating the facts which constitute the fraud.⁵²

(IX.) **Enforcement and Collection.**—(A.) **EXECUTION.**—In most jurisdictions, a judgment for costs in a criminal case is enforced and collected as in civil cases; that is, by execution,⁵³ or action.⁵⁴ But a void or irregular judgment for costs in a criminal case will not support an execution. As for example, a judgment that does not show the amount of costs due.⁵⁵

Property Subject.—Of course only land to which the accused has title can be subjected to this lien.⁵⁶

(B.) **BY IMPRISONMENT.**—(1.) *Considered Generally.*—Costs in criminal cases are not debts within the meaning of the constitutional prohibition

50. *In re Lowe*, 46 Kan. 255, 26 Pac. 749; *State v. Goodbar*, 8 Lea (Tenn.) 451.

51. *Murphy v. State*, 71 Ala. 15; *Parker v. People*, 7 Colo. App. 56, 42 Pac. 172.

52. *Whitley v. Murphy*, 5 Ore. 328, 20 Am. Rep. 741.

53. *Colo.*—*Bransom v. Board of Comrs.*, 5 Colo. App. 231, 37 Pac. 957. *Mo.*—*State v. Buchanan County*, 41 Mo. 254. *Nev.*—*State v. District Court*, 16 Nev. 76. *N. J.*—*State v. Dodge*, 24 N. J. L. 671. *Pa.*—*McNamara v. Earley*, 2 Pa. Co. Ct. 491. *Tex.*—*Landa v. State* (Tex. Crim.), 45 S. W. 713. *Wash.*—*Clallam County v. Hall*, 23 Wash. 85, 62 Pac. 443.

In Oregon, the state's lien on the accused's property for its costs, may be enforced by execution on the judgment where the convict has not disposed of his property between the commission of the felony and the date of his conviction. If he has disposed of it, the state must resort to a suit in equity to enforce it. *State v. Munds*, 7 Ore. 80.

Capias Pro Fine.—Upon a judgment against a person for a fine and costs, a *capias pro fine* may issue on behalf of the state, though not for costs alone without a fine. *Com. v. Webster*, 8

Gratt. (Va.) 702. Compare *Com. v. Wilson*, 3 Ky. L. Rep. 777.

Necessity for Judgment.—An execution for costs in a criminal case, but without any judgment for the recovery of such costs, is void, and a sheriff's deed based on such execution is also void. *Hendon v. Delvichio*, 137 Ala. 594, 34 So. 830.

Time of Issuance.—Must be after taxation, but sentence not necessary. *Harger v. Comrs.*, 12 Pa. 251.

Execution is usually stayed pending an appeal. *State v. McO'Brien*, 21 Mo. 272.

Sales under an execution for costs in criminal cases must be for cash. *Hall v. Doyle*, 35 Ark. 445.

Marshaling Assets.—If the property subject to this lien has been aliened to successive alienees, it is subjected in their hands in the inverse order of alienation. *Knott v. Shaw*, 5 Ore. 482.

54. *Whitley v. Murphy*, 5 Ore. 328, 20 Am. Rep. 741.

55. *Ia.*—*Hayes v. Clinton Co.*, 118 Iowa 569, 92 N. W. 860. *Nev.*—*State v. Jameson*, 13 Nev. 429. *Pa.*—*Harger v. Comrs.*, 12 Pa. 251.

56. *State v. O'Neil*, 7 Ore. 141, holding that land patented under the homestead act of Congress is not liable prior to the issuance of the patent.

against imprisonment for debt. Accordingly it is held in most jurisdictions that imprisonment for non-payment of such costs is not objectionable on constitutional grounds.⁵⁷ Even at common law the courts had power to imprison a defendant until costs were paid.⁵⁸

In some jurisdictions, on the other hand, the defendant cannot be imprisoned at all for the non-payment of costs, because there is no statute authorizing such punishment.⁵⁹ In one case additional labor

57. *Ala.*—*Bolton v. State*, 146 Ala. 691, 40 So. 409; *Ex parte Joice*, 88 Ala. 128, 7 So. 3. *Ga.*—*Green v. State*, 112 Ga. 52, 37 S. E. 93. *Kan.*—*In re Boyd*, 34 Kan. 570, 9 Pac. 240. *Ky.*—*Saylor v. Com.*, 122 Ky. 776, 93 S. W. 48; *Berry v. Brislan*, 86 Ky. 5, 4 S. W. 794. *Miss.*—*Ex parte Meyer*, 57 Miss. 85. *Neb.*—*In re Newton*, 39 Neb. 757, 58 N. W. 436. *N. C.*—*State v. Morgan*, 141 N. C. 726, 53 S. E. 142. *Pa.*—*Keefhaver v. Com.*, 2 Pen. & W. 240; *Seldon v. Cozad*, 13 Pa. Co. Ct. 303. *Tenn.*—*Eaton v. State*, 15 Lea 200; *Hill v. State*, 2 Yerg. 247. *Tex.*—*Ex parte Spiller*, 138 S. W. 1013. *Wash.*—*Colby v. Backus*, 19 Wash. 347, 53 Pac. 367; *Foster v. Territory*, 1 Wash. 411, 25 Pac. 459. *W. Va.*—Code, 1899, ch. 50, §§227, 228.

In Louisiana, such a statute is held to violate the constitutional prohibition against involuntary servitude. *State v. Brannon*, 34 La. Ann. 942.

Hard Labor.—The accused may be sentenced to hard labor to pay the costs in some states. *Ala.*—*Bolton v. State*, 146 Ala. 691, 40 So. 409; *Ex parte Joice*, 88 Ala. 128, 7 So. 3; *State v. Judge*, 87 Ala. 46, 6 So. 328. *Miss.*—*Ex parte Meyer*, 57 Miss. 85. *N. C.*—*State v. Morgan*, 141 N. C. 726, 53 S. E. 142. *Ohio.*—*Gibson v. Zanesville*, 31 Ohio St. 184.

But a prisoner so sentenced by a justice of the peace may be released on habeas corpus. *Ex parte McKivett*, 55 Ala. 236.

In Alabama the maximum term for which the accused can be sentenced to hard labor in payment of costs is eight months in cases of misdemeanor. *Johnston v. State*, 94 Ala. 35, 10 So. 667; *Miller v. State*, 77 Ala. 41; *Bradley v. State*, 69 Ala. 318.

Accordingly, it is error to sentence the defendant to an additional term of 375 days' hard labor for costs incurred even in prosecution for homicide. *Weaver v. State (Ala.)*, 55 So. 956.

If this is the only error, however, the appellate court will not reverse, but will correct and affirm the judgment. *Vaughan v. State*, 83 Ala. 55, 3 So. 530.

One so sentenced must be allowed seventy-five cents a day, not forty cents. *Wilson v. State (Ala.)*, 57 So. 503; *Johnson v. State (Ala.)*, 57 So. 499; *Stanfield v. State (Ala.)*, 57 So. 402; *Swint v. State (Ala.)*, 57 So. 394; *Pugh v. State (Ala.)*, 56 So. 748; *Dowling v. City of Troy (Ala.)*, 56 So. 116.

The defendant may be sentenced to hard labor for the payment of the sheriff's bill for removing the prisoner from the county in which he was arrested to the county in which he was triable. *Clark v. State (Ala.)*, 56 So. 813. *Compare Ex parte State*, 121 Ala. 327, 25 So. 563.

58. *In re Newton*, 39 Neb. 757, 58 N. W. 436, citing *Bishop Crim. Proc.* §1301; *Brown v. People*, 19 Ill. 612; *Hill v. State*, 2 Yerg. (Tenn.) 247.

59. *Ark.*—*State v. Jackson*, 46 Ark. 137. *Cal.*—*Petty v. San Joaquin County Court*, 45 Cal. 245. See *Ex parte Harrison*, 63 Cal. 299. *Ind.*—*Thompson v. State*, 16 Ind. 516. *Ia.*—*State v. Erwin*, 44 Iowa 637. *Kan.*—*Mitchell's Case*, 39 Kan. 762, 19 Pac. 1. *La.*—*State v. Brannon*, 34 La. Ann. 942. *Nev.*—*State v. District Court*, 16 Nev. 76. *Ohio.*—*Brown v. State*, 11 Ohio 276; *Bonsal v. State*, 11 Ohio 72. *Okla.*—*Austin v. State (Okla. Crim.)*, 117 Pac. 1098; *Ex parte Steed (Okla. Crim.)*, 117 Pac. 887; *Ex parte Harry (Okla. Crim.)*, 117 Pac. 726.

“A person committed to the New Jersey Reformatory, under a sentence authorized by the act for the management of that institution, approved March 21, 1901 (P. L. 1901, p. 231), cannot be held therein beyond the maximum term of imprisonment, which the statute fixes as the penalty for the crime for which he was convicted. He cannot be held beyond such period under such a sentence until the costs are

was held proper under the statute only when the fine as well as costs were unpaid.⁶⁰

And a law claimed to authorize imprisonment for non-payment of costs, must do so in clear and unmistakable language, as it will be strictly construed.⁶¹

After Pardon.—In any case a judgment for costs cannot be enforced by imprisonment after a pardon or remission of the fine by the governor, although the civil liability therefor remains.⁶²

(2.) *Sentence to Workhouse.*—In the absence of a statute or ordinance authorizing it a prisoner cannot be sentenced to work out his costs at a *per diem* allowance.⁶³ But in many jurisdictions, the prisoner may be required to work out the costs adjudged against him, in the county workhouse, even after his term of imprisonment has expired, if not otherwise paid or secured.⁶⁴

If the accused works out the costs in the county workhouse, the county must pay to those entitled their share of the proceeds of the convict's labor.⁶⁵

(X.) **Payment and Discharge.**—(A.) **GENERAL STATEMENT.**—A judgment against the accused for costs in a criminal case is not satisfied or discharged by his payment of a fine assessed against him and his discharge from custody,⁶⁶ and, of course, it is not discharged by his escape from custody.⁶⁷ In short, where the accused is imprisoned for non-payment of costs, there is ordinarily no means by which he can discharge himself without paying such costs.⁶⁸

But a discharge by the properly constituted authorities acting under the authority of some statute,⁶⁹ or a discharge under the insolvency

paid." *Perry v. Martin*, 73 N. J. L. 310, 62 Atl. 1001.

60. *State v. Brannon*, 34 La. Ann. 942.

61. **Kan.**—*In re Heitman*, 41 Kan. 136, 21 Pac. 213. **Mont.**—*State v. Sullivan*, 9 Mont. 490, 24 Pac. 23. **Ohio.** *Smith v. Perry*, 18 Ohio C. C. 826, 9 Ohio Cir. Dec. 778.

In Kansas, "it is only when the defendant is adjudged to pay 'any fine and costs' that the court may commit him to the county jail until the same are paid." *In re Grimstead*, 64 Kan. 780, 68 Pac. 638.

62. *Ex parte Purcell*, 61 Ark. 17, 31 S. W. 738; *Phillips v. State*, 58 Miss. 578; *Ex parte Gregory*, 56 Miss. 164.

63. *Uzziel v. Kanouse*, 12 Ill. App. 318. See *State v. Sibley*, 4 Lea (Tenn.) 738.

64. *Ex parte Tongate*, 31 Ind. 370; *Eaton v. State*, 15 Lea (Tenn.) 200.

But the specific tax upon litigation provided for by the Tennessee Code is not costs. *Johnson v. State*, 85 Tenn. 325, 2 S. W. 802.

Violation of City Ordinances.—*Berry v. Brislan*, 86 Ky. 5, 4 S. W. 794.

65. *State v. Sibley*, 4 Lea (Tenn.) 738.

Only Costs Legally Adjudged.—*Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650.

66. **Ia.**—*Gray v. Ferreby*, 36 Iowa 146; *State v. Gray*, 35 Iowa 503. **Mo.** *Ex parte Parker*, 106 Mo. 551, 17 S. W. 658. **Neb.**—*In re Dolson*, 37 Neb. 449, 55 N. W. 1071.

67. *State v. Dodge*, 24 N. J. L. 671; *State v. Simpson*, 46 N. C. 80.

68. *Com. v. Fields*, 33 Gratt. (Va.) 291; *Com. v. Webster*, 8 Gratt. (Va.) 702.

Death of accused pending appeal releases both sureties and appellant. *Kelly v. State* (Tex. Crim.), 66 S. W. 774.

69. *In re Boyd*, 34 Kan. 570, 9 Pac. 240, in this state the county board has this power.

In Pennsylvania, the prison inspectors only have power to discharge "convicts" although they have not

or bankruptcy laws,⁷⁰ may release the defendant from payment of costs.

(B.) PAROLE OR PARDON.—A parole will not release or discharge the defendant from the payment of costs in a criminal case,⁷¹ nor will a pardon, unless pleaded before sentence.⁷²

(C.) APPLICATION OF FUNDS.—If cash funds belonging to the accused are in the hands of the arresting officer, and upon conviction judgment is entered against defendant for the costs, these funds should be applied in satisfaction of the judgment, and the balance, if any, paid to the defendant or his authorized agent.⁷³

paid costs of the prosecution. *Beidleman v. Northampton Co.*, 4 Leg. Gaz. 212.

70. *Ia.*—*Olds v. Forrester*, 126 Iowa 456, 102 N. W. 419; *In re Curley*, 34 Iowa 184. *N. C.*—*State v. Williams*, 97 N. C. 414, 2 S. E. 370; *State v. McNeely*, 92 N. C. 829. *Pa.*—*Com. v. Lewis*, 4 Lanc. Law Rev. 386. *S. C.* *State v. Kenny*, 1 Bailey 375. *Tenn.* *Rogers v. State*, 5 Yerg. 368; *Hill v. State*, 2 Yerg. 247.

71. *Mikesell v. Board of Comrs.*, 82 Kan. 502, 108 Pac. 829; *Com. v. Long*, 5 Binn. (Pa.) 489.

72. *Ark.*—*Edwards v. State*, 12 Ark. 122. *Ind.*—*State v. Farley*, 8 Blackf. 229. *Ia.*—*Estep v. Lacy*, 35 Iowa 419. *Kan.*—*In re Boyd*, 34 Kan. 570, 9 Pac. 240. *Miss.*—*Phillips v. State*, 58 Miss. 578; *Ex parte Gregory*, 56 Miss. 164; *White v. State*, 42 Miss. 635. *Mo.* *State v. McO'Brien*, 21 Mo. 272. *N. C.* *State v. Mooney*, 74 N. C. 98. *Pa.* *Com. v. Ahl*, 43 Pa. 53; *Duncan v. Com.*, 4 Serg. & R. 449; *Com. v. Deniston*, 9 Watts 142; *Playford v. Com.*, 4 Pa. 144. *Eng.*—2 Hawks Pl. Crown 546, §43; *Hall's Case*, 5 Coke 51a, 77 Eng. Reprint 132.

The reason given is that the judgment for costs and that the defendant be imprisoned until such costs are paid, is no part of the punishment, but is merely a means of enforcing the legal obligation resting upon the defendant to pay the costs. The right to these costs and the means for their collection, are vested rights which cannot be disturbed or abridged or lessened by any pardon which the governor may grant. *In re Boyd*, 34 Kan. 570, 9 Pac. 240; *Ex parte Gregory*, 56 Miss. 164.

A "general" pardon does not release the judgment for costs in a criminal case. *Ex parte Purcell*, 61 Ark.

17, 31 S. W. 738; *Libby v. Nicola*, 21 Ohio St. 414.

Logically a general pardon extends to all of the judgment that the public has an interest in but not to that part in which individuals only are interested. *Ex parte Purcell*, *supra*. And see *In re Boyd*, 34 Kan. 570, 9 Pac. 240.

"Fines and forfeitures" which a governor is authorized by the constitution to remit do not include costs. *Ind.* *Ryan v. State*, 95 N. E. 561. *Ia.* *State v. Mateer*, 105 Iowa 66, 74 N. W. 912; *State v. Beeber*, 87 Iowa 636, 54 N. W. 479. *Va.*—*Anglea v. Com.*, 10 Gratt. 696.

Rule on Appeal.—In *Hawkins Pleas of the Crown*, 546, §43, it is said: "If the offense be pardoned after costs taxed, and then the defendant appeal to a superior court, which gives new costs, whether upon affirmance or reversal of the first sentence, they shall not be avoided by reason of the pardon, because they are not given in respect of the offense, but of the award of former costs, which being taxed before the pardon, are not avoided by it; and therefore the appeal was proper for determining whether they were well given or not." See *Phillips v. State*, 58 Miss. 578.

73. *Peters v. State*, 9 Ga. 109.

Without some express statute to authorize it, the fund produced by hiring out convicts cannot be applied to the payment of his insolvent costs, whether the costs accrued in the particular cases in which the convictions were had or in other insolvent cases. *Black v. Fate*, 88 Ga. 238, 14 S. E. 563.

Fine and Forfeiture Fund.—The cases in which the fees of the officers of court are made claims against the fine and forfeiture fund under the Ala-

b. *City, State or County.*—(I.) *Cities and Towns.*—(A.) *STATUTES.* In the absence of statute, a city or town cannot be held liable for the costs of a prosecution.⁷⁴ But by statute in some states, cities are made liable for the costs of a prosecution, in case the accused is found not guilty,⁷⁵ upon approval of the cost bill by the corporation counsel.⁷⁶

(B.) *ENFORCEMENT OF COLLECTION.*—*Assumpsit* will not lie against a town to enforce a claim for costs in a criminal case, when another method is pointed out by statute.⁷⁷

(II.) *The State or County.*—(A.) *ON ACQUITTAL.*—As by the common law, the public pays no costs,⁷⁸ neither state nor county is liable for

bama statute, are criminal cases in which the defendants have been convicted, and have been proved insolvent by the return of execution "no property found," or in which the state enters a *nolle prosequi*, or where the indictment has been withdrawn and filed, or the prosecution abated by the death of the defendant. No provision is made for the payment of fees arising from criminal cases, in which the defendants are not convicted. *Bilbro v. Drakeford*, 78 Ala. 318.

Neither the fees of a justice of the peace (*McPherson v. Boykin*, 76 Ala. 466), nor the fees of a clerk of court or sheriff who have failed to keep a fee book (*Bilbro v. Drakeford*, 78 Ala. 318) are claims against the fine and forfeiture fund.

The fees of witnesses who attend on preliminary trials before a committing magistrate, or on application for bail, are not claims against this fund, but only the fees of state witnesses who appeared before the grand jury or before the court in which the indictment or prosecution is pending. *Bilbro v. Drakeford*, 78 Ala. 318.

74. *Ala.*—*City of Montgomery v. Foster*, 54 Ala. 62. *Miss.*—*Booze v. Yazoo*, 95 Miss. 699, 49 So. 518. *Wis.*—*Preston v. Koshkonov*, 55 Wis. 202, 12 N. W. 440.

Proceedings To Enforce Ordinances. Neither in the court below (*Ala.*—*Selma v. Stewart*, 67 Ala. 338. *Cal.*—*Pillsbury v. Brown*, 47 Cal. 478. *Ill.*—*City of Centralia v. Nagele*, 181 Ill. 151, 53 N. E. 128; *Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837; *Anderson v. Schubert*, 158 Ill. 75, 41 N. E. 853; *Petersburg v. Whitnack*, 48 Ill. App. 663; *People v. Chapin*, 48 Ill. App. 643; *Fosselman v. Springfield*, 38 Ill. App. 296; *Town of Nokomis v. Harkey*, 31 Ill. App. 107. *Mich.*—*Village of*

Sparta v. Boorum, 129 Mich. 555, 90 N. W. 681, 89 N. W. 435, 9 Det. Leg. N. 226. *W. Va.*—*City of Charleston v. Beller*, 45 W. Va. 44, 30 S. E. 152) nor in the appellate court (*Montgomery v. Foster*, 54 Ala. 82).

Because such a proceeding is criminal. *City of Montgomery v. Foster*, 54 Ala. 62; *Charleston v. Beller*, 45 W. Va. 44, 30 S. E. 152.

In *Illinois*, this is the rule though the ordinance is invalid. *Monmouth v. Popel*, 183 Ill. 634, 56 N. E. 348, reversing in part, 81 Ill. App. 512; *Plymouth v. McWherter*, 152 Ill. App. 114.

Prohibition will lie to prevent the enforcement of such a judgment. *Charleston v. Beller*, 45 W. Va. 44, 30 S. E. 152.

75. *Ga.*—*Mayor v. Hoge*, 71 Ga. 696. *Kan.*—*City of Iola v. Harris*, 40 Kan. 629, 20 Pac. 521. *Wash.*—*City of Spokane v. Smith*, 37 Wash. 583, 79 Pac. 1125, in which it is held that under a statute making a city liable for costs on acquittal in a police court, the city would be liable in case a conviction in the police court was set aside on appeal.

Costs on appeal if city unsuccessful. *City of Kokomo v. Wills*, 34 Ind. 48. See *Mott v. State*, 145 Ind. 353, 44 N. E. 548; *Mariner v. Mackey*, 25 Kan. 669.

Who Liable for Costs.—The rule that the real party in interest is liable applies in prosecutions by or on behalf of municipal corporations. *Horn v. People*, 26 Mich. 221; *Preston v. Koshkonong*, 55 Wis. 202, 12 N. W. 440.

76. *Spokane v. Smith*, 37 Wash. 583, 79 Pac. 1125.

77. *Morgan v. Town of Berlin*, 45 Conn. 497, holding that they are to be paid by an order drawn by the trial justice on the town treasurer.

78. *Prince v. State*, 7 Humph.

costs incurred in the prosecution of offenses against the laws, except to the extent, and in the manner, provided by statute.⁷⁹

In case of an acquittal it is provided in some jurisdictions that the state or county shall be liable for the costs.⁸⁰ An acquittal by re-

(Tenn.) 137; *Tucker v. State*, 2 Head (Tenn.) 555; *Mooneys v. State*, 2 Yerg. (Tenn.) 578.

79. U. S.—*Phillips v. Gaines*, 131 U. S. (Appendix) clxix, 25 L. ed. 733. Ala.—*Greene County v. Hale County*, 61 Ala. 72. Colo.—*Boykin v. People*, 23 Colo. 183, 46 Pac. 635; *Board of Comrs. v. Wilson*, 3 Colo. App. 492, 34 Pac. 265. D. C.—*District of Columbia v. Lyon*, 7 Mackey 222. Fla.—*Buckman v. Alexander*, 24 Fla. 46, 3 So. 817. Ill.—*Galpin v. Chicago*, 249 Ill. 554, 94 N. E. 961; *City of Chicago v. O'Hara*, 60 Ill. 413; *Kitchell v. Madison*, 5 Ill. 163; *Moore v. People*, 37 Ill. App. 641. Ind.—*Rawley v. Vigo County*, 2 Blackf. 355. Kan.—*Heller v. Board of Comrs.*, 23 Kan. 86; *State v. Campbell*, 19 Kan. 481. Minn.—*State v. Buckman*, 95 Minn. 278, 104 N. W. 278. Neb.—*Worthen v. Johnson County*, 62 Neb. 754, 87 N. W. 909, liability for mileage of witnesses. N. C.—*State v. Saunders*, 148 N. C. 597, 59 S. E. 695. Pa.—*Codding v. Bradford County*, 116 Pa. 47, 9 Atl. 153; *Com. v. Johnson*, 5 Serg. & R. 195; *Irwin v. Comrs.*, 1 Serg. & R. 505; *Com. v. Yeakel*, 1 Woodw. Dec. 143; *Dougherty v. Cumberland County*, 26 Pa. Super. 610; *Com. v. Curren*, 9 Phila. 623; *Com. v. Curren*, 2 Chest. Co. 393. Wis.—*Noyes v. State*, 46 Wis. 250, 1 N. W. 1, 32 Am. Rep. 710.

Action on Recognizance.—In some jurisdictions costs cannot be taxed against the state in an action on a recognizance, because it is regarded as a penal action. *Courtright v. Attorney General*, 43 Mich. 411, 5 N. W. 441.

But in others costs are allowed because the suit is a civil action. *Dover v. State*, 45 Ala. 244; *State v. Harlow*, 26 Me. 74.

Actions for penalties for obstructing highways do not carry costs against the state. *Metcalf v. Auditor General*, 38 Mich. 94.

County Not Liable for Printing Paper Books.—*Com. v. Buccieri*, 153 Pa. 570, 26 Atl. 245, 32 W. N. C. 113.

80. U. S.—*Phillips v. Gaines*, 131 U. S. (Appendix) clxix, 25 L. ed. 733. Ark.—*Boone County v. Mitchell*, 64 Ark.

125, 40 S. W. 784; *Bradley County v. Bond*, 37 Ark. 226. Colo.—*Board of Comrs. v. Wilson*, 3 Colo. App. 492, 34 Pac. 265. Fla.—*Buckman v. Alexander*, 24 Fla. 46, 3 So. 817. Ga.—*Hyden v. State*, 40 Ga. 476; *Ware v. State*, 33 Ga. 338. Ill.—*Marion County v. Lear*, 108 Ill. 343 (sheriff's fees); *Heist v. People*, 56 Ill. App. 391. Ind.—*Ex parte Harrison*, 112 Ind. 329, 14 N. E. 225; *Israel v. State*, 8 Ind. 467 (holding the state not liable for fees of witness). Kan.—*State v. Brooks*, 33 Kan. 708, 7 Pac. 591; *State v. Manlove*, 33 Kan. 483, 6 Pac. 905; *Board of Comrs. v. Whiting*, 4 Kan. 273 (holding that such statute covers all the fees to which an officer may be entitled). Mass.—*Com. v. Haynes*, 107 Mass. 194 (accused discharged on writ of error); *In re Attorney General*, 104 Mass. 537 (holding that fees of expert witnesses cannot be taxed); *Com. v. Ewers*, 4 Gray 21; *Britton v. Com.*, 1 Cush. 302. Mich.—*People ex rel. Grand Rapids v. Board of Supervisors*, 40 Mich. 481, police court. Miss.—*White v. State*, 42 Miss. 635, holding a pardon to be a sufficient acquittal. Mo.—*State v. Wilder*, 197 Mo. 27, 94 S. W. 499 (in case of acquittal of murder in second degree in juvenile court, state not liable for costs); *State v. Holliday*, 67 Mo. 299; *Ford v. Howard County*, 2 Mo. 225 (holding county liable for witness fees and officers' fees where accused is acquitted). N. C.—*State v. Hicks*, 124 N. C. 829, 32 S. E. 957; *State v. Horne*, 119 N. C. 853, 26 S. E. 36 (both holding county liable for fees of witness). Ore.—*Eisen v. Multnomah County*, 31 Ore. 134, 49 Pac. 730. Pa.—*Com. v. Harrison*, 38 Pa. Super. 17; *Conniff v. Luzerne County*, 30 Pa. Super. 383 (in case of return of defective indictment by grand jury); *Long v. Lancaster County*, 16 Pa. Super. 413 (witness fees). Tenn.—*State v. Cooper*, 120 Tenn. 549, 113 S. W. 1048; *Henderson v. Walker*, 101 Tenn. 229, 47 S. W. 430 (costs on habeas corpus when prisoner discharged to be paid by state as upon acquittal). Wash.—*State v. Rutledge*, 40 Wash. 9, 82 Pac. 126; *State v. Grimes*, 7 Wash. 445, 35 Pac. 361.

versal on appeal is a sufficient acquittal within the meaning of those statutes.⁸¹

And in some jurisdictions if the state abandons the prosecution and dismisses the case, the defendant is entitled to a judgment for his costs lawfully incurred in preparing his defense.⁸²

(B.) ITEMS TAXABLE.—Thus the witnesses' fees of an acquitted defendant may be taxed against the state or county if there is a statute

In Colorado, the liability of a county in criminal cases is as follows: In case of a conviction, judgment must be rendered against the defendant for costs of prosecution, and this judgment is a lien on his property. But if he is acquitted, and the prosecuting witness is not adjudged to pay the costs, or if he is convicted and is unable to pay them, in either case, the costs of the prosecution are a charge against the county. Or if he makes a proper showing of inability to pay his witness fees, the court will order them summoned, and these costs will be paid in the same manner that similar costs are paid in case of the state's witnesses. Except upon some one of the foregoing conditions, a county cannot be held liable for any costs in a criminal proceeding. *Bransom v. Larimer County Comrs.*, 5 Colo. App. 231, 37 Pac. 957.

The Florida constitution, providing for the payment by the state of costs and expenses in criminal prosecutions in certain cases, refers to all the costs and expenses, and not merely to those made by the state. *Buckman v. Alexander*, 24 Fla. 46, 3 So. 817.

Florida Act of 1887, ch. 3702, §4 to "provide for and regulate the payment of costs and expenses in certain cases, of criminal prosecutions by the state," does not require that a person not insolvent shall take the oath there prescribed in order, if he is discharged, to put the payment of the costs and expenses of the case upon the state. *Buckman v. Alexander*, 24 Fla. 46, 3 So. 817.

A bastardy proceeding is not a criminal proceeding and the county is not liable for costs of an unsuccessful proceeding of that nature. *McAndrew v. Madison Co.*, 67 Iowa 54, 24 N. W. 590. See generally the title "Bastardy Proceedings," Vol. 4, p. 54.

Fees of Justice.—In North Carolina the county is not liable for the fees of a justice, where the accused is acquitted in a case over which the jus-

tice has final jurisdiction; but it is otherwise where he acts as examining magistrate. *Merriman v. Henderson County*, 106 N. C. 369, 11 S. E. 267.

81. Mass.—Com. v. Haynes, 107 Mass. 194; Com. v. Bundy, 5 Gray 305; *Britton v. Com.*, 1 Cush. 302. Tex.—*McKinney v. State*, 41 Tex. Crim. 413, 55 S. W. 337. Wash.—*City of Spokane v. Smith*, 37 Wash. 583, 79 Pac. 1125, holding that acquittal on appeal entitled defendant to benefit of this statute.

82. *State v. Krueger*, 69 Mo. App. 31, costs of taking depositions.

Dismissal or Nol. Pros.—When the case is dismissed by *nol. pros.* the county is not liable for the costs in some states, on the ground that this is not an acquittal within the meaning of the statutes. *Craighead County v. Cross County*, 50 Ark. 431, 8 S. W. 183; *Stalcup v. Greenwood Dist.*, 44 Ark. 31; *Colorado County v. Beethe*, 44 Tex. 447. Compare *McArthur v. State*, 41 Tex. Crim. 635, 57 S. W. 847.

Where the case is dismissed for failure of the prosecuting witness to appear, the county is liable. *Cassidy v. Palo Alto Co.*, 58 Iowa 125, 12 N. W. 231.

In Iowa, not only is a *nol. pros.* sufficient to place the costs on the county, but also the quashal of the indictment or entry of judgment for the defendant on demurrer. *Bonney v. Van Buren Co.*, 2 G. Gr. 230. See also *In re Stoneberger*, 31 Kan. 638.

But a dismissal for want of jurisdiction is not such an acquittal of the accused as will render the county liable for costs. *McGuire v. Iowa Co.*, 133 Iowa 636, 111 N. W. 34. See, however, *Ferrier v. Deutchman*, 111 Ind. 330, 12 N. E. 497.

A discharge of the accused on a *nol. pros.* is a sufficient acquittal. *Board of Comrs. v. Johnson*, 31 Ind. 463; *Miami County v. Blake*, 21 Ind. 32. See also *Agnew v. Comrs.*, 12 Serg. & R. (Pa.) 94.

authorizing it,⁸³ also clerk's and sheriff's fees,⁸⁴ the costs of the preliminary examination,⁸⁵ costs of a search warrant proceeding,⁸⁶ and even the costs on appeal,⁸⁷ provided the requisite statutory steps to

83. *State v. Hicks*, 124 N. C. 829, 32 S. E. 957; *State v. Ray*, 122 N. C. 1095, 29 S. E. 948; *State v. Horne*, 119 N. C. 853, 26 S. E. 36; *Long v. Lancaster Co.*, 16 Pa. Super. 413.

Unless there is a statute authorizing it, the state or county is not liable for the fees of the defendant's witnesses in a criminal prosecution in which the defendant at the trial is acquitted, because at common law, the defendant, whether acquitted or convicted, is alone bound to pay his witnesses, and without any right of being reimbursed from the public treasury. *State v. Barton*, 3 Humph. (Tenn.) 13; *Hutt v. Winnebago County*, 19 Wis. 116.

But the statutes in many states now provide that the witnesses of a discharged defendant may recover their costs from the state (*Buckman v. Alexander*, 24 Fla. 46, 3 So. 817), or county when such witnesses are properly in attendance on court (Colo.—Board of Comrs. v. Wilson, 3 Colo. App. 492, 34 Pac. 265. Ga.—*Warnstaff v. Louisa County*, 76 Iowa 585, 41 N. W. 195. N. C.—*State v. Ray*, 122 N. C. 1095, 29 S. E. 948; *State v. Horne*, 119 N. C. 853, 26 S. E. 36. Pa.—*Long v. Lancaster Co.*, 16 Pa. Super. 413), and if disallowed in the bill of costs may be enforced against the county by an action (*State v. Graves*, 13 Wash. 485, 43 Pac. 376).

In Delaware, in order to render the state liable for the expenses of witnesses for the defense, a petition must be presented and read in open court. It need not narrate the evidence, but must state the nature of it. *State v. Evans*, 1 Marv. 477, 41 Atl. 136.

Misdemeanor Case.—In South Carolina the county is not liable for witnesses' fees due the accused's witnesses in a misdemeanor case. *Ex parte Henderson*, 51 S. C. 331, 29 S. E. 5.

Unnecessary Witnesses.—The state cannot be taxed with the fees of witnesses who were neither necessary nor examined. *State v. Oliver*, 116 Mo. 188, 22 S. W. 637; *State v. Hill*, 72 Mo. 512.

Fees of Witnesses Not Subpoenaed. But the fact that the witnesses attend without subpoena does not ex-

onerate the county from payment of their fees, provided their testimony is material. *Jones County v. Linn County*, 68 Iowa 63, 25 N. W. 930.

The compensation of an expert though an expense, is not one of the taxable items of cost in prosecutions for which the state can be made liable. *In re Attorney General*, 104 Mass. 537; *State v. Guilbert*, 77 Ohio St. 333, 83 N. E. 80.

84. **Clerk's fees** may be included in adjudging costs against the state or county (*Henderson v. Walker*, 101 Tenn. 229, 47 S. W. 430) if the statute permits it (Ill.—*Satterfield v. Jefferson County*, 85 Ill. 347; *City of Chicago v. O'Hara*, 60 Ill. 413. Ind.—*Ex parte Harrison*, 112 Ind. 329, 14 N. E. 225. Kan.—*Bedilion v. Cowley County Comrs.*, 27 Kan. 592).

In Kansas, the county is made liable for clerk's and sheriff's fees in any criminal action wherein the state fails to convict. *Board of Comrs. v. Whiting*, 4 Kan. 273.

85. In case a charge on preliminary examination appears to be unfounded, the county is liable for the costs of such proceeding (*Board of Comrs. v. Graham*, 4 Colo. 201; *Com. v. Winskey*, 1 Pa. Co. Ct. 77), except in those jurisdictions in which such costs are assessed against the prosecuting witness (*Shields v. Shawnee County Comrs.*, 5 Kan. 589).

The county is liable for the fees of witnesses on preliminary examination. *Johnson County v. Porter*, 4 G. Gr. (Iowa) 79.

86. *State v. Green*, 16 Lea (Tenn.) 20, no property thereunder being found.

87. It is provided that where the accused is successful with his appeal, or where he is without means, his costs may be taxed against the state or county. Ia.—*State v. Dorland*, 106 Iowa 40, 75 N. W. 654; *State v. Waddle*, 94 Iowa 748, 64 N. W. 276. Mass.—*Com. v. Haynes*, 107 Mass. 194; *Britton v. Com.*, 1 Cush. 302. Minn.—*State v. Tetu*, 98 Minn. 351, 108 N. W. 470, 107 N. W. 953. Wash.—*State v. Rutledge*, 40 Wash. 9, 82 Pac. 126; *State*

charge it have been taken.⁸⁸ But the costs of a continuance granted the accused cannot be.⁸⁹

(C.) CONSTRUCTION OF STATUTES. — Such liability cannot arise by implication, but only by express statutory provision.⁹² In other words, statutes imposing liability on the state or county for costs of criminal prosecutions are strictly construed and must be strictly complied with.⁹³ And statutes which make the state liable for costs in criminal cases where the defendant is acquitted have reference only to the costs that accrued at the trial which had not previously been specially adjudged against either party.⁹⁴

v. Fennimore, 2 Wash. 370, 26 Pac. 807.

Not in the absence of statutory authority. *Colo.*—*Boykin v. People*, 23 Colo. 183, 46 Pac. 635. *Conn.*—*State v. Anderson*, 82 Conn. 392, 73 Atl. 751. *Fla.*—*Brown v. State*, 44 Fla. 28, 32 So. 107. *Ind.*—*Merrick v. State*, 63 Ind. 327. *Ia.*—*State v. Rainsbarger*, 74 Iowa 539, 38 N. W. 403.

Copy of stenographer's report of the trial court cannot generally be taxed against the county. *State v. Superior Court*, 32 Wash. 80, 72 Pac. 1027.

But in Ohio a defendant in a criminal case, who is successful on his appeal, is entitled to have allowed by the county commissioners, and paid out of the county treasury, the legal fees paid by him to the official stenographer or assistant for a necessary shorthand transcript of the shorthand notes taken on the trial of the cause. *Clinton County v. Martin*, 65 Ohio St. 287, 62 N. E. 129.

Printing.—A county is not liable for printing an abstract and argument on appeal, although the judgment against the accused is reversed on appeal, unless statutory provision therefor exists. *State v. Rainsbarger*, 74 Iowa 539, 38 N. W. 403. Such a statute is now in force in Iowa. Code 1897, §5462; *State v. Dorland*, 106 Iowa 40, 75 N. W. 654.

The respondent is not allowed costs for unnecessary reprinting of portions of abstract in the brief. *State v. Richardson*, 16 N. D. 1, 109 N. W. 1026.

If a *nol. pros.* is entered for the state after the appeal, a judgment cannot be entered against the county for the costs that accrued after the appeal. *State v. Shuffler*, 119 N. C. 867, 26 S. E. 94.

In Florida, the words "final trial" in §14 of the declaration of rights providing that no person shall be com-

pelled to pay costs except after conviction on final trial, do not apply to proceedings in an appellate court. *State v. Newman*, 24 Fla. 33, 3 So. 467.

88. *Colo.*—*Foulke v. Board of Comrs.*, 9 Colo. App. 201, 48 Pac. 153. *Okla.*—*Bailey v. Territory*, 15 Okla. 80, 79 Pac. 775. *Pa.*—*Com. v. Sawyer*, 35 Pa. Super. 74, costs of transporting prisoner from a foreign jurisdiction.

89. *State v. Brigham*, 63 Mo. 258.

92. *Ala.*—*State v. Brewer*, 59 Ala. 130. *Ill.*—*Galpin v. State*, 249 Ill. 54, 94 N. E. 961. *Neb.*—*Worthen v. Johnson County*, 62 Neb. 754, 87 N. W. 909. *N. H.*—*State v. Kinne*, 41 N. H. 238. *Ore.*—*Eisen v. Multnomah County*, 31 Ore. 134, 49 Pac. 730. *Tenn.*—*State v. Murphy*, 101 Tenn. 515, 47 S. W. 1098; *State v. Odom*, 93 Tenn. 446, 25 S. W. 105; *Morgan v. Pickerd*, 86 Tenn. 208, 9 S. W. 630; *State v. Barton*, 3 Humph. 13.

A judgment cannot be awarded against a county for costs in favor of a defendant who has been tried and acquitted on a criminal charge, under a statute providing that in all actions or suits prosecuted and defended in the name and for the use of a county, it shall be liable for costs in like manner as natural persons. Because such statute was held not to refer to a criminal prosecution instituted by the state in its sovereign capacity to punish a violation of some public law. *Eisen v. Multnomah Co.*, 31 Ore. 134, 49 Pac. 730.

93. *Ala.*—*Dawson v. Matthews*, 105 Ala. 485, 17 So. 19. *Ill.*—*People v. Pierce*, 6 Ill. 553. *Ind.*—*Israel v. State*, 8 Ind. 467. *Mo.*—*State v. Holladay*, 67 Mo. 299. *Tenn.*—*State v. Murphy*, 101 Tenn. 515, 47 S. W. 1098; *State v. Odom*, 93 Tenn. 446, 25 S. W. 105; *Tucker v. State*, 2 Head 555.

94. *State v. Brigham*, 63 Mo. 258. In Missouri, the county is not liable

(D.) **IN CASE OF INSOLVENCY OF DEFENDANT.**—In some jurisdictions the state,⁹⁵ or county⁹⁶ is made liable for costs in case the accused is insolvent.⁹⁷

(E.) **TAXATION OF COSTS.**—(1.) *In General.*—As a general rule, the way in which to recover costs from the state or county is to have them taxed.⁹⁸ But the court may order the payment of costs without any showing or application by the accused,⁹⁹ and this may be done when judgment is finally entered, or when orders are made or action is had which finally disposes of the cause.¹

in case of misdemeanor, unless the defendant be acquitted, and there is no prosecutor who is liable for costs or in cases when the defendant is convicted and is unable to pay the costs. *State v. Williams*, 92 Mo. App. 443, 450.

95. **Fla.**—*Buckman v. Alexander*, 24 Fla. 46, 3 So. 817, holding that no oath of insolvency is unnecessary. **La.** *Shaw v. Howell*, 18 La. Ann. 195; *Parker v. Robertson*, 14 La. Ann. 249. **Mo.**—*Kelley v. Andrew County*, 43 Mo. 338.

Inability of Prosecutor or Defendant To Pay.—The costs of criminal proceedings cannot be taxed against the state or county, because it is impossible to make the costs by execution out of the prosecutor (*Musgrove v. Hamilton County*, 111 Tenn. 1, 77 S. W. 779; *Morgan v. Pickard*, 86 Tenn. 208, 9 S. W. 690; *State v. Wormick*, 1 Lea (Tenn.) 559), except in those jurisdictions which have statutes requiring it (**U. S.**—*Phillips v. Gaines*, 131 U. S. (Appendix) clxix, 25 L. ed. 733. **Kan.** *Mikesell v. Board of Comrs.*, 82 Kan. 502, 108 Pac. 829. **N. C.**—*Pegram v. Guilford County*, 75 N. C. 120).

96. **Ark.**—*Boone County v. Mitchell*, 64 Ark. 125, 40 S. W. 784. **Colo.** *Board of Comrs. v. Wilson*, 3 Colo. App. 492, 34 Pac. 265. **Ia.**—*State v. Cater*, 109 Iowa 69, 80 N. W. 222. **Mo.** *State ex rel. Simms v. Carpenter*, 51 Mo. 555. **Neb.**—*Worthen v. Johnson County*, 62 Neb. 754, 87 N. W. 909. **N. C.**—*State v. Saunders*, 146 N. C. 597, 59 S. E. 695.

A county in **Kansas** is liable for the fees of a sheriff and clerk in a criminal case, when they are not paid by the defendant or prosecuting witness. *Gunning v. Board of Comrs.*, 81 Kan. 708, 108 Pac. 999.

Transcript of Evidence.—In Iowa it is within the sound judicial discretion of the court, subject to review in case

of abuse, to order a transcript of the defendant's evidence for the purpose of an appeal at the expense of the county, where it is shown that the defendant is unable to pay for [such transcript, provided application for such transcript is made to the trial judge and proper showing is made by the accused of his inability to procure such transcript. *State v. Kehr*, 137 Iowa 91, 114 N. W. 542; *State v. Shaffer*, 137 Iowa 93, 114 N. W. 540; *State v. Goodsell*, 136 Iowa 445, 113 N. W. 826; *State v. Steidley*, 133 Iowa 31, 110 N. W. 147; *State v. Wright*, 111 Iowa 621, 82 N. W. 1013; *State v. Cater*, 109 Iowa 69, 80 N. W. 222; *State v. Robbins*, 106 Iowa 688, 77 N. W. 463; *State v. Waddle*, 94 Iowa 748, 64 N. W. 276.

97. In Tennessee, a judgment may be rendered against the state for the state's costs previously adjudged against a defendant upon conviction for a felony, provided the court adjudges the defendant insolvent and there is a return of execution *nulla bona*. But this return or adjudication of insolvency is absolutely necessary. *Musgrove v. Hamilton County*, 111 Tenn. 1, 77 S. W. 779; *Aiken v. State*, 99 Tenn. 657, 42 S. W. 927; *Riddick v. State*, 99 Tenn. 655, 42 S. W. 926; *State v. Odom*, 93 Tenn. 446, 25 S. W. 105; *State v. Martin*, 10 Lea 549. See also *Shaw v. Howell*, 18 La. Ann. 195; *State ex rel. Simms v. Carpenter*, 51 Mo. 555. In other words, the issuing of an execution for costs by the clerk of the court is the proper method of determining the defendant's ability to pay the costs. *State ex rel. Hopkins v. Buchanan County Ct.*, 41 Mo. 254.

98. *State v. Dorland*, 106 Iowa 40, 75 N. W. 654.

99. *County of Jones v. County of Linn*, 68 Iowa 63, 25 N. W. 930.

1. *County of Jones v. County of Linn*, 68 Iowa 63, 25 N. W. 930.

But a formal judgment against the state or county is not essential to the taxation and allowance of the costs in some jurisdictions.² But the liability of the county to the accused for costs and disbursements incurred by him in making his defense, is discharged by paying the same to the person rendering the services.³

(2.) *Bill of Costs.* — As a general rule the state or county cannot be made liable for the payment of costs, in the absence of a bill of costs,⁴ properly allowed and certified as required by the statute,⁵ showing what services were performed for which costs are taxed.⁶

(3.) *Relief From Erroneous Taxation.* — In some jurisdictions an appeal is allowed by the state or county from an order taxing costs against it.⁷

(F.) ENFORCEMENT AND COLLECTION. — (1.) *The Usual Method.* — The liability of the state or county for costs in criminal prosecutions cannot be enforced except in the particular manner prescribed by the statute.⁸ Usually, however, a designated officer requests the auditor to draw

2. *McGuire v. Iowa Co.*, 133 Iowa 636, 111 N. W. 34.

North Carolina Code, §736, relating to making out bills of costs by a justice in cases in which the county is liable, applies only where he binds defendant over. *Merrimon v. Henderson County*, 106 N. C. 369, 11 S. E. 267.

In Iowa formal judgment against the state or county for costs is not essential to having them audited by the board of supervisors. Such a judgment if entered could not be enforced save by presenting claims for the fees taxed to the board of supervisors of the county for allowance, and if this were refused, by suing the county therefor. *McGuire v. Iowa Co.*, 133 Iowa 636, 111 N. W. 34.

3. *Eisen v. Multnomah County*, 31 Ore. 134, 49 Pac. 730.

4. *Merrimon v. Henderson County*, 106 N. C. 369, 11 S. E. 267; *Puckett v. Hyde*, 6 Heisk. (Tenn.) 194.

In Missouri, this bill of costs must be certified by the clerk and judge to the state auditor for payment, but this certificate is not conclusive on the auditor. *State v. Wilder*, 196 Mo. 418, 95 S. W. 396.

But in Nevada, the costs may be taxed without the rendition of a cost bill. *State v. Second Judicial Dist. Ct.*, 16 Nev. 76. See *State v. Henderson*, 15 Lea (Tenn.) 274.

Conclusiveness of Bill of Costs. — In Tennessee the comptroller may examine and adjust the bills of costs against the state. *State v. Wilbur*, 101 Tenn. 211, 47 S. W. 411. But a county judge cannot revise a bill of costs properly

adjudged against the county according to law. *State v. Puckett*, 7 Lea (Tenn.) 709.

5. *Ark.* — *Craighead County v. Cross County*, 50 Ark. 431, 8 S. W. 183 (holding, however, that this certificate is not conclusive); *Ouachita v. Sanders*, 10 Ark. 467. *La.* — *City of New Orleans v. Patton*, 27 La. Ann. 168 (holding the certificates conclusive); *Parker v. Robertson*, 14 La. Ann. 249. *Mo.* *State v. Oliver*, 118 Mo. 188, 22 S. W. 637; *s. c.* 50 Mo. App. 217; *State v. Hill*, 72 Mo. 512. *Tenn.* — *Musgrove v. Hamilton County*, 111 Tenn. 1, 77 S. W. 779; *State v. Odom*, 93 Tenn. 446, 23 S. W. 105; *Morgan v. Pickard*, 86 Tenn. 208, 9 S. W. 690; *Puckett v. Hyde*, 6 Heisk. 194; *State v. Delap*, Peck 90. *Wash.* — *State v. Evenson*, 13 Wash. 609, 52 Pac. 230, holding that the cost bill must be approved by the prosecuting attorney in misdemeanor cases as well as felonies.

In Missouri, the bill for costs must be properly certified by the judge and prosecuting attorney. *State v. Holladay*, 70 Mo. 137.

In Tennessee, the successor in office of the district attorney may certify the bill of costs in proper cases. *Henderson v. Walker*, 101 Tenn. 229, 47 S. W. 430.

6. *Lockard v. Board of Comrs.*, 66 Kan. 781, 71 Pac. 856.

7. *State v. Belle*, 92 Iowa 258, 60 N. W. 525; *State v. Rainsbarger*, 74 Iowa 539, 38 N. W. 403; *State v. Zimmerman*, 31 Kan. 85, 1 Pac. 257.

8. *State v. Odom*, 93 Tenn. 446, 23 S. W. 105.

his warrant on the treasurer for the payment of the bill of costs. If the former refuses to make such request, he may be compelled to do so by mandamus.⁹ The application for an order on the state treasurer must be presented in legal form, and must show that all the preliminary requisites have been complied with.¹⁰

(2.) *By Action*.—If the state or county fails to pay the costs properly taxed against it, an action will lie against it to recover the same.¹¹

(G.) COSTS ON CHANGE OF VENUE.—(1.) *Generally Paid By Original County*. With a few exceptions,¹² if there is a change of venue of a criminal prosecution, the county from which the trial is removed must pay the costs,¹³ regardless of whether the accused is convicted or acquitted.¹⁴

(2.) *Items Taxable*.—The question as to what costs may be charged against the county from which the trial is removed depends on the

9. *Trapp v. Roney*, 120 Ala. 397, 24 So. 1001; *White v. Burgin*, 113 Ala. 170, 21 So. 832; *State v. Grimes*, 7 Wash. 445, 35 Pac. 361.

In some states the county judge issues a warrant for the bill of costs against the state or county addressed to a designated officer. And if he improperly refuses to issue it, he may be compelled to do so by mandamus. *State v. Wilbur*, 101 Tenn. 211, 47 S. W. 411; *State v. Ferriss*, 3 Lea (Tenn.) 700; *Puckett v. Hyde*, 6 Heisk. (Tenn.) 194.

In Iowa, a judgment for costs in a criminal case against the county or state is enforced by presenting the claim to the board of supervisors of the county for allowances, and if this is refused, by suing the county therefor. *McGuire v. Iowa County*, 133 Iowa 636, 111 N. W. 34. But such claim must be certified and sworn to when presented to the board of supervisors. *McGuire v. Iowa County*, 133 Iowa 636, 111 N. W. 34.

10. *State v. Delap, Peck* (Tenn.) 90.

11. *Cassidy v. Palo Alto Co.*, 58 Iowa 125, 12 N. W. 231.

The declaration or complaint in such action must show that everything required by the statute has been performed to make the county liable; otherwise it is fatally defective on demurrer. *First Nat. Bank v. Custer County*, 7 Mont. 464, 17 Pac. 551.

An assignee suing must allege the extent of his assignor's interest. *Lockhard v. Board of Comrs.*, 66 Kan. 781, 71 Pac. 856.

12. *Henry County v. St. Clair Coun-*

ty, 81 Mo. 72; *Berry v. St. Francois County*, 9 Mo. 360; *Kershaw County v. Richland County*, 61 S. C. 75, 39 S. E. 263.

13. *Ala.*—*Greene County v. Hale County*, 61 Ala. 72. *Ark.*—*Hempstead County v. Royston*, 58 Ark. 113, 23 S. W. 650. *Cal.*—*Needham v. Thresher*, 49 Cal. 392. *Ill.*—*Rock Island County v. Mercer County*, 24 Ill. 35. *Ind.*—*Trant v. State*, 140 Ind. 414, 39 N. E. 513. *Ia.*—*Lockhart v. Montgomery County*, 76 Iowa 79, 40 N. W. 104, fees of jurors and sheriff must be paid by the county in which case tried. *Ky.*—*Com. v. Comes*, 98 Ky. 4, 32 S. W. 139. *Md.*—*Baltimore v. Howard County*, 61 Md. 326. *Mich.*—*Kent County v. Mecosta County*, 126 Mich. 299, 85 N. W. 739. *Mont.*—*State v. Lewis & Clark County*, 34 Mont. 351, 86 Pac. 419. *Neb.*—*Dawes County v. Sioux County*, 77 Neb. 567, 110 N. W. 378; *Fulmer v. Madison County*, 33 Neb. 422, 50 N. W. 255. *Nev.*—*Washoe County v. Humboldt County*, 14 Nev. 123. *N. C.*—*Finley v. Erwin*, 4 N. C. 105. *Wyo.*—*Stoll v. Johnson County*, 6 Wyo. 231, 44 Pac. 58.

If the change of venue is made in violation of constitutional or statutory provisions so that the court to which the change is taken is without jurisdiction, no judgment for costs can be rendered in either county. *State v. Logston*, 3 Heisk. (Tenn.) 276.

The rule does not apply where one county takes original jurisdiction of a crime committed in an adjoining county near its border. *Floyd County v. Cerro Gordo County*, 47 Iowa 186.

14. *Ex parte Taylor*, 4 Ind. 479.

statutes in the particular jurisdiction, and they should always be consulted in the first instance to determine the items properly taxable against the initial county.¹⁶ It may be stated as a general rule that the costs for which a county, from which a criminal case is removed, is liable, are such only as would have accrued on the trial of the case in the former county.¹⁶

In some states the county of trial may, and in others it may not, recover from the county wherein the offense was committed, the expenses incident to the running of the court during the trial, such as jurors' and court officers' fees,¹⁷ the recovery being limited and

15. **Ala.**—Greene County *v.* Hale County, 61 Ala. 72. **Ark.**—Independence County *v.* Dunkin, 40 Ark. 329. **Cal.**—Needham *v.* Thresher, 49 Cal. 392 (holding the county where the indictment was found liable for fees of sheriff of county where the trial is held); Sargent *v.* Cavis, 36 Cal. 552 (holding the county where the indictment was found liable for witness' fees). **Ia.**—County of Jones *v.* County of Linn, 68 Iowa 63, 25 N. W. 930, all costs and expenses incurred on the trial. **Ky.** *Com. v. Comes*, 98 Ky. 4, 32 S. W. 139. **Minn.**—Board of Comrs. *v.* Board of Comrs., 84 Minn. 267, 87 N. W. 846. **Nev.**—Washoe County *v.* Humboldt County, 14 Nev. 123, sheriff's fees for summoning the jury. **Ohio.**—State *v.* Board of Comrs., 14 Ohio C. C. 26, 7 Ohio Dec. 351. **Wis.**—Green Lake County *v.* Waupaca County, 113 Wis. 425, 89 N. W. 549, not a charge for judgment roll, a term applicable only to civil cases.

In Maryland, the initial county is liable not only for the *per diem* of the jurors in attendance, whether impaneled or not, but also the *per diem* of the sheriff, bailiffs or other subordinate officials essential to the organization of the court, and necessary to the transaction of its business. Howard County *v.* Franklin County, 30 Md. 432.

Fees of counsel appointed to defend an indigent prisoner may be allowed in some states (*State v. Miller*, 107 Ind. 39, 7 N. E. 758), but fees of special prosecutors have been denied (*State v. Lewis & Clark County*, 34 Mont. 351, 86 Pac. 419).

Defendant's costs were held not covered by the Iowa statute in *State v. Rainsbarger*, 74 Iowa 539, 38 N. W. 403, as to costs on appeal. By §§254, 5353, 5354 of the code the court of the county trying the case must allow the

costs. This came up on the application of defendant to the court from which the case was removed, for a transcript on appeal. *State v. Cater*, 109 Iowa 69, 80 N. W. 222, citing *Lockhart v. Montgomery County*, 76 Iowa 79, 40 N. W. 104.

16. **Ind.**—Trant *v.* State, 140 Ind. 414, 39 N. E. 513; *Ex parte Harrison*, 112 Ind. 329, 14 N. E. 225; *Brown County v. Summerfield*, 36 Ind. 543. **Kan.**—Davis County *v.* Riley County, 9 Kan. 635. **Mich.**—Kent County *v.* Mecosta County, 126 Mich. 299, 85 N. W. 739, stenographer's fee not recoverable. **Mont.**—State *v.* Lewis & Clark County, 34 Mont. 351, 86 Pac. 419, compensation of special counsel, appointed in place of regular county attorney to conduct prosecution in county to which case removed, is not recoverable. **Neb.**—Stanton County *v.* Madison County, 10 Neb. 304, 4 N. W. 1055.

17. Not recoverable: **Ia.**—Lockhart *v.* Montgomery County, 76 Iowa 79, 40 N. W. 104. **Minn.**—Board of Comrs. *v.* Board of Comrs., 84 Minn. 267, 87 N. W. 846. **Ohio.**—State *v.* Board of Comrs., 7 Ohio Dec. 351, 14 Ohio C. C. 26. **Wis.**—Green Lake County *v.* Waupaca County, 113 Wis. 425, 89 N. W. 549.

This is not so in all jurisdictions. *Greene County v. Hale County*, 61 Ala. 72; *Kent County v. Mecosta County*, 126 Mich. 299, 85 N. W. 739.

In Nebraska, the county from which a change of venue in a criminal case is taken is liable to the county in which the trial is had only for the fees of such jurors of the regular panel as sat upon the trial of that case and such additional jurors as were required to be in attendance on account of the trial. *Dawes County v. Sioux County*, 77 Neb. 567, 110 N. W. 378. Compare

extending to such fees and expenses only as are allowed by law.¹⁸

(3.) *Taxation and Collection of Costs.*—In the absence of a statute to the contrary the right to tax the costs rests with the trial court.¹⁹

The manner of taxing and of collecting these costs is generally prescribed by statute. Usually an itemized cost bill is made out by the clerk of the county of trial and authenticated by the trial judge as correct, and presented to the proper officer of the county where the case originated.²⁰ Sometimes a warrant is drawn by the auditor of the initial county on the treasurer of such county for the amount allowed and certified by the trial court, or an order may be issued by the clerk of the trial court directly upon the treasurer of the initial county.²¹

c. *The United States and District of Columbia.*—*In General.* It seems that neither the United States nor the District of Columbia is liable for costs in a criminal case, although the prosecution fails, because there is no statute authorizing it.²²

Jones County v. Linn County, 68 Iowa 63, 25 N. W. 930.

Sheriff's Fees.—"Where, in a criminal case, the venue is changed, and the state fails to convict, or the defendant proves insolvent, the county in which the indictment was found is not liable for the fees of the sheriff of the county in which the trial was had." Comrs. of Ross County v. State, 49 Ohio St. 373, 34 N. E. 735.

In Arkansas, the initial county is liable for all the expenses incurred by the trial county by reason of the change, including the "current expenses of the court" as well as those for which it was already liable, to wit, the costs in the cause Hempstead County v. Royston, 58 Ark. 113, 23 S. W. 650.

18. Kent County v. Mecosta County, 126 Mich. 299, 85 N. W. 739; Washoe County v. Humboldt County, 14 Nev. 123 (holding that it may be shown in resisting payment that services were not rendered or that the charge is without authority of statute).

19. State v. Cater, 109 Iowa 69, 30 N. W. 222; Waushara County v. Portage County, 83 Wis. 5, 52 N. W. 1135.

20. Ark.—Hempstead County v. Royston, 58 Ark. 113, 23 S. W. 650. Mont.—State v. Lewis & Clark County, 34 Mont. 351, 86 Pac. 419, mere certification of costs to the county wherein the offense was committed does not have the force of a judgment against such county. Okla.—Territory v. Delena, 3 Okla. 573, 41 Pac.

618. Tenn.—State v. Delap, Peck 90. Wyo.—Stoll v. Johnson County, 6 Wyo. 231, 44 Pac. 58.

Where the venue of a case is changed and after the trial the bill of costs is sent to the prosecuting attorney of the initial county for his inspection, he cannot mutilate it by striking out items, but he must submit a report stating what part should be allowed and what disallowed. State v. Graves, 13 Wash. 485, 43 Pac. 376.

Notice to district attorney necessary by rule of court. Waushara County v. Portage County, 83 Wis. 5, 52 N. W. 1135.

21. Gill v. State, 72 Ind. 266; Comp. Laws (N. M.) §3448.

Mandamus.—The order entered by the trial court auditing and allowing the costs and charges against the initial county as required by statute, is not final and conclusive, and hence cannot be enforced by mandamus issued to the auditor of the initial county compelling him to draw his warrant. Trant v. State, 140 Ind. 414, 39 N. E. 513.

22. United States v. Barker, 2 Wheat. (U. S.) 395, 4 L. ed. 271; Henry v. United States, 15 Ct. Cl. 162; Nabb v. United States, 1 Ct. Cl. 173; District of Columbia v. Lyon, 7 Mackey (D. C.) 222.

The District.—"An act was passed in Maryland in 1781, declaring that in all prosecutions where the defendant is acquitted he shall not be required to pay costs, but that they shall

Witness Fees.—A federal court cannot make an order for the payment by the government of the witness fees for either side, in prosecutions removed from a state court, but only in cases in which the federal government is a party. Under special authority from the department of justice, the marshal may pay the witnesses of the defendant, or the witnesses summoned for the state.²³

d. *The Prosecuting Witness.*—(L) **Liability Dependent on Statute.** In the absence of a statute authorizing it, no judgment can be rendered for costs against a prosecuting witness.²⁴

In many jurisdictions statutes provide for the taxation of costs against the prosecutor in case the prosecution fails,²⁵ or in the lan-

be paid by the state. That statute came very near being a law of the District of Columbia, but it expired in 1799, shortly before the cession of the District." *District of Columbia v. Lyon, supra.*

23. *Virginia v. Felts*, 133 Fed. 85.

The District of Columbia is not liable for the fees of defendant's witnesses, where a judgment of conviction in the police court is reversed in the criminal court and the defendant acquitted. *District of Columbia v. Lyon*, 7 Mackey (D. C.) 222.

24. *Cal.*—*In re Waring*, 50 Cal. 30.

Kan.—*State v. Jones*, 19 Kan. 481. *Ky.* *Adams v. Com.*, 2 Bibb 242. *Tenn.* *Hansard v. State*, 5 Humph. 115.

Proceedings To Exact Peace Bond.

Ind.—*State v. Abrams*, 4 Blackf. 440.

Kan.—*State v. Dean*, 24 Kan. 53, following *State v. Menhart*, 9 Kan. 98.

Ky.—*Adams v. Com.*, Litt. Sel. Cas. 107.

But a party making a malicious and groundless application has been ordered to pay costs in *Colo.*—*Fitzpatrick v. People*, 36 Colo. 311, 85 Pac. 650. *N. C.* *State v. Cannady*, 78 N. C. 539. *Ohio.* *Woodburn v. Gillingham*, Tapp. 251.

Preliminary Examination.—*McDonald v. Cruzen*, 2 Ore. 259.

Taking up Estrays in Kansas.—In an action before a justice of the peace, in which the defendant is charged with violating the stray law, the complaining witness cannot be adjudged to pay the costs and be imprisoned for failure to do so. *In re Walker*, 1 Kan. App. 287, 40 Pac. 1097.

25. *U. S.*—Rev. St. §975; *Lowe v. Kansas*, 163 U. S. 81, 16 Sup. Ct. 1031, 41 L. ed. 78 (giving the origin and history of these statutes); *Francis v. United States*, 5 Wall. 338, 18 L. ed. 603. *Colo.*—*Fitzpatrick v. People*, 36

Colo. 311, 85 Pac. 650 (evidence must warrant finding that the prosecution was commenced maliciously); *Leppel v. District Court*, 33 Colo. 24, 78 Pac. 632.

Ga.—*Green v. State*, 112 Ga. 52, 37 S. E. 93; *Gault v. Wallis*, 53 Ga. 675.

Ia.—*McAlister v. Johnson*, 108 Iowa

42, 78 N. W. 790, prosecutor's name

must be endorsed on indictment to justify award of costs against him. *Mo.*

State v. French, 118 Mo. App. 15, 93

S. W. 295 (holding that a proper judgment must be first rendered in favor

of the accused before this liability can

attach); *State v. Williams*, 92 Mo. App.

443. *Neb.*—*Teats v. Fox*, 75 Neb. 747,

106 N. W. 779. *N. Y.*—*People v.*

Kranz, 63 Misc. 146, 118 N. Y. Supp.

499, holding prosecutor not liable for

fees of state's attorney. *N. C.*—*State*

v. Whitley, 123 N. C. 728, 31 S. E.

392; *State v. Cockerham*, 23 N. C. 381

(holding that costs cannot be taxed

against the prosecuting witness in

prosecutions for perjury); *State v. Lum-*

brick, 4 N. C. 543. *Eng.*—*Encyc. Laws*

of Eng. 2nd ed. Vol. 4, p. 103; *Stubb's*

Case, L. R. 24 Q. B. D. 577; *Reg. v.*

Bayard, L. R. (1892) 2 Q. B. D. 181.

Preliminary Examination.—*Shields v.*

Shawnee County Comrs., 5 Kan. 589;

Errickson v. State, 10 Neb. 585, 7 N. W.

333.

Where grand jury ignores the indict-

ment, costs may be taxed to the prose-

cuting witness. *State v. Donnell*, 11

Iowa 452.

On non-appearance of prosecuting

witness, discretionary with the trial

court. *Anno St. (Colo.)* §23; *Palo Alto*

Co. v. Moncrief, 58 Iowa 131, 12 N. W.

142. *Compare State v. Holliday*, 22

Iowa 397.

Misdemeanors Only.—*Tuck v. State*, 8

Ala. 664; *Ex parte Cain*, 9 Mo. 769.

Costs of Appeal.—The provisions of

guage of some statutes, whenever the defendant is "discharged or acquitted."²⁶

Conditions To Fixing Liability. — Usually, however, before the prosecuting witness can be made liable for costs, it must appear that the prosecution was malicious or without probable cause,²⁷ and he must

the Washington statute authorizing the taxing of costs against complaining witnesses apply only to cases of examinations before magistrates, and to complaints submitted to grand juries for their investigation. Therefore the costs of an unsuccessful appeal from the justice to the superior court cannot be taxed against the prosecuting witness. *Town of Ilwaco v. Miller*, 8 Wash. 449, 36 Pac. 269, following *In re Permatiek*, 3 Wash. 672, 29 Pac. 350.

Witness fees, in some jurisdictions (*State v. Grand Trunk R. Co.*, 58 N. H. 198), but not in others (*Office v. Gray*, 4 N. C. 424).

In *North Carolina*, the prosecutor may be taxed with the costs of defendant's witnesses, only where the court finds that such witnesses were proper for the defense. *State v. Jones*, 117 N. C. 768, 23 S. E. 247.

Construction of Statute.—A statute imposing a liability on a prosecutor for costs will not be construed retrospectively (*State v. Berry*, 25 Mo. 355), and will be strictly construed (*State v. Green*, 2 Head [Tenn.] 356; *Weemer v. State*, 3 Shann. Cas. [Tenn.] 452).

Constitutionality of Statute.—Such statutes do not contravene the 14th amendment to the constitution of the United States. *Lowe v. Kansas*, 163 U. S. 81, 16 Sup. Ct. 1031, 41 L. ed. 78; *Appeal of Lowe*, 46 Kan. 255, 26 Pac. 749. See in accord, *State v. Smith*, 65 Wis. 93, 26 N. W. 258.

28. **U. S.**—*United States v. Flanakin*, Hempst. 30, 25 Fed. Cas. No. 15,119a, construing the Arkansas statute. **Kan.**—*State v. Reisner*, 20 Kan. 548 (holding that a person convicted below, but discharged on appeal, "was not acquitted or discharged" within the meaning of the Kansas statute); *Shields v. Shawnee County Comrs.*, 5 Kan. 589. **N. C.**—*State v. Murdock*, 85 N. C. 598. **Pa.**—*Com. v. Koehler*, 23 Pa. Super. 65. **Va.**—*Com. v. St. Clair*, 1 Gratt. 556.

The Missouri statute does not apply to prosecutions for libel, or to prosecutions for petit larceny (*Cowan v. Jones*, 79 Mo. App. 222), or to prosecu-

tions for disturbing the peace, but only to cases of a physical invasion of another's rights (*State v. Butler*, 133 Mo. App. 566, 113 S. W. 668; *State v. Wood*, 128 Mo. App. 642, 107 S. W. 431).

A verdict of acquittal by a properly constituted jury is necessary before the prosecutor can be made liable. *Sovereign v. State*, 4 Ohio St. 489.

The quashal of the indictment for incompetency of one of the grand jurors who found the indictment, will justify a judgment for costs against the prosecutor. *Com. v. St. Clair*, 1 Gratt. (Va.) 556.

A nol. pros. does not ground the liability of the prosecutor. **Ark.**—*State v. Branum*, 23 Ark. 540. **Ia.**—*United States v. Switzer*, 1 Morris 302. **Neb.**—*Burton v. State*, 34 Neb. 125, 51 N. W. 601. **N. C.**—*Comrs. of Guilford County v. March*, 89 N. C. 268.

27. **Ala.**—*Burns v. State*, 5 Ala. 227. **Ariz.**—*Rev. St. par. 2229*. **Colo.**—*Fitzpatrick v. People*, 36 Colo. 311, 85 Pac. 650; *Leppel v. District Court*, 33 Colo. 24, 78 Pac. 682. **Ga.**—*Green v. State*, 112 Ga. 52, 37 S. E. 93; *Jacobs v. State*, 20 Ga. 839. **Ia.**—*State v. McAlister*, 107 Iowa 641, 78 N. W. 672; *In re Trenchard*, 16 Iowa 53; *State v. Donnell*, 11 Iowa 452. **Kan.**—*State v. Lyon*, 83 Kan. 168, 109 Pac. 990; *Orchard v. Osborn*, 43 Kan. 76, 22 Pac. 1002; *Little v. Evans*, 41 Kan. 578, 21 Pac. 630. **Neb.**—*Burton v. State*, 34 Neb. 125, 51 N. W. 601. **N. M.**—*Comp. Laws*, §344. **N. Y.**—*Code Crim. Proc.* §719; *Brower v. Fisher*, 4 Johns. Ch. 441; *People v. Carr*, 54 Hun 443, 7 N. Y. Supp. 724; *People v. Norton*, 33 Hun 277. **N. C.**—*State v. Whitley*, 123 N. C. 728, 31 S. E. 392. **Okla.**—*Bailey v. Territory*, 15 Okla. 80, 79 Pac. 775. **Pa.**—*Com. v. Doyle*, 16 Pa. Super. 171. **Tenn.**—*State v. Wormick*, 1 Lea 559; *State v. Green*, 2 Head 356; *Hansard v. State*, 5 Humph. 115. **Wash.**—*Colby v. Backus*, 19 Wash. 347, 53 Pac. 367; *Ilwaco v. Miller*, 8 Wash. 449, 36 Pac. 269; *In re Permatiek*, 3 Wash. 672, 29 Pac. 350. **Wis.**—*State v. Smith*, 65 Wis. 93, 26 N. W. 258.

have an opportunity of being heard before the court imposing the costs.²⁸

Accordingly, if a prosecution is not trifling but of a grave character and is not unfounded but founded on probable cause, and there is no evidence of malice in the prosecution, it is the duty of the court to set aside a verdict against the prosecutor for the costs.²⁹

And, of course, where the defendant has been convicted of the crime charged, the costs of the prosecution cannot be taxed to the prosecuting witness.³⁰

Necessity for Security for Costs.—And in other jurisdictions the complaining party is not liable for the costs where he has given no security for costs.³¹

(II.) Who Is the Prosecuting Witness.—He who sets the machinery of the law in motion out of which the costs arise, is to be deemed the

Proof of malice and want of probable cause must be clear and conclusive. *State v. Green*, 2 Head (Tenn.) 356; *Frazer v. State*, 2 Swan (Tenn.) 535; *Weems v. State*, 3 Shann. Cas. (Tenn.) 452. It is not enough that the grand jury ignores a bill of indictment. *Frazer v. State*, 2 Swan (Tenn.) 535.

“Where a prosecutor has given to the district attorney fully and fairly the knowledge in his possession respecting a case, he should not have the costs imposed upon him by reason of a failure to convict because a large amount of the evidence was excluded through a technical defect in the indictment; but if the prosecutor employs private counsel who participates with the district attorney in the conduct of the case and makes suggestions as to the form of the indictment, the prosecutor cannot complain of the costs being imposed upon him by reason of failure to convict through a defect in the indictment.” *Com. v. Kocher*, 23 Pa. Super. 65.

28. **Kan.**—*State v. Cummerford*, 16 Kan. 507. **Okl.**—*Bailey v. Territory*, 15 Okla. 80, 79 Pac. 775. **Pa.**—*Com. v. Doyle*, 16 Pa. Super. 171.

A statute which authorizes the taxation of costs against the complaining witness unless the court shall sustain the finding that there was probable cause for the complaint, is unconstitutional and void because the complaining witness is in no sense a party to the trial of a misdemeanor, and hence is denied the right to be heard on the question of his good faith. *Teats v. Fox*, 75 Neb. 747, 106 N. W. 779.

29. *Com. v. Doyle*, 16 Pa. Super. 171, citing *Wadlinger on Costs*, §§192, 193.

Impeachment of Verdict.—The finding of the jury that the prosecution was conducted maliciously and without probable cause is no more conclusive than any other finding of a jury, and hence may be set aside by the court. *State v. Lyon*, 83 Kan. 168, 109 Pac. 990. Compare *State v. Forney*, 31 Kan. 635, 3 Pac. 305.

Where a prosecutor is required by rule to show cause why he should not be compelled to pay the costs of a criminal case because of a return by the grand jury of “no bill; malicious prosecution,” upon a bill of indictment, it is not competent for him to show by evidence that such return was not well founded in fact. *Green v. State*, 112 Ga. 52, 37 S. E. 93.

Right of Appeal.—If the trial court sets aside the verdict of the jury taxing costs against the prosecuting witness, and puts the costs on the county, the county may appeal. *State v. Zimmerman*, 31 Kan. 85, 1 Pac. 257.

In some states a judgment that a prosecution is frivolous, and not required by the public interest, and that the prosecutor pay costs, is conclusive and not appealable. **Ia.**—*State v. Hodgson*, 79 Iowa 462, 44 N. W. 708. **Mo.**—*State v. Baldwin*, 79 Mo. 243. **N. C.**—*State v. Lance*, 109 N. C. 789, 14 S. E. 110; *State v. Hamilton*, 106 N. C. 660, 10 S. E. 854.

30. *State v. Hodgson*, 79 Iowa 462, 44 N. W. 708.

31. *Board of Supervisors v. Van Liew*, 148 Mich. 520, 112 N. W. 131.

prosecuting witness.³² But an involuntary witness cannot be considered a prosecutor and liable for costs; only a volunteer informer can be so regarded.³³

Persons Under Disabilities.—The fact that the prosecuting witness labors under legal disabilities does not exempt him from liability for costs.³⁴

Selecting the Prosecutor.—In some jurisdictions, at any stage of the proceeding, the court or judge may determine who is the prosecutor and tax that person with costs.³⁵ In others, power is given the jury to select the actual prosecutor,³⁶ though someone else appears as such in the indictment.³⁷

(III.) **Taxation of Costs.**—Judgment may be entered against the

32. *In re Trenchard*, 16 Iowa 53.

The Affiant.—The person upon whose affidavit the information is filed. *Kan.* *In re Winne*, 41 Kan. 127, 21 Pac. 176. *Mo.*—*State ex rel. Smith v. Hodges*, 53 Mo. App. 532; *State ex rel. Kleinsorge v. Bante*, 34 Mo. App. 311. *N. M.*—*Comp. Laws*, §344.

The Person Marked on Indictment. *State v. Lupton*, 63 N. C. 483.

When the prosecutor is marked as such on the bill before indictment found, he can be taxed with the costs without notice and though absent (*State v. Horton*, 89 N. C. 581), but an order to mark anyone as prosecutor after indictment found cannot be made without his consent unless on notice (*State v. Crosset*, 81 N. C. 579).

There is sufficient notice if the motion is made in open court, the party being present. *State v. Hamilton*, 106 N. C. 660, 10 S. E. 854; *State v. Norwood*, 84 N. C. 794; *State v. Hughes*, 83 N. C. 665.

The order may be made on motion of the defendant's counsel, at the instance of the solicitor, or by the court *ex mer motu*. *State v. Jones*, 117 N. C. 768, 23 S. E. 247; *State v. Adams*, 85 N. C. 560.

33. *Com. v. Hutcheson*, 1 Bibb (Ky.) 355; *Wortham v. Com.*, 5 Rand. (Va.) 669; *Com. v. Dove*, 2 Va. Cas. 29.

Officers of court prosecuting are exonerated from liability. *Kan.*—*State v. Manlove*, 33 Kan. 483, 6 Pac. 905. *Mo.*—*State ex rel. Kleinsorge v. Bante*, 34 Mo. App. 311. *Neb.*—*State v. McCutcheon*, 20 Neb. 304, 30 N. W. 58. *Ohio.*—*Carter v. Hawley*, Wright 332. *Pa.*—*Com. v. Grim*, 1 Pa. Co. Ct. 40 (agents of society for prevention of cruelty to animals); *Com. v. Jackson*, 13 Lanc. Bar 59.

34. Married women (*State v. Shaw*, 45 Mo. App. 383; *Errickson v. State*, 10 Neb. 585, 7 N. W. 333. *Contra*, *Moyers v. State*, 11 Humph. [Tenn.] 40), and infants (*State v. Dillon*, 1 Head [Tenn.] 389) are liable for the costs.

35. *State v. Stone*, 153 N. C. 614, 69 S. E. 219.

36. *State v. Berry*, 25 Mo. 355; *Com. v. Fell*, 31 Pa. Super. 574; *Com. v. Kocher*, 23 Pa. Super. 65.

Even though such party is a foreign corporation doing business in the commonwealth. *Com. v. Fell*, 31 Pa. Super. 574; *Com. v. Doyle*, 16 Pa. Super. 171.

37. *Com. v. Anderson*, 17 Pa. Co. Ct. 89; *Com. v. Ream*, 1 Pa. Co. Ct. 33, 13 Lanc. Bar 134; *Com. v. Bennett*, 1 Pittsb. Rep. 261.

In Pennsylvania, where two persons are jointly indicted for a misdemeanor, and one defendant enters a plea of guilty and the other is acquitted by the verdict, the jury have no power to impose the costs on the prosecutor. *Com. v. Edwards*, 135 Pa. 474, 19 Atl. 1064.

"In imposing costs in a criminal prosecution the jury may look beyond the name of an officer indorsed on the indictment, and impose the costs upon the actual prosecutor. Thus, where a person avows himself the prosecutor, employs an officer who secures the evidence and makes the information, and where such person also retains a private counsel to assist in the prosecution, he may be named by the jury as the prosecutor, and in a proper case costs may be imposed on him." *Com. v. Kocher*, 23 Pa. Super. 65.

prosecutor for the costs upon his failure to pay or to give security therefor.³⁸

Requisites and Validity.—All presumptions are in favor of the regularity of the trial court's action in taxing costs to the prosecuting witness, in the absence of a showing to the contrary.³⁹ A judgment, especially if rendered by a justice, is not void and should not be quashed for uncertainty merely because it does not name the prosecutor,⁴⁰ or because actually rendered in the absence of the prosecutor.⁴¹

Relief From Taxation.—The prosecutor if he acts promptly may present his petition to be relieved from the payment of such costs.⁴²

By Appeal.—In some jurisdictions the prosecuting witness may appeal from a judgment awarding costs against him,⁴³ without first making a motion to retax before the trial court,⁴⁴ provided the evidence upon which the court acted is properly made a part of the record.⁴⁵ But in others the right of appeal is denied for want of a statute authorizing it,⁴⁶ or because this would be allowing the state an appeal or a new trial in criminal cases.⁴⁷

By Retaxation.—If costs are improperly taxed against the prosecuting witness by the court after the acquittal of the defendant, a motion may be made for retaxation, and a proper inquiry may be had thereon.⁴⁸

(IV.) Collection and Enforcement.—The judgment for costs against the prosecutor is usually enforced by execution as in civil cases,⁴⁹

38. Rev. St. (Ariz.) par. 2230; Code Crim. Proc. (N. Y.) §720; *People v. Kranz*, 63 Misc. 146, 118 N. Y. Supp. 499.

39. *State v. Donnell*, 11 Iowa 452.

40. *State v. Green*, 2 Head (Tenn.) 356.

Must be named if taxed by verdict. *Clemens v. Com.*, 7 Watts (Pa.) 485.

41. *State v. Owens*, 87 N. C. 565; *State v. Spencer*, 81 N. C. 519.

42. *Com. v. Doyle*, 16 Pa. Super. 171.

43. Ill.—*Berman v. People*, 101 Ill. 322. Ia.—*State v. Roney*, 37 Iowa 30. Mo.—*State v. Wood*, 128 Mo. App. 642, 107 S. W. 431. Compare *State v. Baldwin*, 70 Mo. 243. N. Y.—Code Crim. Proc. §720. N. C.—*State v. Whitley*, 123 N. C. 728, 31 S. E. 392; *State v. Powell*, 86 N. C. 640. Wis.—*State v. Smith*, 65 Wis. 93, 26 N. W. 258.

Certiorari in Tennessee.—*State v. Green*, 2 Head (Tenn.) 356.

44. *Burton v. State*, 34 Neb. 125, 51 N. W. 601, holding such motion unnecessary where the trial court has considered the prosecuting witness' liability and deliberately determined that he must pay the costs.

45. *State v. Donnell*, 11 Iowa 452.

46. Colo.—*Heiderer v. People*, 2 Colo. 672. Neb.—*O'Chandler v. Hansen*, 48 Neb. 485, 67 N. W. 604; *State v. Ensign*, 11 Neb. 529, 10 N. W. 449. Wis.—*State v. Rusch*, 44 Wis. 582.

47. *In re Lowe*, 47 Kan. 769, 28 Pac. 1089; *People v. Carr*, 54 Hun 443, 7 N. Y. Supp. 724.

48. *In re Lowe*, 47 Kan. 769, 28 Pac. 1089.

49. Rev. St. (Ariz.) par. 2230; *State v. Lemcke*, 117 Mo. App. 486, 94 S. W. 734.

In Georgia, if the prosecution is abandoned before trial, the officer issuing the warrant may "enter a judgment against the prosecutor for all the costs and enforce it by an execution in the name of the state." *State v. Steele*, 112 Ga. 39, 37 S. E. 174; *Underwood v. Harvey*, 106 Ga. 268, 32 S. E. 124; *Gault v. Wallis*, 53 Ga. 675.

An execution issued in the name of the accused on such a warrant will be void. *State v. Steele*, 112 Ga. 39, 37 S. E. 174; *Underwood v. Harvey*, 106 Ga. 268, 32 S. E. 124.

Judgment must be first rendered.

and is enforceable by imprisonment only when a statute so authorizes.⁵⁰

e. *Apportionment of Costs*.—The rule as to the apportionment of costs in civil cases cannot be invoked in criminal cases, because in criminal prosecutions the party is successful as to all or as to no part of its demand.⁵¹

D. **ITEMS TAXABLE**.—1. **Scope of Section**.—For the most part, the particular items that may be taxed have been treated in connection with the substantive liability of the party for costs in the first instance. Accordingly, reference is made to those sections for the various items that may be taxed against any particular party, and only the general rules will be stated here.⁵²

2. **Continuances**.—In some jurisdictions, the costs incident to the continuance of a criminal case must be borne by the party who made the motion for it. Accordingly, the accused is liable for the costs of a continuance granted on his motion, although he is acquitted at the trial and the statute makes the state liable in case of an acquittal.⁵³

3. **Witness' Fees**.—A witness' fees cannot be taxed as part of the costs, unless such right is derived from some statute.⁵⁴ Witnesses' fees are generally allowed to those witnesses attending court.⁵⁵

State v. Leidy, 115 Mo. App. 62, 90 S. W. 759.

Quashal.—If such execution is irregularly issued it may be quashed on motion of the prosecuting witness. State v. Lemcke, 117 Mo. App. 486, 94 S. W. 734.

50. *In re Heitman*, 41 Kan. 136, 21 Pac. 213; State v. Ensign, 11 Neb. 529, 10 N. W. 449.

But in some jurisdictions, the court may enforce the payment of the costs by ordering the prosecutor to be imprisoned until the same shall have been paid. **Ga.**—Green v. State, 112 Ga. 52, 37 S. E. 93. **Kan.**—State v. Stegman, 62 Kan. 476, 63 Pac. 746; State v. McGillvray, 21 Kan. 680. **N. C.**—State v. Stone, 153 N. C. 614, 69 S. E. 219; State v. Cannady, 78 N. C. 539.

51. *Hayes v. Clinton County*, 118 Iowa 569, 92 N. W. 860; State v. Belle, 92 Iowa 258, 60 N. W. 525; Von Rueden v. State, 96 Wis. 671, 71 N. W. 1048.

But judgment apportioning costs is not for that reason open to collateral attack. *Miller v. Borough of Hastings*, 25 Pa. Super. 569.

52. State v. Butler, 118 Mo. App. 587, 95 S. W. 310; State v. Barker, 63 Mo. App. 535. See the title "**Continuances**."

53. State v. Brigham, 63 Mo. 258; State v. Barker, 63 Mo. App. 535.

If the accused shows a legal right to a continuance in order to properly present his defense, he cannot be compelled to pay the costs of the term to obtain it. *Heist v. People*, 56 Ill. App. 391.

54. **U. S.**—*Virginia v. Felts*, 133 Fed. 85. **Ind.**—*Israel v. State*, 8 Ind. 467. **Mo.**—State v. Oliver, 116 Mo. 188, 22 S. W. 637. **Neb.**—*Worthen v. Johnson County*, 62 Neb. 754, 87 N. W. 909.

See *supra*, I, C.

55. **Attendance Without Subpoenas**. As to whether a witness must be in attendance in obedience to a subpoena in order to be entitled to his fees, the cases do not agree. Some cases hold that a witness in confinement or under recognizance cannot recover his fees against the defendant or the county. *Markwell v. Warren County*, 53 Iowa 422, 5 N. W. 570; State v. Walsh, 44 N. J. L. 470. But a provision that no unnecessary witness shall be subpoenaed does not affect the right of a witness not subpoenaed to fees or the obligation of the county to pay them. *County of Jones v. County of Linn*, 68 Iowa 63, 25 N. W. 930; *Com. v. Philadelphia County*, 6 Binn. (Pa.) 397.

Not double fees for attendance in several cases at the same time. *Com. v. Curren*, 2 Chest. Co. Rep. (Pa.) 393; State v. O'Haver, 15 Lea (Tenn.) 46.

The statutes in some states provide that no more than a specified number of witnesses may recover costs.⁵⁶ But the omission to examine a witness, or an examination disclosing that he has no knowledge of material facts, does not conclusively show that his attendance was unnecessary so as to prevent the taxing of his fees.⁵⁷

E. TAXATION OF COSTS. — 1. Scope of Section. — The taxation of costs in particular cases has already been treated in connection with the substantive liability of each particular party, and only the general rules will be stated here.

2. Manner of Taxation. — Costs in criminal cases must be taxed according to law, and not in accordance with the stipulations of the parties.⁵⁸

3. What Law Governs. — Costs must be taxed in a criminal case under the law in force at the time when the crime was committed.⁵⁹

4. Judgment for Costs. — a. Formalities. — There must not only be a judgment in the strict sense of that term,⁶⁰ but there must be a proper rendition and entry of the judgment, so that it may be enforced by execution,⁶¹ before any recovery of costs will be allowed against those persons designated by the statute as liable therefor.⁶²

b. Collateral Attack — In accordance with familiar rules a judgment assessing costs in a criminal case, which is merely irregular, cannot be collaterally attacked.⁶³

5. Relief From Improper Taxation. — There is no doubt about the right of the injured party, upon a proper showing, to relief from an erroneous or improper taxation of costs in a criminal case. The difficulty is as to the remedy.⁶⁴

In Tennessee the witness must prove his attendance in open court. *Lancaster v. State*, 3 Lea (Tenn.) 652.

56. *Herrington v. Flanders*, 115 Ga. 823, 42 S. E. 222; *Cameron v. State*, 37 Ind. App. 381, 76 N. E. 1021.

57. *State v. A. B. C.*, 68 N. H. 441, 40 Atl. 1065, where it was said that reasonable prudence may require that a witness be subpoenaed without knowing definitely what he will testify to, especially in criminal cases.

58. *Murphy v. People*, 3 Colo. 147.

59. *McBryde v. State*, 34 Ga. 202.

It is also well settled that statutes providing for the allowance of fees in criminal cases, must be given a prospective and not a retrospective effect. *Ala.*—*Caldwell v. State*, 55 Ala. 133. *Mo.*—*State v. Walker*, 80 Mo. 610. *Utah.*—*People v. Clayton*, 5 Utah 598, 18 Pac. 628.

60. *State v. French*, 118 Mo. App. 15, 93 S. W. 295.

The form of the judgment is not open to objection because it does not

"specify the portion of costs to be paid by each defendant. Each is liable for the entire costs, and the judgment might properly be general as to the costs." *Von Rueden v. State*, 96 Wis. 671, 71 N. W. 1048.

61. *Hayes v. Clinton County*, 118 Iowa 569, 92 N. W. 860.

62. See, *supra*, I, C, 2.

63. *Ind.*—*Mott v. State*, 145 Ind. 353, 44 N. E. 548. *Mo.*—*State v. Butler*, 118 Mo. App. 587, 95 S. W. 310. *Pa.*—*Miller v. Borough of Hastings*, 25 Pa. Super. 569.

See the title "Judgments."

Otherwise if judgment void.—*Donaldson v. Walker*, 101 Tenn. 236, 47 S. W. 417.

64. *Whitley v. Murphy*, 5 Ore. 328, 20 Am. Rep. 741.

Under Code of Tennessee, §7602, a frivolous taxation of costs against the state or county by a justice of the peace will be disallowed. *Henley v. State*, 98 Tenn. 665, 41 S. W. 352, 39 L. R. A. 126.

By Retaxation.—The usual method employed to correct an erroneous taxation of costs is by motion to retax before the court which made the original taxation,⁶⁵ and this remedy is available to any party aggrieved.⁶⁶

By statute in some jurisdictions, this motion must be served on the parties to be affected thereby.⁶⁷

Injunction and Prohibition.—But a motion to retax is not the exclusive remedy. An injunction will lie in a proper case to restrain their collection.⁶⁸

Prohibition is the remedy to prevent the enforcement by execution of an unauthorized judgment for costs in a criminal case.⁶⁹

By Appeal.—An appeal will lie in some jurisdictions to review an order taxing costs in a criminal case,⁷⁰ if such errors sufficiently appear of record to enable the court to review them.⁷¹

65. Ala.—Blankenship v. State, 105 Ala. 128, 17 So. 99. Cal.—Petty v. San Joaquin County Ct., 45 Cal. 245. Ill.—Corbin v. People, 52 Ill. App. 355. Kan.—State v. Ellvin, 51 Kan. 784, 33 Pac. 547. Mo.—Warrensburg v. Simpson, 22 Mo. App. 695. Tenn.—State v. Richards, 113 S. W. 370; State v. Davidson County, 52 S. W. 477 (holding that equity could not entertain a bill to recover the costs, because a motion to retax is an adequate remedy); State v. Alexander, 115 Tenn. 156, 90 S. W. 20; Henderson v. Walker, 101 Tenn. 229, 47 S. W. 430; State v. Goodbar, 8 Lea 451.

Certiorari is not the proper remedy to correct errors in the taxation costs, because the motion to retax is adequate. Petty v. San Joaquin County Court, 45 Cal. 245; State v. Second Judicial Dist. Ct., 16 Nev. 76.

Cannot Be Used To Obtain Judgment Against Clerk.—A motion to retax costs cannot be used to obtain a summary judgment against the officer collecting or recovering costs under proper execution. Tribble v. State, 147 Ala. 699, 41 So. 183.

A motion will not lie against the clerk to hold him personally responsible for the improper collection of costs after they have been paid into the state treasury, where the defendant paid these costs willingly, and made no motion to have them refunded while in the hands of the clerk. State v. Oden, 101 Tenn. 669, 49 S. W. 750.

On Whose Motion.—In Tennessee a retaxation of costs in a criminal case may be on motion of the county judge.

Donaldson v. Walker, 101 Tenn. 236, 47 S. W. 417.

Notice of motion to retax is sometimes required. State v. Hill, 3 Coldw. (Tenn.) 98.

66. State v. Belle, 92 Iowa 258, 60 N. W. 525.

67. Stewart v. State, 38 Tex. Crim. 627, 44 S. W. 505.

68. Burch v. Dooley, 123 Ind. 288, 24 N. E. 110; Russell v. Cleary, 105 Ind. 502, 5 N. E. 414; Whitley v. Murphy, 5 Ore. 328, 20 Am. Rep. 741.

69. Charleston v. Beller, 45 W. Va. 44, 30 S. E. 152.

70. State v. Belle, 92 Iowa 258, 60 N. W. 525; State v. Powell, 44 Mo. App. 21.

“In disposing of the costs in a criminal prosecution, the discretion of the grand jury, of the petit jury, and of the court is in nature judicial and is to be guided in its operation by the general principles that govern the exercise of judicial discretion. It may be reviewed only so far as to determine whether its exercise is judicial or arbitrary, and it is only an abuse of this discretion that is subject to correction.” Com. v. Kocher, 23 Pa. Super. 65.

71. Com. v. Mitchell, 33 Pa. Super. 345.

In some jurisdictions, an appellate court will refuse to review the decision of the court below on a motion to retax costs, unless the bill of exceptions embodies such evidence as will enable the higher court to intelligently review the decision. Stewart

But an appellate court will not generally review an order taxing costs until a motion to retax has been made and the trial court thus given an opportunity to correct the errors, if any have been made,⁷² except where the court has deliberately determined the liability for costs, and it cannot be claimed that there was any mistake or inadvertence of the clerk. In such case the reason of the rule ceases.⁷³

F. COLLECTION AND ENFORCEMENT.—In many jurisdictions, if costs are imposed in criminal cases the payment thereof may be enforced by execution, as in civil cases.⁷⁴

G. RECOVERY BACK OF COSTS PAID.—Costs voluntarily paid in a criminal case cannot be recovered back without a demand.⁷⁵

II. COSTS IN CIVIL CASES.—A. DEFINITION AND GENERAL CONSIDERATION.—1. Definition and Nature of Right.—The term "costs" as applied to proceedings in a court of justice, embraces the expenses incident to the conduct of a suit or action at law or in equity either in its prosecution or defense, and costs are generally allowed the successful party to reimburse him for the expenses of litigation.⁷⁶

v. State, 38 Tex. Crim. 627, 44 S. W. 505.

72. *Ala.*—*Murphy v. State*, 71 Ala. 15. *Kan.*—*State v. Ellwin*, 51 Kan. 784, 33 Pac. 547; *In re Lowe's Appeal*, 46 Kan. 255, 26 Pac. 749. *Minn.*—*State v. Reickards*, 21 Minn. 47. *Tenn.*—*State v. Goodbar*, 8 Lea 451; *State v. Puckett*, 7 Lea 709. *Utah.*—*People v. Peacock*, 5 Utah 237, 14 Pac. 332.

73. *Burton v. State*, 34 Neb. 125, 51 N. W. 601.

74. *Ala.*—*Hendon v. Delvichio*, 137 Ala. 594, 34 So. 830. *Colo.*—*Anno St.*, §1081. *Utah.*—*Salt Lake City v. Robinson*, 116 Pac. 442. *Wash.*—*Clallam County v. Hall*, 23 Wash. 85, 62 Pac. 443.

See *infra*, I, C, 2.

A *capias pro fine* may issue on behalf of the state to recover its costs. *Johnson v. Scott*, 134 Ky. 736, 121 S. W. 695.

75. *Ford v. Brownele*, 13 Minn. 184.

76. 1 Bouv. Law Dict. 376, and the following cases: *U. S.*—*Henry v. United States*, 15 Ct. Cl. 162. *Ga.*—*Davis v. State*, 33 Ga. 531; *Wellmaker v. Terrell*, 60 Ga. App. 791, 60 S. E. 464. *Kan.*—*Bennett v. Kroth*, 37 Kan. 235, 15 Pac. 221. *N. Y.*—*In re Terry*, 67 Misc. 514, 123 N. Y. Supp. 253, 261. *Tenn.*—*Ex parte Griffin*, 88 Tenn. 547, 13 S. W. 75; *State Tax Cases*, 12 Lea 744; *State v. Nance*, 1 Lea 644; *Smith v. Van Bebber*, 1 Swan 110; *William Carey v. Campbell*, 3 Snead 62. *Tex.*—*State v. Dyches*, 28 Tex. 535.

The sums prescribed by law as charged for the services enumerated in the fee bill. *Ind.*—*Alexander v. Harrison*, 2 Ind. App. 176, 28 N. E. 119. *Ia.*—*Forbes v. Chicago*, etc. R. Co., 129 N. W. 810. *Mo.*—*St. Louis v. Meintz*, 107 Mo. 615, 18 S. W. 30; *City of Carterville v. Cardwell*, 152 Mo. App. 32, 132 S. W. 745. *N. J.*—*Apperson v. Mutual Benefit Life Ins. Co.*, 38 N. J. L. 388. *N. M.*—*Neher v. Crawford*, 10 N. M. 725, 65 Pac. 156; *Price v. Garland*, 5 N. M. 98, 20 Pac. 182.

The statutory allowance to a party to an action for his expenses in conducting the suit. *Bennett v. Kroth*, 37 Kan. 225, 15 Pac. 221, 1 Am. St. Rep. 248.

"Certain sums of money granted by law to the prevailing party by way of indemnity for maintaining an action or for vindicating a defense." *Sommer v. Compton*, 53 Ore. 341, 100 Pac. 289.

Costs are the "mulet the law enacts for irregularities." *Farnsworth v. Paul*, 1 Disn. (Ohio) 423, quoting from *Graham & Waterman on New Trials*, p. 597.

Cost is a pecuniary allowance made by positive law to the successful party in a suit, or a distinct proceeding within a suit, in consideration of and to reimburse his probable expenses. *Price v. Garland*, 5 N. M. 98, 20 Pac. 182, citing *Abb. Law Dict.*

As between a party to a suit and the officer or witness, the charges allowed are usually denominated fees; but, as between the parties to a suit, these charges are usually called costs.⁷⁷ When used in a statute the term generally refers to the costs of the court alone.⁷⁸ The principle underlying the award of costs is that their purpose is to indemnify the successful party against the expenses of maintaining his rights in the courts.⁷⁹ They are incident to the recovery and are no part of the relief sought,⁸⁰ nor do they become a debt either

77. 1 Bouv. L. Dict., 370, and the following cases: Mo.—City of St. Louis v. Meintz, 107 Mo. 611, 18 S. W. 30; City of Carterville v. Cardwell, 152 Mo. App. 32, 132 S. W. 745. N. J. Apperson v. Mutual Benefit Life Ins. Co., 38 N. J. L. 388. N. Y.—In re Terry, 67 Misc. 514, 123 N. Y. Supp. 258. Pa.—Musser v. Good, 11 Serg. & R. 247, 248.

This distinction, however, has little, if any, practical value. Alexander v. Harrison, 2 Ind. App. 176, 28 N. E. 119.

Costs are the fees allowed officers of courts for their services in a judicial proceeding; though incidental to a suit they are independent of the issue. Wellmaker v. Terrell, 60 Ga. App. 791, 60 S. E. 464.

78. Ordinarily attorney's fees cannot be allowed as costs in the absence of an express statute to that effect (Davis v. State, 33 Ga. 531; Waters v. Waters, 49 Mo. 385; Watson v. Watson, 21 Ohio C. C. 249, 11 Ohio Cir. Dec. 463), nor commissions due to attorneys on adjudged forfeitures (State v. Dyches, 28 Tex. 535); nor charges of expert witnesses (City of St. Louis v. Meintz, 107 Mo. 611, 18 S. W. 30), "costs of the proceedings."

"Costs are awarded by each court in the proceedings before it. They are certain legal fees allowed by law computable from the record, whereas attorney's fees are extrinsic to the record, not to be found from it, but dependent on facts dehors the record." State v. Graham, 68 W. Va. 248, 69 S. E. 301.

The word "costs" includes disbursements. Board of County Comrs. v. Board of County Comrs., 84 Minn. 267, 84 N. W. 846; Woolsey v. O'Brien, 23 Minn. 71.

Cost and Expenses Distinguished. The word "costs" is not synonymous with expense. Expense is costs when

made so by statute. State v. Comrs., 6 Ohio Dec. 240, affirmed, 14 Ohio C. C. 26, 7 Ohio C. D. 351.

The tax on litigation is not costs. State v. Davidson County, 96 Tenn. 178, 33 S. W. 924; Ex parte Griffin, 88 Tenn. 547, 13 S. W. 75; Johnson v. State, 85 Tenn. 325, 2 S. W. 802; State Tax Cases, 12 Lea (Tenn.) 744; Galbraith v. Gaines, 10 Lea (Tenn.) 568; Elliston v. Winstead, 10 Lea (Tenn.) 472; State v. Hartman, 5 Lea (Tenn.) 118.

79. In re Pine's Stream, 114 N. Y. Supp. 681.

80. Ark.—Watkins v. Parker, 134 S. W. 1187. Cal.—Gray v. Dougherty, 25 Cal. 266; Gaffey v. Mann, 5 Cal. App. 712, 91 Pac. 172. Ky.—Knight v. Whitman, 6 Bush 51. N. Y.—Clark v. Rowling, 3 N. Y. 216. Tex.—Scott v. Burton, 6 Tex. 322; Hanks v. Thompson, 5 Tex. 6. But see Ball v. Chase (Tex. Civ. App.), 49 S. W. 934.

The authorities holding that an award of final judgment carries with it all costs to date, do not apply on a vacation of the judgment for irregularity or illegality. Newman v. Benedict, 129 N. Y. Supp. 389.

Costs are no such part of the matter in dispute as to give a court jurisdiction by increasing the amount involved. Votan v. Reese, 20 Cal. 89.

Expenses incident to a receivership are usually termed costs. Hetterman v. Young (Tenn. Ch. App.), 61 S. W. 1085.

Costs Are in the Nature of Damages.

"The general principle is that costs are considered as an appendage to the judgment, rather than a part of the judgment itself; that they are considered, in some sense, as damages, and are always entered, in effect, as an increase of damages by the court." Ashworth v. Tramwell, 102 Va. 852, 47 S. E. 1011; McRea v. Brown, 2 Munf. (Va.) 46; Douglass v. McCoy, 24 W. Va. 722.

upon an express or implied contract until judgment is rendered.⁸¹

2. Origin and Basis of Right.—a. *At Common Law.*—Costs, as such were unknown at common law,⁸² but each party was liable for his own costs.⁸³ Amercement seems to be the nearest thing to the allowance of costs at common law. If the plaintiff failed in his action, he was amerced for his false clamor.⁸⁴ But the common law rule, by which an unsuccessful party was amerced *pro falso clamore*, furnishes the foundation of the statutes which afterwards gave costs by name.⁸⁵ In some actions, however, costs were included in the quantum of damages.⁸⁶

81. "A judgment for costs is not a debt by contract either express or implied. It is a liability created by statute, and, in the absence of the statute allowing the same, there could be no judgment rendered in favor of a defendant against a plaintiff, where the latter fails in his suit." *Buckley v. Williams*, 84 Ark. 187, 105 S. W. 95, 120 Am. St. Rep. 24.

Therefore a discharge in bankruptcy pending the determination of a suit does not relieve the bankrupt from paying them, nor will a conveyance of property before judgment in the suit be declared fraudulent as respects the costs. *Dows v. Griswold*, 122 Mass. 440; *Pelham v. Aldrich*, 8 Gray (Mass.) 515, 69 Am. Dec. 266; *Ogden v. Prentice*, 33 Barb. (N. Y.) 160.

A final judgment for costs is a valid set off. *Porter v. Liscom*, 22 Cal. 430, 83 Am. Dec. 76.

82. **U. S.**—*Lowe v. Kansas*, 163 U. S. 81, 16 Sup. Ct. 1031, 41 L. ed. 78; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. ed. 468; *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181; *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 106, 14 Fed. Cas. No. 7,876. **Ill.**—*Galpin v. City of Chicago*, 249 Ill. 554, 94 N. E. 961. **Ky.**—*Thurnham's Exr. v. Shouse*, 8 Dana 3, 33 Am. Dec. 500. **N. H.**—*State v. Kinne*, 41 N. H. 238. **N. J.**—*Brittin v. Blake*, 36 N. J. L. 442. **Ohio.**—*Carpenter v. Kent*, 11 Ohio St. 554; *Cleveland, etc. R. Co. v. Bartram*, 11 Ohio St. 457; *State v. Taylor*, 10 Ohio 378; *Farrier v. Cairns*, 5 Ohio 45; *Bell v. Bates*, 3 Ohio 380. **Vt.**—*Hart v. Skinner*, 16 Vt. 138, 42 Am. Dec. 500. **Va.**—*Gresham v. Ewell*, 85 Va. 1, 6 S. E. 700; *West v. Ferguson*, 16 Gratt. 270. **W. Va.**—*Wilkinson v. Hoke*, 39 W. Va. 403, 19 S. E. 520; *Roberts v. Paul*, 5 W. Va. 531, 40 S. E. 470.

83. *United States v. Ringgold*, 8 Pet. (U. S.) 150, 8 L. ed. 899; *Gatewood v. Palmer*, 10 Humph. (Tenn.) 466; *Caldwell v. State*, 2 Sneed (Tenn.) 490; *Allison v. Thompson*, 2 Swan (Tenn.) 202.

84. **U. S.**—*Lowe v. Kansas*, 163 U. S. 81, 16 Sup. Ct. 1031, 41 L. ed. 78; *Day v. Woodworth*, 13 How. 363, 14 L. ed. 181. **Ohio.**—*Carpenter v. Kent*, 11 Ohio St. 554; *Cleveland, etc. R. Co. v. Bartram*, 11 Ohio St. 457; *State v. Taylor*, 10 Ohio 378. **Va.**—*Gresham v. Ewell*, 85 Va. 1, 6 S. E. 700; *West v. Ferguson*, 16 Gratt. 270. **W. Va.**—*Roberts v. Paul*, 50 W. Va. 531, 40 S. E. 470; *Wilkinson v. Hoke*, 39 W. Va. 403, 19 S. E. 520.

85. *Musser v. Good*, 11 Serg. & R. (Pa.) 247.

"At first, by the common law, no costs were awarded to either party *eo nomine*. If the plaintiff failed to recover, he was amerced *pro falso clamore*; if he recovered judgment, the defendant was in *misericordia* for his unjust detention of the plaintiff's debt, and was not, therefore, punished with the *expensa litis* under that title. But, this being considered a great hardship, the statute of Gloucester (6 Edw. 1, c. 1) was passed, which gave costs in all cases when the plaintiff recovered damages. This was the origin of cost *de incremento*; for, when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the case." *Price v. Garland*, 5 N. M. 98, 20 Pac. 182.

86. 3 Black. Com. 399; 4 Minor's Inst. (3d ed.) 969; *Gresham v. Ewell*, 85 Va. 1, 6 S. E. 700; *West v. Ferguson*, 16 Gratt. (Va.) 270; *Roberts v. Paul*, 50 W. Va. 531, 40 S. E. 470; *Wilkinson v. Hoke*, 39 W. Va. 403, 19 S. E. 520.

b. *Under the Statutes.*—Courts possess no inherent power to award costs,⁸⁷ and in the absence of a statute none can be recovered by either of the parties,⁸⁸ whether in an action *ex contractu* or *ex de-*

It is said, also, that in early times, before any statute on the subject was passed, the justices in Eyre were wont at their *iters* to give a plaintiff who had prevailed a reasonable sum beyond the damages, not as costs of suit, but as an allowance, *ex gratia*, for the expenses of the suit.' Lehigh, etc. R. Co. v. McFarland, 44 N. J. L. 674; Bac. Abr. title "Costs."

87. Wallace v. Sheldon, 56 Neb. 55, 76 N. W. 418.

88. U. S.—Bradford v. Southern R. Co., 195 U. S. 243, 25 Sup. Ct. 55, 49 L. ed. 178; Gulf, etc. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666; Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. ed. 468; Michigan Aluminum Foundry Co. v. Aluminum Co., 190 Fed. 903; Tesla Elec. Co. v. Scott, 101 Fed. 524; O'Neill v. Kansas City R. Co., 31 Fed. 663; Coggill v. Laurence, 2 Blatchf. 304, 6 Fed. Cas. No. 2,957. Ala.—Henry v. Murphy, 54 Ala. 246; Westcott v. Booth, 49 Ala. 182. Ark.—Buckley v. Williams, 84 Ark. 187, 105 S. W. 95; Thorn v. Clendenin, 12 Ark. 60 (clerk of court not entitled to fees in advance). Cal.—Williams v. Atchison, etc. R. Co., 156 Cal. 140, 103 Pac. 885; Fox v. Hale & Norcross S. & M. Co., 122 Cal. 219, 54 Pac. 731; Duley v. Peacock (Cal. App.), 119 Pac. 1086; Murphy v. Casey, 13 Cal. App. 781, 110 Pac. 956. Conn.—Studwell v. Cooke, 38 Conn. 554. D. C.—District of Columbia v. Lyon, 7 Mackey 222. Idaho.—Schmelzel v. Board of County Comrs., 16 Idaho 32, 100 Pac. 106, where expenses of jurors are denied as costs. Ill.—Galpin v. City of Chicago, 249 Ill. 554, 94 N. E. 961; Smith v. McLaughlin, 77 Ill. 596; Aldrich v. Maher, 153 Ill. App. 413; Union County v. Axley, 53 Ill. App. 670. Kan.—Warner v. Warner, 83 Kan. 548, 112 Pac. 97; Hall v. Greenwood County Comrs., 22 Kan. 37 (costs of proceedings before county commissioners to be placed on tax roll). Ky.—Turnham's Exr. v. Shouse, 8 Dana 3, 33 Am. Dec. 473. La.—Deal v. Hodge, 124 La. 998, 50 So. 523; Liquidating Comrs. v. Marrero, 106 La. 130, 30 So. 305. Me.—Porteous, Mitchell & Braun Co. v. Miller, 107 Me. 155, 77 Atl. 710.

Md.—Kierstedt v. Rogers, 6 Har. & J. 282. Mass.—Agler v. Boston, 168 Mass. 516, 47 N. E. 194. Mich.—Hester v. Comers, 64 Mich. 450, 47 N. W. 1097; Jeffery v. Hursh, 58 Mich. 246, 258, 25 N. W. 176, 27 N. W. 7; In re Hartwell, 2 Mich. N. P. 97. Mo.—State v. Wilder, 197 Mo. 27, 94 S. W. 499; St. Louis v. Meintz, 107 Mo. 611, 18 S. W. 30; St. Louis, etc. R. Co. v. Cape Girardeau, etc. R. Co., 126 Mo. App. 272, 102 S. W. 1042; Price v. Clevenger, 99 Mo. App. 536, 74 S. W. 894. Mont.—Montana Ore. Purchasing Co. v. Boston, etc. Min. Co., 27 Mont. 288, 70 Pac. 1114. Neb.—Douglass Count v. Moores, 66 Neb. 284, 92 N. W. 199; Wallace v. Sheldon, 56 Neb. 55, 76 N. W. 418; Dow v. Updike, 11 Neb. 95, 98, 7 N. W. 857. Nev.—McKenzie v. Coslett, 28 Nev. 65, 78 Pac. 976. N. H.—Smith v. Boynton, 44 N. H. 529; State v. Kinne, 41 N. H. 238. N. J.—State v. Walsh, 44 N. J. L. 470 (per diem of witness detained in jail in default of security for appearance); In re Public Highway, 22 N. J. L. 293. N. M.—Price v. Garland, 5 N. M. 98, 20 Pac. 182. N. Y.—Matter of City of Brooklyn, 148 N. Y. 107, 42 N. E. 413; People v. Gilmore, 88 N. Y. 626, reversing 26 Hun 1; Scherl v. Flam, 136 App. Div. 753, 121 N. Y. Supp. 522; Ficke v. Hessberg, 127 N. Y. Supp. 1008; Auerbuch v. Hochlich, 63 Misc. 327, 117 N. Y. Supp. 187; McCormick v. Shea, 42 Misc. 555, 85 N. Y. Supp. 1029. N. C.—Patterson v. Ramsey, 136 N. C. 561, 48 S. E. 811. N. D.—Casseday v. Robertson, 125 N. W. 1045. Ohio.—Farrier v. Cairns, 5 Ohio 45; Cincinnati Trac. Co. v. Felix, 15 Ohio C. D. 393; Castle v. Roach, 8 Ohio N. P. 212. Ore.—State v. Estes, 34 Ore. 196, 55 Pac. 25 (appeals from medical examining board); Mitchell v. Downing, 23 Ore. 448, 32 Pac. 394; Wood v. Fitzgerald, 3 Ore. 568. Pa.—Smith v. Equitable Trust Co., 215 Pa. 413, 64 Atl. 591; Grim v. Weissenberg School Dist., 57 Pa. 433; Musser v. Good, 11 Serg. & R. 247; Herbein v. Philadelphia R. Co., 9 Watts 272. S. C.—Scott v. Alexander, 27 S. C. 15, 2 S. E. 706, holding in accordance with rule stated in the text

licto,⁸⁹ or a special proceeding.⁹⁰ The first statute that allowed costs *eo*

as to expense of printing briefs, reports and of employing stenographer. **S. D.**—*Elfring v. New Birdsall Co.*, 17 S. D. 350, 96 N. W. 703. **Tenn.**—*State v. Murphy*, 101 Tenn. 515, 47 S. W. 1098; *State v. Spurgeon*, 99 Tenn. 659, 47 S. W. 235; *Johnson v. State*, 94 Tenn. 499, 29 S. W. 963; *Morgan v. Pickard*, 86 Tenn. 208, 9 S. W. 690. **Vt.**—*Munger v. Verder*, 59 Vt. 386, 8 Atl. 154; *Tyler v. Frost*, 48 Vt. 486. **Va.**—*West v. Ferguson*, 16 Gratt. 270, proceedings to contest election. **Wis.**—*In re Donges' Estate*, 103 Wis. 497, 79 N. W. 786; *Everett v. Gores*, 89 Wis. 421, 62 N. W. 82.

Not based on contract. *Buckley v. Williams*, 84 Ark. 187, 105 S. W. 95, 120 Am. St. Rep. 24; *Matheson v. Rogers*, 84 S. C. 458, 65 S. E. 1054, 67 S. E. 476.

"From early times the legislature and the courts, in England and America, in order to put a check on unjust litigation, have not only, as a general rule, awarded costs to the party prevailing in a civil action, but have, not infrequently, required actual payment of costs, or security for their payment, from the plaintiff in a civil action, or even from the prosecutor in a criminal proceeding. For instance, plaintiffs have been required, by general statute or by special order, to give security for the costs of the action, or to pay the costs of a former suit before suing again for the same cause. *Shaw v. Wallace*, 2 Dall. 179; *Hurst v. Jones*, 4 Dall. 353; *Henderson v. Griffin*, 5 Pet. 151, 159. Third persons allowed to intervene, on condition of giving bond to pay costs, may be compelled to do so by attachment, without remitting the payee to suit upon the bond. *Craig v. Leitensdorfer*, 127 U. S. 764, 771. And in an information to enforce a charitable trust a relator is required, who may be compelled, if the information is not maintained, to pay the costs. *Attorney General v. Smart*, 1 Ves. Sen. 72, and note; *Attorney General v. Butler*, 123 Mass. 304, 409." *Lowe v. Kansas*, 163 U. S. 81, 16 Sup. Ct. 1031, 41 L. ed. 78.

⁸⁹. *Northern v. Hanners*, 121 Ala. 587, 25 So. 817; *Drake v. Vernon* (S. D.), 128 N. W. 317.

Constitutionality.—"Reasonable reg-

ulations imposing costs and requiring security for costs as incidents of judicial proceedings to redress wrongs or protect rights, do not violate the bill of rights entitling every person to 'obtain justice freely and without being obliged to purchase it.'" *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

⁹⁰. **Colo.**—*Phillips v. Corbin*, 25 Colo. 567, 56 Pac. 180. **Nev.**—*Garrard v. Gallagher*, 11 Nev. 382. **N. H.**—*State v. Kinne*, 41 N. H. 238. **N. J.**—*Metter v. Easton & Amboy R. Co.*, 37 N. J. L. 223; *In re Public Highway*, 22 N. J. L. 293.

In *Columbia Water Power Co. v. City of Columbia*, 4 S. C. 388, the code provision was held to allow acts in an action but not in a special proceeding.

Costs in disbarment proceedings cannot be taxed against either party in the absence of express statutory direction. **Ky.**—*Turner v. Com.*, 2 Metc. 619. **Neb.**—*Morton v. Watson*, 60 Neb. 672, 84 N. W. 91. **N. D.**—*In re Eaton*, 7 N. D. 269, 74 N. W. 870. **Ore.**—*Compare Ex parte Ditchburn*, 32 Ore. 533, 52 Pac. 694. **S. D.**—*In re Kirby*, 10 S. D. 416, 73 N. W. 908. **Wash.**—*State v. Martin*, 45 Wash. 76, 87 Pac. 1054.

On an *ex parte* proceeding to instruct the clerk as to a taxation of costs—no costs were allowed. *Hart's Heirs v. Young*, 2 Dana (Ky.) 156.

A statutory proceeding to establish a boundary between towns is not in the nature of an action, and no costs are allowed to either side. *Monmouth v. Leeds*, 79 Me. 171, 8 Atl. 828.

In **Montana**, costs may be allowed of course to the plaintiff upon a judgment in his favor, in special proceedings in the nature of an action such as *habeas corpus*. *State v. Newell*, 13 Mont. 302, 34 Pac. 28.

In **New York** costs in special proceedings are limited by statute the same as costs in actions, and costs cannot be awarded in excess of these limitations. *In re Taxpayers & Freeholders of Village of Plattsburg*, 157 N. Y. 78, 51 N. E. 512.

Under the **New York** law relating to costs in "special proceedings," where issues of fact are joined upon

nomine, was the statute of Gloucester (6 Edw. I, ch. 1), which allowed them to plaintiff.⁹¹ Subsequently, the statute 23, Henry VIII, allowed costs to defendant, in like manner and to the same extent as the plaintiffs were entitled.⁹²

Construction of Statutes.—All statutes relating to costs are to be strictly construed.⁹³ But this does not mean that they are to be

a return made to an alternative writ of mandamus, the cause is deemed to be an "action," and not a special proceeding. *People v. Lewis*, 28 How. Pr. 470.

On the other hand, a proceeding by certiorari to review an assessment of taxes is deemed a special proceeding within Laws of 1859, ch. 302, §20 (*People v. Comrs. of Taxes & Assessments*, 76 N. Y. 64), and in certain districts of the state an extra allowance may be made in such proceedings (*In re Long Island Water Supply Co.*, 148 N. Y. 107, 42 N. E. 413; *In re Holden*, 126 N. Y. 589, 27 N. E. 1063; *In re R. & S. R. Co. v. Davis*, 55 N. Y. 145; *In re Grade Crossing Comrs.*, 20 App. Div. 273, 46 N. Y. Supp. 1070). Aside from this an extra allowance cannot be made in special proceedings. *In re Tarrytown, etc. R. Co.*, 117 N. Y. Supp. 695, for the voluntary dissolution of a corporation.

Under Code, §318, a proceeding to remove a policeman from office is not a "special proceeding." *People v. Board of Police*, 39 N. Y. 506.

Under Code Civ. Proc. §3347, restricting §§2557, 2662, an application for costs in the surrogate's court is not a "special proceeding." *In re Mace*, 4 Redf. Sur. (N. Y.) 325.

A supplementary proceeding is to be deemed an "action," or the continuation of an action, and not a "special proceeding" under the South Carolina Code. *Dauntless Mfg. Co. v. Davis*, 24 S. C. 536.

91. 3 Black. Com. 399; 4 Minor's Inst. (3d ed.) 969; *Day v. Woodworth*, 13 How. (U. S.) 363, 14 L. ed. 181. See also the dissenting opinion of Baldwin, J. in Rule No. 37, 5 Pet. (U. S.) 724; *Gresham v. Ewell*, 85 Va. 1, 6 S. E. 700; *West v. Ferguson*, 16 Gratt. (Va.) 270; *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470; *Wilkinson v. Hope*, 39 W. Va. 403, 19 S. E. 520.

This statute provided that "whereas before time damages were not taxed but to the value of the issues of the

land, it is provided that the demandant may recover against the tenant the costs of his writ purchased, together with the damages above said (§1), and this act shall hold place in all cases where the party is to recover damages. And every person from henceforth shall be compelled to render damages where the land is recovered against him upon his own intrusion or his own act." *Carpenter v. Kent*, 11 Ohio St. 554; *Cleveland, etc. R. Co. v. Bartram*, 11 Ohio St. 457; *Bell v. Bates*, 3 Ohio 380.

"This was the origin of costs *de incremento*; for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause. See Bac. Abr. tit. Costs. Under the provisions of this statute every court of common law has an established system of costs, which are allowed to the successful party by way of amends for his expense and trouble in prosecuting his suits." *Day v. Woodworth, supra*.

92. 3 Black. Com. 399; 4 Minor's Inst. (3d ed.) 969, and the following cases: N. J.—*Lehigh Val. R. Co. v. McFarland*, 44 N. J. L. 674. Vt.—*State v. Bradford*, 32 Vt. 50. Va.—*Gresham v. Ewell*, 85 Va. 1, 6 S. E. 700; *West v. Ferguson*, 16 Gratt. 270. W. Va. *Roberts v. Paul*, 50 W. Va. 538, 40 S. E. 470; *Wilkerson v. Hope*, 39 W. Va. 403, 19 S. E. 520.

The statute of 23 Henry VIII, ch. 15, §1, provided, in substance, that the defendant shall be entitled to costs, "if the plaintiff be non-suited, or a verdict pass against him in any action," etc., "upon a wrong personally done to the plaintiff, or in any action," etc., "upon any speciality made to the plaintiff, or upon any contract supposed to have been made between the plaintiff and any other person." *Turnham's Exrx. v. Shouse*, 8 Dana (Ky.) 3, 33 Am. Dec. 473.

93. Ala.—*Morrow v. Rosenstihl*, 106 Ala. 198, 17 So. 608; *State v. Brewer*,

construed as penal statutes.⁹⁴ Statutes regulating costs apply to cases then pending, in the absence of any provision to the contrary.⁹⁵

3. What Law Governs.—The law of the forum, and not the *lex loci contractus*, governs the right to and allowance of costs in suits and actions.⁹⁶ It is also well settled that the recovery of costs is governed by the statute in force at the time the right to have them taxed accrued.⁹⁷ In other words, the right to costs depends upon

59 Ala. 130. **Ark.**—Fanning v. State, 47 Ark. 442, 2 S. W. 70. **Ill.**—Galpin v. City of Chicago, 249 Ill. 554, 94 N. E. 961; Gehrke v. Gehrke, 190 Ill. 166, 60 N. E. 59; Dobler v. Village of Warren, 174 Ill. 92, 50 N. E. 1048. **Mo.**—Lucas v. Brown, 127 Mo. App. 645, 127 S. W. 1089; Veidt v. Missouri, etc. R. Co., 109 Mo. App. 102, 82 S. W. 1122; State v. Board of Police Comrs., 108 Mo. App. 98, 82 S. W. 960; State v. Union Trust Co., 70 Mo. App. 311. **Neb.**—Branson v. Branson, 84 Neb. 288, 121 N. W. 109; Stanton Co. v. Madison Co., 10 Neb. 304, 4 N. W. 1055. **N. Y.**—Crofut v. Brandt, 58 N. Y. 108. **N. D.**—Whitney v. Akin, 125 N. W. 470. **Ore.**—Pugh v. Good, 19 Ore. 85, 23 Pac. 827; Jackson v. Siglin, 10 Ore. 93. **S. C.**—State v. Orangebury County, 10 S. C. 40.

Courts cannot go beyond the provisions of the statute. Dedekam v. Vose, 3 Blatchf. 153, 7 Fed. Cas. No. 3,731; Price v. Garland, 5 N. M. 98, 20 Pac. 182.

A statute which authorizes the court to decree costs against a person contesting a tax, if the tax is adjudged valid, does not empower the court to decree costs against the state, as the former power is exclusive of any other. Auditor General v. Baker, 84 Mich. 113, 47 N. W. 515.

94. State v. Lineberger, 72 Pa. 239; Garrison v. Trotter, 114 Tenn. 526, 86 S. W. 1078; Hite v. Rayburn, 114 Tenn. 463, 85 S. W. 1105.

The law of costs is by the Tennessee code, §3219, to be construed remedially, and this construction applies as well in favor of officers and witnesses as to parties. Williams v. State, 3 Heisk. 313. See Johnson v. State, 94 Tenn. 499, 29 S. W. 963; Parham v. Gibbs, 16 Lea 296; Perkins v. State, 9 Baxt. 1. They are in their nature penal and are to be strictly construed. Wilson v. Cochran, 46 Pa. 233, citing 4 Binn. (Pa.) 13.

95. Meigs v. Parke, 1 Morris (Iowa) 378.

96. Union Mut. Fire Ins. Co. v. Hopkins, 3 R. I. 110.

Usurious Contract.—In an action in South Carolina on a contract made in Alabama, and which was usurious according to the laws of the latter state, judgment was recovered upon the sum actually due, with interest at the legal rate in Alabama. Held that it was discretionary with the court whether plaintiff should be allowed his costs although by the laws of Alabama he would be in such case legally entitled to them. McKeithen v. Butler, 2 Rich. Eq. (S. C.) 37.

97. **U. S.**—Lyll v. Miller, 3 McLean 422, 15 Fed. Cas. No. 8,620. **Cal.**—Begbie v. Begbie, 128 Cal. 154, 60 Pac. 667. **Conn.**—Taylor v. Keeler, 30 Conn. 324. **Ind.**—Free v. Haworth, 19 Ind. 404; Brock v. Parker, 5 Ind. 538. **Ia.**—Carter v. Bartel, 110 Iowa 211, 81 N. W. 462; Meigs v. Parke, 1 Morr. 378. **Me.**—Ellis v. Whittier, 37 Me. 548. But see Withee v. Preston, 33 Me. 211. **Mass.**—Com. v. Cambridge, 4 Metc. 35; Billings v. Segar, 11 Mass. 340. **Mich.**—Jeffrey v. Hursh, 58 Mich. 246, 27 N. W. 7, 25 N. W. 176. **N. Y.**—Jones v. Underwood, 18 How. Pr. 532; Fisher v. Hunter, 15 How. Pr. 156; McMasters v. Vernon, 1 Abb. Pr. 179; Rich v. Husson, 1 Duer 617; Munson v. Curtis, 43 Hun 214. **Pa.**—Grim v. Weissenberg School Dist., 57 Pa. 433, 98 Am. Dec. 237; Grace v. Altemus, 15 Serg. & R. 133. **S. C.**—Irwin v. Brooks, 19 S. C. 96; Kapp v. Loyens, 13 S. C. 288. **Utah.**—Hepworth v. Gardner, 4 Utah 439, 11 Pac. 566. **Vt.**—Pearl v. Harrington, Brayt. 48.

Law Changed Before Judgment.—In Ellis v. Whittier, 27 Me. 548, it was said that the act in force at the time judgment was entered would govern; but when the law is changed after verdict and before judgment, the final verdict should doubtless be regarded as

the statutes in force at the termination of the action, and not upon those in force when it was commenced.⁹⁸

B. RECOVERY OF AND LIABILITY FOR COSTS. — 1. Persons Who May Recover or Must Pay Costs. — a. Statement of General Rule. — The general rule is well settled that only parties to the suit or proceedings are entitled to,⁹⁹ or are liable for, costs in civil cases.¹ In other

the termination of the suit. See *Scudder v. Gori*, 28 How. Pr. (N. Y.) 155; *s. c.*, 18 Abb. Pr. 207; *Jackett v. Judd*, 18 How. Pr. (N. Y.) 385.

"When the act on which a suit pending is founded, is summarily repealed, and a complete bar to all further proceedings in the suit thereby interposed by the legislature, then all voluntary control or agency of the parties in the disposition of the cause is ended *vi majori*, and neither can be regarded as the prevailing party" nor receive costs. *Saco v. Gurney*, 34 Me. 14.

98. *Cal.*—*Begbie v. Begbie*, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141. *Conn.* *Lew v. Bray*, 81 Conn. 213, 70 Atl. 628; *Taylor v. Keeler*, 30 Conn. 324. *Me.*—*Ellis v. Whittier*, 37 Me. 548. *Mass.*—*Fessenden v. Nickerson*, 125 Mass. 316; *Brigham v. Dole*, 2 Allen 49. *N. Y.*—*Supers. of Onondaga v. Briggs*, 3 Denio 173.

"If acts of Congress make specific provision for costs, they control. If they make no provision for certain kinds of costs, the provisions, if any, of the state statutes may be followed (*Scatcherd v. Love*, 166 Fed. 53, 91 C. C. A. 639, and cases cited), at least if they do not result in injustice in a particular case (*Primrose v. Fenno* (C. C.), 113 Fed. 375). Such seems to be the prevailing doctrine at this time." *Michigan Aluminum Foundry Co. v. Aluminum Co. of America*, 190 Fed. 903.

99. *Ky.*—*Brentlinger v. Funk*, 3 J. J. Marsh. 656. *Me.*—*Reed v. Reed*, 25 Me. 242. *Md.*—*Willson v. Williams*, 108 Md. 522, 70 Atl. 409. *N. H.*—*Hodgdon v. Merrill*, 26 N. H. 16; *Pike v. Pike*, 24 N. H. 384; *Holland v. Seaver*, 21 N. H. 386; *Little v. Bunce*, 7 N. H. 485. *N. Y.*—*McRoberts v. Pooley*, 12 N. Y. St. 107. *Va.*—*Cogbill v. Cogbill*, 2 Hen. & M. 467.

Although the money under a contract of fire insurance is made payable in whole or in part to the mortgagee in case of loss, the original assured

does not cease to be a party to the contract, and to have an interest in the insurance. Therefore, if he sues on the contract in his own name or with the mortgagee's assent, he may recover costs. *Jackson v. Farmers' Mut. Fire Ins. Co.*, 5 Gray (Mass.) 52. See also *Palmer Sav. Bank v. Ins. Co.*, 166 Mass. 189, 44 N. E. 211.

"Where a transferee pending a suit permits it to be prosecuted in the name of the original parties, there is no rule of law that prevents those parties from recovering costs of suit." *Crittenden v. San Francisco Sav. Bank*, 157 Cal. 201, 107 Pac. 103.

New York Code of Civ. Proc., §§2557, 2562, authorizes the surrogate to award costs to the parties only, and not to the attorney or attorneys of a party to the proceedings before him personally. *M'Mahon v. Smith*, 20 Misc. 305, 45 N. Y. Supp. 663.

Persons Choosing the Wrong Form. A person who resorts to the wrong form to redress his wrongs, cannot recover his costs unless he succeeds in that tribunal. *Keaton v. Cobb*, 16 N. C. 439, 18 Am. Dec. 598.

1. *Ala.*—*Jones v. Brooks*, 30 Ala. 588. *Ill.*—*Wallace v. Espy*, 68 Ill. 143. *Me.*—*Anonymous*, 31 Me. 590. *Mo.* *German Lutheran Church v. Walther*, 42 Mo. App. 68. *N. Y.*—*Easton v. Calendar*, 11 Wend. 90. *N. C.*—*Loven v. Parson*, 127 N. C. 301, 37 S. E. 271; *Smith v. Smith*, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113. *Pa.*—*Holden v. Winslow*, 19 Pa. 449. *Tex.*—*King v. Haley*, 75 Tex. 163, 12 S. W. 1112; *Mills v. Hackett*, 65 Tex. 580.

Parties made complainants to a bill in equity without their authority cannot be adjudged liable for costs. *McGeorge v. Big Stone Gap Imp. Co.*, 88 Fed. 599.

If the defendant's wife in an action to set aside a fraudulent conveyance voluntarily files an answer denying the allegations of the bill, "it is not an abuse of discretion to treat her as lia-

words, persons who have no privity of interest with the original parties to the suit, or are not parties to the contest between the plaintiff and the defendant any further than to protect the interests of third persons, cannot become parties to the record, so as to entitle them to, or render them liable for, costs.² Parties merely beneficially interested and who are not parties to the record, cannot be adjudged liable for costs.³ And one who acquires the subject-matter of the suit during the litigation, but is not a party to the record, can be adjudged liable for costs only by the court and cannot be taxed by the clerk.⁴

b. *Who Are Parties.*—(I.) *The General Rule.*—The question naturally arises here: When is a person such a party to the action as that he can be held liable for costs? The general rule is that he who procures the suit to be brought, though he is neither the legal nor the

ble, with the other defendant for the payment of the costs." *Scott v. Aultman Co.*, 211 Ill. 612, 71 N. E. 1112.

A defendant in a cross petition, who enters an appearance to the pleading is liable for costs, though not made a defendant in such petition. *Miller v. Pryse*, 20 Ky. L. Rep. 1544, 49 S. W. 776.

A ward cannot be made liable for the costs of a proceeding against his guardian, unless he was a party thereto. *Van Rees v. Witzenburg*, 112 Iowa 30, 83 N. W. 787.

Receiver.—After the entry of a judgment for costs against plaintiff, a receiver was appointed by the controller of the currency, under the National Banking Act. It was held that the court cannot order the receiver because he is not a party to the record. *Ocean Nat. Bank v. Carll*, 7 Hun (N. Y.) 237.

A defendant in ejectment is not liable for costs unless properly made a party to the record. *Doe v. Jones*, 6 B. Mon (Ky.) 388; *Johnston v. Mann*, 21 W. Va. 15.

Rule Where Party Is Stricken Out or Omitted From Amended Pleadings. The defendant, at the termination of the case, is not entitled to costs against a plaintiff whose name has been stricken out (*Ellis v. Western Nat. Bank*, 136 Ky. 310, 124 S. W. 334; *Richardson v. Wolcott*, 10 Allen (Mass.) 439), or omitted from an amended and supplemental bill, though inserted in the original bill. (*Eacho v. Cosby*, 26 Gratt. (Va.) 112).

2. *Winship v. Conner*, 43 N. H. 167.

3. *Bradford v. Cooledge*, 103 Ga. 753, 30 S. E. 579; *Lewis v. Edwards*, 92 Ga. 533, 17 S. E. 920; *Francis v.*

Holbrook, 68 Ga. 829 (caveat to establish a will); *Pritchard v. Pritchard*, 2 Tenn. Ch. App. 294.

Real Party in Interest.—Costs are sometimes taxed against the real party in interest though not a nominal party to the proceeding. *People v. Bacon*, 18 Mich. 247.

More frequently costs are not allowed to either party. *Tennant v. Crocker*, 85 Mich. 328, 340, 48 N. W. 577; *State v. Ritchie*, 32 Utah 381, 91 Pac. 24.

An auctioneer seeking to recover the difference between a sale and a re-sale, is the real party in interest, and is liable for costs. *Carter v. Bennett*, *Riley* (S. C.) 287.

If a servant requests his master to defend a suit brought against the latter for injuries incurred in consequence of the servant's negligence or misconduct, the servant is liable for the costs and counsel fees in such suit. *Grand Trunk R. Co. v. Latham*, 63 Me. 177.

4. *Walker v. Doty*, 76 S. C. 464, 57 S. E. 181; *State v. Marshall*, 28 S. C. 559, 6 S. E. 564.

A defendant on a cross-bill should not be charged with any portion of the costs made under the original bill before he was made a party, especially where he was not a party to the original bill. *Kennedy v. Kennedy*, 66 Ill. 190.

A party to a supplementary bill, which is a continuation of a suit originally instituted for his benefit, and which adopts and insists on all the grounds originally taken, may be adjudged liable for the costs of the whole suit. *Roux v. Chaplin*, 1 Strobb. Eq. (S. C.) 129.

equitable plaintiff, is liable for costs.⁵ Nor is it necessary that all, in order to be parties to a suit, should be made so at the commencement of the proceeding. They may be cited in and made parties, or may be permitted to come in and become parties by order or leave of court.⁶ But a defendant who was never served with process, and who was never in court, and, consequently, has been put to no expense in defending the suit, is not entitled to a judgment for his costs.⁷

(II.) **Parties Improperly or Unnecessarily Joined.**—(A.) **RIGHT TO COSTS.** The better rule, at least in equity, is that even though a person made defendant is not a necessary or proper party to the proceeding, he is nevertheless entitled to costs if he was joined through no fault of his.⁸

5. *Moore v. Mann*, 29 Me. 559; *Utt v. Long*, 6 Watts & S. (Pa.) 174; *Kinly v. Donnelly*, 6 Phila. (Pa.) 120.

The mere fact that he has notice to appear and defend does not make him a party (*Holden v. Winslow*, 19 Pa. 449), even though he employs counsel to attend the trial (*Davis v. Higgins*, 91 N. C. 382).

Nor is a person who procures a suit to be instituted and carried on in another's name, liable for costs. *Utt v. Long*, 6 Watts & S. (Pa.) 174.

But the person whose name appears on the record is liable for costs, although his name was used without his knowledge or consent. *Hopkins v. Godbehire*, 2 Yerg. (Tenn.) 241.

And persons who appear in court and act as parties defendant may be adjudged to pay costs though they have not regularly made themselves parties by a rule of court. *Jones v. Physioc*, 18 N. C. 173; *Haskins v. Low*, 17 Pa. 64.

If a defendant is properly described in the summons and comes in and defends, he is entitled to costs on dismissal, although there was a mistake in the middle initial of his name. *New York v. Ackerman*, 51 Misc. 424, 101 N. Y. Supp. 687.

This case is distinguished from those cases where a party not properly described in the summons has officiously come in as defendant in the action. In such case he is not entitled to costs. *Upham v. Cohn*, 14 N. Y. Civ. Proc. 27; *Smith v. Jackson*, 12 N. Y. Civ. Proc. 428.

A trustee who signs for bond holders exceptions to a master's report is a party against whom a judgment for costs may be rendered. *Fidelity Ins., etc. Co. v. Shenandoah Iron Co.*, 42 Fed. 372.

6. *Winship v. Conner*, 43 N. H. 167.

7. *Elliott v. Bank*, 4 Ark. 437; *Harty v. Smith*, 74 Ill. App. 194.

Parties Failing To Answer.—It is error to decree costs to a defendant in equity who did not answer the bill. *Sutherland v. Crawford*, 25 Ky. 369; *Briscoe v. McKee*, 2 J. J. Marsh. (Ky.) 369.

Where no issue is made by reason of the failure of the defendants to answer, no costs can be awarded to such defendant. *Salls v. Salls* 19 N. Y. Supp. 246.

A defunct corporation is not entitled to costs, because no service can be obtained against it. *Combes v. Keyes*, 89 Wis. 297, 62 N. W. 89.

8. **Ky.**—*Moore's Heirs v. Fauntleroy*, 3 A. K. Marsh. 360. **N. J.**—*Smith v. Umstead* (N. J. Eq.), 65 Atl. 442. **N. Y.** *Stafford v. Mott*, 3 Paige 100; *Richardson v. Thedford*, 5 App. Div. 404, 39 N. Y. Supp. 307; *New York v. Ackerman*, 51 Misc. 424, 101 N. Y. Supp. 687. **Tenn.**—*Overton v. Hardin*, 6 Coldw. 375, accommodation endorser. **Vt.**—*Soule v. Albee*, 31 Vt. 142.

"When a party against whom no liability is alleged, nor relief sought, is made a party defendant for purposes of jurisdiction, and recovery is had against his co-defendants, the costs incurred by reason of such misjoinder should be adjudged against the plaintiff." *Beale v. Ryan*, 40 Tex. 399.

Agents or Attorneys.—"In a suit in equity against a principal, one who has represented him as agent or attorney in transactions respecting the subject-matter and is not charged with fraud, should not be made a party; if so made, he is entitled to be dismissed with his costs." *Paton v. Lancaster*, 38 Iowa 494.

Other courts maintain that persons improperly or unnecessarily made parties to a suit are not entitled to costs,⁹ and that they waive any claim to costs, by appearing and failing to object to their joinder until final hearing.¹⁰

(B.) LIABILITY FOR COSTS.—But no judgment for costs can be rendered against one improperly made a party.¹¹

If a trustee in a mortgage who has no interest in a suit, is made a nominal party thereto, his costs are properly taxed against the unsuccessful party, where he makes no defense, nor is any disclaimer on his part necessary. *Bonnell v. Prince*, 11 Tex. Civ. App. 399, 32 S. W. 855.

Witness as Party Defendant.—It is necessary to make a mere witness a party defendant to a bill in equity who has no interest in the cause and against whom no decree can be entered. And if he answers the bill at the hearing it will be dismissed as to him with costs. *Reeves v. Adams & Blackwood*, 17 N. C. 192.

Formal Parties.—Where defendants are brought before the court as merely formal but necessary parties, and without any fault on their part, they are sometimes entitled to their costs against the complainant. *American Ins. Co. v. Coster*, 3 Paige Ch. (N. Y.) 323.

Counsel Fees.—If one who is neither a necessary nor a proper party to a suit is wrongfully joined, he may recover reasonable attorney's fees from the plaintiff who made him a party. *Cooksey v. Jordan* (Tex. Civ. App.), 140 S. W. 1175.

9. *Merchants' Ins. Co. v. Marvin*, 1 Paige Ch. (N. Y.) 557 (junior incumbancers unnecessarily appearing and answering); *Archibald v. Means*, 40 N. C. 230.

Parties erroneously joined by direction of court. *Lewis v. Thornton*, 6 Munf. (Va.) 87.

Suit Dismissed.—*English v. Roche*, 6 Ind. 62; *Crossman v. Griggs*, 186 Mass. 275, 71 N. E. 560.

If cestuis que trustent are improperly made parties in a suit by the trustees, they are not entitled to recover their costs from the defendant. *Roberts v. New York Elev. R. Co.*, 155 N. Y. 31, 49 N. E. 262.

10. *Soule v. Albee*, 31 Vt. 142. See *Springer v. Ayer*, 50 Wash. 612, 97 Pac. 774.

If a wife is made a party to a pro-

ceeding to foreclose a mortgage, and she appears and sets up the defense that she is not a necessary party, neither party will be entitled to costs as against the other although the plaintiff unnecessarily made her a party, because she unnecessarily defended the suit. *Barker v. Burton*, 67 Barb. (N. Y.) 458; *Soule v. Albee*, 31 Vt. 142.

11. **Cal.**—*Campodonico v. Grossini*, 66 Cal. 358, 5 Pac. 609. **Ia.**—*Coldren Land Co. v. Royal*, 140 Iowa 381, 118 N. W. 426; *Paton v. Lancaster*, 38 Iowa 494. **Ky.**—*Trustees of Lexington v. McConnell's Heirs*, 3 A. K. Marsh. 224. **N. Y.**—*Corscadden v. Haswell*, 88 App. Div. 158, 84 N. Y. Supp. 597. **Pa.** *Strathern v. Gilmore*, 184 Pa. 265, 39 Atl. 83, 41 W. N. C. 386, holding purchasers of school land at irregular sale not liable for costs of action to set it aside.

If a complainant makes a mere agent a party to a suit for specific performance of a contract, he cannot recover costs against him. *Boyd v. Vanderkemp*, 1 Barb. Ch. (N. Y.) 273.

But a person who is a proper though not a necessary party to a suit, may be held liable for the costs. *McCosker v. Brady*, 1 Barb. Ch. (N. Y.) 329.

A person who voluntarily intrudes himself into a proceeding not concerning him may be held jointly liable with the party thereto. *Black v. Black*, 5 Mont. 15, 2 Pac. 317.

Though where a person who is made, at his own suggestion, a party to a suit in equity, has, as is shown by the record, parted with his interest in the property in litigation before being made a party, the bill should be dismissed as to him, yet he should be required to pay all costs occasioned by his action. *Bigelow v. Stringfellow*, 25 Fla. 366.

A census enumerator is a proper and necessary party to an action to correct the census, if such correction is ordered, and hence may be held liable for the costs thereof. *Semones v.*

Disclaimer.—Such party, however, when brought into the suit should disclaim and refrain from making any defense, if he wishes to avoid personal liability for costs.¹² And this disclaimer should be made and filed at an early stage of the proceedings.¹³ A defendant may be required to pay costs if the disclaimer is filed after a plea or answer to the merits.¹⁴ Nor does a disclaimer free a defendant from costs

Needles, 137 Iowa 177, 114 N. W. 904.

A surety defending an action brought against the principal on his bond, is chargeable with costs. *Kip v. Brigham*, 7 Johns. (N. Y.) 167; *Mossein v. Empire State Surety Co.*, 117 App. Div. 820, 102 N. Y. Supp. 1013.

12. Cal.—*Bulwer Consol. Min. Co. v. Standard Consol. Min. Co.*, 83 Cal. 589, 23 Pac. 1102; *Brooks v. Calderwood*, 34 Cal. 563 (holding the defendant liable where he answers after disclaiming). Ind.—*Paine v. Lake Erie, etc. R. Co.*, 31 Ind. 283. Ia.—*Semones v. Needles*, 137 Iowa 177, 114 N. W. 904. Mich.—*Botsford v. Botsford*, 49 Mich. 29, 12 N. W. 897.

Where a person not a defendant on the record, to whom the statute gives the opportunity of defending, avails himself of the opportunity by defending in the name of the party sued, he is liable for costs in case of failure, no matter what the form or nature of the action may be, provided the costs cannot be collected from the defendant on the record. *Farmers' Loan & Trust Co. v. Kurach*, 5 N. Y. 558; *Perrigo v. Dowdall*, 25 Hun (N. Y.) 234.

When a mortgage is made a defendant with the owners of the fee, and unites with them in contesting the action instead of making a disclaimer, he is liable with them for the costs, should they fail in their defense. *Pinheiro v. Bettencourt* (Cal. App.), 118 Pac. 941.

The grantor of a defective deed, who subsequently transferred all his right in the premises, is a proper party defendant to a bill for confirmation of the title under such defective deed, and he may be made liable for costs after an unsuccessful defense. *Watson v. Wells*, 5 Conn. 468.

13. Cal.—*Bulwer Consolidated Min. Co. v. Standard Consol. Min. Co.*, 83 Cal. 589, 23 Pac. 1102. Ill.—*Finch v. Martin*, 19 Ill. 105. Kan.—*Kansas Pac. R. Co. v. Bratney*, 10 Kan. 415. Ky.—*Usher v. Jouitt*, 5 Litt. Sel. Cas. 32;

Kennedy v. Davis, 2 Bibb 343. Mass.—*Warren v. Waldron*, 108 Mass. 232; *Prescott v. Hutchinson*, 13 Mass. 439; *Wells v. Osborn*, 2 Mass. 446. N. Y.—*Catlin v. Harned*, 3 Johns. Ch. 61. N. O.—*McKinnon v. McDonald*, 57 N. C. 1, 72 Am. Dec. 574. Tex.—*Johnson v. Schumacher*, 72 Tex. 334, 12 S. W. 207; *State v. Rhomberg*, 69 Tex. 212, 7 S. W. 195; *Blue v. Chandler*, 17 Tex. 126; *Baker v. Tom*, 4 Tex. 5. W. Va.—*Fisher v. Camp*, 26 W. Va. 576. Eng.—*Buchanan v. Greenway*, 11 Beav. 58, 50 Eng. Reprint 738.

A disclaimer filed in trespass to try title admits the plaintiff's title to the land, and considered alone in connection with the petition entitles the plaintiff to a judgment for the land and the defendant to a judgment for costs. *Wooters v. Hall*, 67 Tex. 513, 3 S. W. 725.

In Iowa the costs are in the discretion of the court where the defendant fails to file his disclaimer at the appearance term. *Dolan v. Maxwell*, 144 Iowa 237, 122 N. W. 923.

Title to Premises.—Costs are properly taxable against plaintiff where defendant disclaims title, and plaintiff has been otherwise unsuccessful in an action to bar defendant from claiming title to certain premises. *Ninde v. City of Oskaloosa*, 55 Iowa 207, 7 N. W. 571, 2 N. W. 618.

14. S. C.—*Lupo v. True*, 16 S. C. 580. Tex.—*Etter v. Dignowitty*, 77 Tex. 212, 13 S. W. 973. Eng.—*Maxwell v. Wightwich*, 3 L. J. Eq. 210.

When defendants in trespass to try title, more than two years after the filing of the suit, entered a disclaimer as to part of the land sued for, they were liable for all costs up to the time of filing disclaimer, although the judgment was in their favor for the part as to which they had not disclaimed. *Barnes v. Lightfoot*, 26 Tex. Civ. App. 113, 62 S. W. 564, writ of error dismissed for want of jurisdiction, 94 Tex. 703, without opinion.

that accrued up to the time of disclaiming.¹⁵ But a partial disclaimer will be sufficient.¹⁶

(III.) *Nominal Parties.*—Costs will not ordinarily be assessed against one who is but a nominal party without any substantial interest in the controversy.¹⁷ And where it is necessary the court will search out the actual plaintiff and subject him to costs.¹⁸

(IV.) *Substituted Parties.*—Where a new party is substituted in lieu of the original party to the action, the former becomes responsible

Where a defendant in trespass to try title disclaims as to a part only of the lands sued for and subsequently by amendment disclaims as to a part of that claimed by his first answer, the plaintiff though failing on the trial to recover the part thus left in controversy, is entitled to recover his costs incurred up to the time of filing the latter and more extensive disclaimer. *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467; *Voght v. Bexar County*, 16 Tex. Civ. App. 567, 42 S. W. 127, *affirmed*, 91 Tex. 285, 43 S. W. 14, *citing* *Keyser v. Meusback*, 77 Tex. 64, 13 S. W. 967.

15. *Etter v. Dignowitty*, 77 Tex. 212, 13 S. W. 973.

16. *Prescott v. Hutchinson*, 13 Mass. 439; *Gregory v. Stratton*, 12 Mich. 61.

Where on disclaimer save as to part of the land sued for the defendant on his disclaimer recovers any part of the land in controversy, he is entitled to his costs. *Herring v. Swain*, 84 Tex. 523, 19 S. W. 774. See also *Bexar County v. Voght*, 91 Tex. 285, 43 S. W. 14, *affirming* 16 Tex. Civ. App. 567, 42 S. W. 127; *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467; *Gilbert v. Mansfield*, 38 Tex. Civ. App. 300, 85 S. W. 830; *Willburn v. Tow* (Tex. Civ. App.), 23 S. W. 853; *Houston, etc. R. Co. v. Bowie*, 2 Tex. Civ. App. 437, 21 S. W. 304.

17. *Ind.*—*Whitesell v. Strickler*, 167 Ind. 602, 78 N. E. 845. *Ia.*—*Knight v. Acton*, 109 N. W. 1089. *Ky.*—*Edwards v. Loy*, 113 Ky. 746, 68 S. W. 1091, defendant in election contest. *Mich.*—*Teed v. Marvin*, 41 Mich. 216, 2 N. W. 20. *Mo.*—*Strohmeyer v. Zepfenfeld*, 28 Mo. App. 268, *terretenants*.

A personal judgment for costs may be entered against a sheriff in an action against him and a judgment creditor to restrain a threatened execution sale. The sheriff is not a nominal party, but he is the real party in the trespass and primarily liable.

Bender v. Ragan, 53 Wash. 521, 102 Pac. 427.

But in Pennsylvania the nominal or legal plaintiff is liable, although a statute exists in that state allowing execution to issue also against the equitable plaintiff, whether marked on the record or not. This, however, does not relieve the legal plaintiff. *Kinry v. Donnelly*, 6 Phila. (Pa.) 120.

Under the Kentucky statute "where a plaintiff brings a suit in equity upon a claim or demand, and it is necessary that others than the real defendant should be made nominal parties defendant, the plaintiff, if he succeeds against the real defendant, but not against the nominal defendants, the nominal defendants are not entitled to recover their costs against him; but the costs incurred by and against the nominal defendants must be paid by the parties in whose behalf it was incurred. On the other hand, if the plaintiff fails to obtain relief against any of the parties, real or nominal, then all the parties, both real and nominal, are entitled to their costs against him." *People's Trust Co. v. Deweese*, 143 Ky. L. Rep. 730, 137 S. W. 201.

18. *Armstrong v. Lancaster*, 5 Watts (Pa.) 68.

A party in interest in a suit, prosecuting in the name of another, will, on the application of such nominal party or party to the record, be directed by rule of court to pay the costs adjudged in the suit against the party to the record. *Colvard v. Oliver*, 7 Wend. (N. Y.) 497.

Striking Out Nominal Plaintiff.

Where an amendment is allowed changing the parties to a suit by striking out the name of a nominal plaintiff and permitting the cause to proceed in the name of the beneficial plaintiff, costs will not be allowed against the plaintiff whose name is thus stricken out. *McDowell v. Town*, 90 Ill. 359.

for all the costs, and the original party is discharged.¹⁹ If the new party is irresponsible, the court should order him to give security as a condition to granting the motion.²⁰

c. *Rule in Louisiana*.—In Louisiana, the liability for costs is solidary. There is no distinction between the character of the liability of plaintiffs and defendants for costs.²¹

d. *Prevailing or Successful Party*.—(1) *Statement of Rule*.—From an early period, both in this country and in England, for the purpose of checking unjust litigation, statutes have existed allowing the party prevailing in a civil action at law to recover of the unsuccessful one the legal costs which he has expended in enforcing or protecting his rights.²² And in the jurisdictions where such statutes are in force,

19. *Warner v. Turner*, 18 B. Mon. (Ky.) 758; *Ex parte Ray*, 59 Mo. 280.

But in some states, notwithstanding one may not be substituted as a party if he is the real party, he may, when discovered, be held liable for costs. *Baker v. Raley*, 18 Mo. App. 562.

20. *Ky.*—*Dougherty v. Smith*, 4 Met. 279; *Warner v. Turner*, 18 B. Mon. 758. *Nev.*—*Virgin v. Brubaker*, 4 Nev. 31. *Ohio*.—*Sifford v. Beaty*, 12 Ohio St. 189. *Eng.*—*Webb v. Ward*, 7 T. R. 296, 101 Eng. Reprint 932. Compare *Snow v. Townsend*, 6 Taunt. 123, 1 E. C. L. 333.

21. *Dunbar v. Murphy*, 11 La. Ann. 713.

In Louisiana, the defendant in a revocatory action coupled with an attachment is liable *in solido* with the principal defendant for the costs of the attachment, because the suit is a unity. *Bank of Patterson v. Urban Co.*, 116 La. 1023, 41 So. 214.

Where a plaintiff succeeds in her demand, even in part, against both of two defendants, the latter owe costs of suit *in solido*. *Lamotte v. Martin*, 52 La. Ann. 864, 27 So. 291.

22. *U. S.*—*Pine River, etc. Co. v. United States*, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. ed. 1164; *Lowe v. Kansas*, 163 U. S. 81, 16 Sup. Ct. 1031, 41 L. ed. 78; *Mansfield, etc. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462; *United States v. Schurz*, 102 U. S. 378, 26 L. ed. 167; *Pennsylvania v. Wheeling, etc. Bridge Co.*, 18 How. 460, 15 L. ed. 449. *Ala.*—*Stevens v. Standard Oil Co.*, 156 Ala. 581, 47 So. 140. *Cal.*—*Lawrence v. Getchel*, 4 Pac. 544. *Fla.*—*White v. Walker*, 5 Fla. 478. *Ga.*—*Paulk v. Towner*, 106 Ga. 219, 32 S. E. 99; *Ward v. Barns*, 95 Ga. 103, 22 S. E. 133; *Smith v.*

Turnley, 46 Ga. 454; *Cahoun v. Atlanta*, 42 Ga. 187. *Ill.*—*Price v. Blackmore*, 65 Ill. 386; *Hodge v. People*, 78 Ill. App. 378. *Ind.*—*Baldwin v. Heil*, 155 Ind. 682, 58 N. E. 200. *Ia.*—*Cory v. Hamilton*, 84 Iowa 594, 51 N. W. 54; *McVey v. Manatt*, 80 Iowa 132, 45 N. W. 548. *Ky.*—*Willis v. Calhoun*, 140 S. W. 199 (in this state the successful party both at law and in equity is entitled); *Le Moyne v. Anderson*, 29 Ky. L. Rep. 1017, 96 S. W. 843. *La.*—*St. Romain v. Robeson*, 12 Rob. 104. *Me.*—*Abbott v. Penobscott Co.*, 52 Me. 584. *Mass.*—*Richards v. Randall*, 4 Gray 53. *Mo.*—*Cranor v. School Dist. No. 2*, 151 Mo. 119, 52 S. W. 232; *Swofford Bros. Dry Goods Co. v. Randolph*, 151 Mo. App. 385, 132 S. W. 255. *Mont.*—*Harris v. Shontz*, 1 Mont. 212. *Neb.*—*Wallace v. Sheldon*, 56 Neb. 55, 76 N. W. 418. *N. H.*—*Everett v. Mansfield*, 75 N. H. 611, 78 Atl. 495; *Clement v. Wheeler*, 25 N. H. 361. *N. J.*—*Brittin v. Blake*, 36 N. J. L. 442; *Hall v. Leaming*, 31 N. J. L. 321; *Reeve v. Eft*, 31 N. J. L. 139; *Hann v. McCormick*, 4 N. J. L. 109, 86 Am. Dec. 213. *N. M.*—*Comp. Laws*, 1897, §3148. *N. Y.*—*Ashley v. Marshall*, 29 N. Y. 494; *People v. Loomis*, 8 Wend. 396; *Brush v. Hewett*, 4 N. Y. Leg. Obs. 384. *N. C.*—*Wall v. Covington*, 76 N. C. 150. *Ohio*.—*Bell v. Bates*, 3 Ohio 380; *Peck v. Cavagna*, 4 Ohio N. P. 284, 7 Ohio Dec. 142, *affirmed*, 55 Ohio St. 676, 48 N. E. 1115; *Kinney's Admr. v. Lockwood*, Wright 340; *Pepper v. Oram*, Tapp. 72. *Pa.*—*Haskins v. Low*, 17 Pa. 64; *Sayen v. Johnson*, 3 Del. Co. 323. *S. C.*—*Hand v. Savannah, etc. R. Co.*, 21 S. C. 162. *Tenn.*—*Cincinnati, etc. R. Co. v. Shelton*, 130 S. W. 843; *Garrison v. Trotter*, 114 Tenn. 526, 86 S. W. 1078;

the court is without discretion as to granting costs in such a case.²³

(II.) **Who Is Prevailing Party.**—It may be stated as a general rule that the prevailing party is one who prosecutes a meritorious action or defends successfully.²⁴ But a party who prevails upon the main

Hite v. Bayburn, 114 Tenn. 463, 85 S. W. 1105; *Justice of Green County v. Graham*, 6 Baxt. 78; *Allison v. Thompson*, 2 Swan 202. **Tex.**—*Ft. Worth, etc. R. Co. v. Robertson* (Tex.), 138 S. W. 107; *Caldwell v. Dillard* (Tex. Civ. App.), 132 S. W. 853; *International, etc. R. Co. v. Hall*, 78 Tex. 657, 15 S. W. 108; *Bellamy v. McCarthy*, 75 Tex. 293, 12 S. W. 849; *Bridge v. Samuelson*, 73 Tex. 522, 11 S. W. 539. **Vt.**—*Thrall v. Chittenden*, 31 Vt. 183.

Reason for Rule.—The reason for giving costs to the prevailing party is thus stated by the framers of the New York Code in their report to the legislature: "The losing party ought, as a general rule, to pay the expense of the litigation. He has caused a loss to his adversary unjustly, and should indemnify him for it. The debtor who refuses to pay ought to make his creditor whole." New York Code Comrs. Report, 1848, p. 208.

Costs are incidental to the judgment, and plaintiff who fails to recover must pay them all. *St. Romain v. Robeson*, 12 Rob. (La.) 194.

Costs in a Register's Court trying the validity of a will depend upon the event of the suit. *Havard v. Davis*, 1 Browne (Pa.) 334.

Substantial Issues.—Where plaintiff brought particular parties defendant into court, and its claim to a preference over them in the distribution of the fund was denied, it was held that the substantial issues were determined against its claim, and the costs properly followed. *Citizens' Nat. Bank v. Gardner*, 147 Iowa 695, 125 N. W. 161, 164.

Federal Courts.—The prevailing party in common law suits in the federal courts has been fully and always recognized as entitled to his costs as a matter of right. *Corporation of St. Anthony v. Houlihan*, 184 Fed. 252, 106 C. C. A. 394; *Hathaway v. Roach*, 2 Woodb. & M. 63, 11 Fed. Cas. No. 6,213; *Ethridge v. Jackson*, 2 Sawy. 593, 8 Fed. Cas. No. 4,541.

Costs in those courts are now controlled by the act of 1853 (10 U. S. at L. 161; U. S. Rev. St., §823, etc.,

which regulates fees and costs which are strictly chargeable as between party and party. *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Troy, Iron, etc., Factory v. Corning*, 7 Blatchf. 16, 24 Fed. Cas. No. 14,198; *Garretson v. Clark*, 17 Blatchf. 256, 10 Fed. Cas. No. 5,249; *Ethridge v. Jackson*, 2 Sawy. 593, 8 Fed. Cas. No. 4,541.

23. Cal.—*Stoddard v. Treadwell*, 29 Cal. 281. **Ky.**—*Lykins v. Hamrick*, 144 Ky. L. Rep. 80, 137 S. W. 852. **Wis.** *Elk Horn First Nat. Bank v. Prescott*, 27 Wis. 616.

In an action to recover possession of personal property, costs are allowed as a matter of course to the prevailing party. **Cal.**—*Rohr v. McCaig*, 33 Cal. 309. **Kan.**—*Dresher v. Corson*, 23 Kan. 313. **Ore.**—*Phipps v. Taylor*, 15 Ore. 484, 16 Pac. 171. **Utah.**—*Dudley v. Facer*, 8 Utah 403, 32 Pac. 668; *Miller v. Zeigler*, 3 Utah 17, 5 Pac. 518. **Wis.**—*Lanyon v. Woodward*, 65 Wis. 543, 27 N. W. 337.

But in Texas the court may for good cause stated in the record adjudge the costs otherwise. *Rev. St.* 1895, Art. 1438; *Ft. Worth, etc. R. Co. v. Robertson* (Tex.), 138 S. W. 107; *Beaumont Rice Mills v. Bridges*, 45 Tex. Civ. App. 439, 101 S. W. 511. See also *Bexar Co. v. Voght*, 91 Tex. 235, 286, 43 S. W. 14 (*affirming* 16 Tex. Civ. App. 567, 42 S. W. 127); *Walling v. Kinard*, 10 Tex. 508.

24. Williams v. Williams, 133 Mass. 587; *Belding v. Conklin*, 2 Code Rep. (N. Y.) 112.

The unsuccessful party, in the sense of §351 of the Tennessee Code means the party adjudged to pay the costs. *State v. Cole*, 6 Lea 492. See *Elliston v. Winstead*, 10 Lea 472.

The defendant is the successful party in case of nonsuit, discontinuance or abatement by death of plaintiff. *Hagerty v. Hughes*, 4 Baxt. (Tenn.) 222.

It is well settled that a plaintiff who recovers a judgment before a justice of the peace and fails on appeal to the circuit court to increase his judgment is not a successful party in the sense of the Tennessee statute, and is

issue in the case, though not to the full extent of his claim, but to a greater extent than admitted by his adversaries, is entitled to costs.²⁵

onerated with all the costs. *Garrison v. Trotter*, 114 Tenn. 526, 86 S. W. 1078 (overruling *Steuart v. Henry*, 3 Baxt. 231); *Parham v. Gibbs*, 16 Lea 296; *Williams v. Cosby*, 2 Heisk. 644.

Enjoining Foreclosure of Mortgage. Under Code (N. C.) §528, providing that to either party to whom judgment shall be rendered there shall be allowed as costs his actual disbursements, a defendant prevailing in a suit to enjoin the enforcement of a mortgage on the ground that the debt secured included usury, is entitled to costs. *Cook v. Patterson*, 103 N. C. 127, 9 S. E. 402.

Title or Possession of Realty.—A defendant is entitled to costs under §§1022 and 1024 of the Cal. Code Civ. Proc. which allows costs to either party in a judgment in his favor which involves the title or possession of realty, where plaintiff in an action to determine title and to enjoin defendant from trespassing and asserting title was found to be owner of a portion only of the land, and not entitled to any relief. *Lawrence v. Getchell* (Cal.), 2 Pac. 746.

Increase of Damages.—Under Rev. St. (Maine), ch. 18, §13, a party is the prevailing party, and entitled to costs (in the case of a petition for increase of damages caused by the laying out or discontinuing a way) who obtains a verdict for damages where the commissioners had allowed him none. *Abbott v. Penobscot County*, 52 Me. 584.

Tort.—In a joint action against two defendants for tort, where they enter a joint plea of not guilty, and one is found guilty, and the other not guilty, as between the one who is found not guilty and plaintiff he is the prevailing party and entitled to his costs. *Brown v. Stearns*, 13 Mass. 536.

Reference.—In view of the statute providing that if any person shall, by a verdict or otherwise, recover damages, he shall have judgment also for costs, plaintiff in an action of trespass, which by agreement of parties was referred to referee, who reported defendant guilty without any finding of damages is not entitled to costs, but the cost of the reference should be divided. *Anderson v. Exton*, 4 N. J. L. 174.

Under an agreement between the parties to an action tried before a

referee, that "the successful party" should pay the stenographer's bill and tax it in the costs, the party who prevails before the referee, and enters judgment on his report, is "the successful party." *Adams v. New York, etc. R. Co.*, 20 Abb. N. C. (N. Y.) 180.

"A party who defeats an action by a counter-claim is as much entitled to his costs as a party who defeats it by any other defense. *Mori v. Howard*, 143 Ky. 480, 136 S. W. 904; *Shannon v. Stratton*, 144 Ky. 172, 137 S. W. 850." *Lykins v. Hamrick*, 144 Ky. L. Rep. 80, 137 S. W. 852. See *Shannon v. Stratton*, 144 Ky. 26, 137 S. W. 850. See also the title "Set-Off, Recoupment and Counterclaim."

Under a statute providing that the successful party recover his costs, it has been held that where the plaintiff fails to recover on his cause of action, and the defendant fails on his set-off as such, but is only allowed to defeat plaintiff's recovery because of his right to apply his money on a note held against him, if there are any costs made by the defendant outside of that issue, those costs should be taxed to the defendant. *Stephenson v. Joplin State Bank* (Mo. App.), 141 S. W. 691.

Success on Appeal.—A party who finally prevails on appeal is the prevailing party within the meaning of that term as used in the statutes. *Pomroy v. Cates*, 81 Me. 377, 17 Atl. 311; *Murray v. Aikin, etc.* Min. Co., 39 S. C. 457, 18 S. E. 5.

25. **Mass.**—*New Haven, etc. Co. v. Northampton*, 102 Mass. 116. **Mo.** *Hawkins v. Nowland*, 53 Mo. 328. **Neb.** *Bennett v. Baum*, 133 N. W. 439. **Vt.** *Weston v. Cushing*, 45 Vt. 531.

And so a defendant establishing his right to improvements is entitled to recover costs under §528 of the North Carolina Code. *Vann v. Newsom*, 110 N. C. 122, 14 S. E. 519.

Where an injunction is perpetuated for more than is credited on the execution, costs should not be decreed to the complainants. *White's Exrs. v. Guthrie*, 1 J. J. Marsh. (Ky.) 503.

Rule in Replevin.—Both parties may recover costs in an action of replevin when each party prevails as to a part of the property taken and delivered to

(III.) **Rule in Case of Partial Success.**—In the absence of some statutory provision authorizing it, costs in actions at law cannot be apportioned.²⁶ And the rule has become generally settled, and is established by statute in some states, that the prevailing party is entitled to costs, although he may recover only a party of his demand.²⁷

the plaintiff. Accordingly, the defendant may recover costs if he has judgment in his favor for a part of the property taken. *Porter v. Willet*, 14 Abb. Pr. (N. Y.) 319; *Hull v. Halsted*, 1 How. Pr. (N. Y.) 174; *Small v. Bixley*, 18 Wend. (N. Y.) 514; *Seymour v. Billings*, 12 Wend. (N. Y.) 285; *Lanyon v. Woodward*, 65 Wis. 543, 27 N. W. 337. See generally the title "**Replevin**."

26. **Ia.**—*Johnson v. Ruth*, 144 Iowa 693, 123 N. W. 326; *McGuire v. Montross*, 102 Iowa 20, 70 N. W. 743; *Upson v. Fuller*, 43 Iowa 409. **Mo.**—*Buckman v. Missouri*, etc. R. Co., 121 Mo. App. 299, 98 S. W. 820. **Ore.**—*McDonald v. Evans*, 3 Ore. 474. **Utah.**—*Freed Furniture & C. Co. v. Sorensen*, 28 Utah 419, 79 Pac. 564, 107 Am. St. Rep. 731.

"The cases are numerous in this state, both at law and in equity, that, where each party succeeds in part, neither is entitled to costs against the other. 2 Ann. Dig. N. J. p. 2744, §36. The test, I take it, is that if the complainant succeeds on one or more substantial issues, and the defendant likewise succeeds on one or more substantial issues, neither is entitled to costs as against the other; and such has been the result in this case." *Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 881, 606.

"Although the defendant may sustain a plea of partial failure of consideration and cause the recovery to be diminished to a sum less than that originally claimed by the plaintiff, the judgment should include costs against him, unless he has made a valid continuing tender, equal in amount to the sum found by the jury, and has duly filed a plea of tender." *Livingston Bros. v. Salter*, 6 Ga. App. 377, 65 S. E. 60.

If a part of the plaintiff's demands have been allowed, the defendant will be condemned to pay the costs. *Clement v. Louisiana Irr., etc. Co.*, 129 La. —, 56 So. 902.

"In a suit where the defendant becomes plaintiff in reconvention, and

the judgment taxes plaintiff with the costs of the reconventional demand and the defendant with the costs of the main demand, the plaintiff must pay for the testimony necessary to sustain the reconventional demand, while the defendant must pay for the testimony necessary to sustain the main demand." *Cook, etc., Contracting Co. v. Denis*, 126 La. 413, 52 So. 560.

In North Carolina, if the plaintiff alleges two causes of action and recovers on one, he is entitled to full costs. *Kinston Cotton Mills v. Rocky Mount Hosiery Co.*, 154 N. C. 462, 70 S. E. 910.

In New York, if each party is successful in part, neither will be allowed costs. *Catacraft Power, etc., Co. v. City of Buffalo*, 131 App. Div. 485, 115 N. Y. Supp. 1045.

Under the Texas statute the court may, and should, apportion the costs in cases wherein there is a partial recovery, according to the facts of the case and the result of the trial. *Ft. Worth, etc., R. Co. v. Robertson (Tex.)*, 138 S. W. 107, citing *Jones v. Ford*, 60 Tex. 127.

Apportionment of costs in replevin consistent with the verdict. *Sullivan v. O'Hara*, 1 Ind. App. 259, 27 N. E. 590.

27. **U. S.**—*Kitteredge v. Race*, 92 U. S. 116, 23 L. ed. 488. **Cal.**—*Havens v. Dale*, 30 Cal. 547. **Ill.**—*St. Charles v. O'Malley*, 18 Ill. 407. **Ia.**—*Rand v. Wiley*, 70 Iowa 110, 29 N. W. 814. **Kan.**—*Meskimen v. Day*, 35 Kan. 46, 10 Pac. 14. **Ky.**—*Harrodsburg Water Co. v. City of Harrodsburg*, 28 Ky. L. Rep. 625, 89 S. W. 729. **La.**—*McCarthy v. Boze*, 26 La. Ann. 382; *Manning v. Ayraud*, 15 La. Ann. 126; *Underwood v. Lacapere*, 14 La. Ann. 276. **Mass.**—*Saunders v. Frost*, 5 Pick. 259, 16 Am. Dec. 394. **Mo.**—*Ozias v. Haley*, 141 Mo. App. 637, 125 S. W. 556. **N. Y.** *Wood v. Brown*, 6 Daly 428. **N. C.** *Field v. Wheeler*, 120 N. C. 264, 26 S. E. 812. **Ore.**—*Phipps v. Taylor*, 15 Ore. 484, 16 Pac. 171. **Pa.**—*Bachman v. Gros*, 150 Pa. 516, 24 Atl. 712. **Tenn.** *McReynolds v. Cates*, 7 Humph. 29..

But in some jurisdictions if the plaintiff is successful as to a part of his demand, though he fails as to others, an equitable apportionment of costs may be made by the court.²⁸ Thus, where a plaintiff recovers any of the land to which the defendant claims title, he is entitled to costs.²⁹ But costs will not be allowed the plaintiff where the defendant has prevailed as to the major portion of the claims asserted against him.³⁰

Tex.—*Moroney Hardware Co. v. Goodwin Pottery Co.*, 120 S. W. 1088. **Vt.** *Day v. Cummings*, 19 Vt. 496.

There can be but one prevailing party in an action at law for the recovery of a money judgment. It transpires frequently that in the verdict each party wins on some of the issues and as to such issues he prevails, but the party in whose favor the verdict compels a judgment is the prevailing party. Each side may score, but the one with the most points at the end of the contest is the winner, and under §1547, Rev. St. 1899, Ann. St., 1906, p. 1174, is entitled to recover his costs, "except in those cases in which a different provision is made by law." *Ozias v. Haley*, 141 Mo. App. 637, 125 S. W. 556.

In the case of *Sullivan v. Latimer*, 43 S. C. 262, 21 S. E. 3, the court held as follows: "The prevailing party shall have his costs, it makes no difference how many questions he has raised; if he succeeds in any one of them he shall have his costs, and the same shall be taxed against the appellee." See *King v. Tabor*, 15 N. M. 488, 110 Pac. 601, 603.

If the plaintiff fails, he is not entitled to costs, merely because defendant fails to establish his counterclaim. *Whitelegge v. DeWitt*, 12 Daly (N. Y.) 319.

28. *Overman v. Lanier* (N. C.), 73 S. E. 192; *Beaumont Rice Mills v. Bridges*, 45 Tex. Civ. App. 439, 101 S. W. 511. See also the statutes in the various jurisdictions.

Adjudging all costs against plaintiffs is not an apportionment. *Daniels v. Smith*, 252 Ill. 222, 96 N. E. 902.

In *Mori v. Howard*, 143 Ky. 482, 136 S. W. 904, the court held that where part of a debt is contested by a counterclaim, and the plaintiff succeeds in recovering any part of the disputed item, he should be allowed his costs growing out of the issue made by the counterclaim. And the same rule applies where the counterclaim disputes

the entire claim of plaintiff and the plaintiff nevertheless recovers anything upon the trial. *Shannon v. Stratton*, 144 Ky. 26, 137 S. W. 850.

In Iowa, by code, §3852, the court may make an equitable apportionment of costs where a party is successful as to a part of his demand and fails as to a part. *Johnson v. Ruth*, 144 Iowa 693, 123 N. W. 326; *Ashdown v. Ely*, 140 Iowa 739, 117 N. W. 976; *McDonald v. Benge*, 138 Iowa 591, 116 N. W. 602; *Dorr v. Dudley*, 135 Iowa 20, 112 N. W. 203; *McGuire v. Montross*, 102 Iowa 20, 70 N. W. 743; *Ferguson v. Thorpe*, 54 Iowa 422, 6 N. W. 690; *Upson v. Fuller*, 43 Iowa 409.

29. **Kan.**—*Meskimen v. Day*, 35 Kan. 46, 10 Pac. 14. **Ky.**—*Bradford v. Allen*, Hard. 1. **Me.**—*Thornton v. York Bank*, 45 Me. 158. **N. H.**—*Morrill v. Foster*, 36 N. H. 57. **N. C.**—*Moore v. Angle*, 116 N. C. 843, 21 S. E. 699. **Pa.**—*Bachman v. Gross*, 150 Pa. 516, 24 Atl. 712. **Tex.**—*Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026; *Jobe v. Ollre*, 80 Tex. 185, 15 S. W. 1042; *Yeary v. Cummins*, 28 Tex. 91.

Upon a verdict in ejectment, where the plaintiff recovers only part of the land sued for, the court may apportion the costs of the suit between the parties. *Foster v. Letz*, 86 Ill. 412.

30. *Roth v. Robertson*, 64 Misc. 343, 118 N. Y. Supp. 351; *Coleman v. Brooke*, 15 Phila. (Pa.) 202, 39 Leg. Int. 158.

Where plaintiff succeeds only on an issue of trivial importance and fails on the main issue, he will not be allowed costs. *Marks Adjustable Folding Chair Co. v. Wilson*, 43 Fed. 302.

Loss on Merits.—Although a party's prayer for relief is partially granted, costs are properly taxed against him where he loses on the merits of the case. *Tredway v. McDonal*, 51 Iowa 663, 2 N. W. 567.

In contests over water rights, as all the parties are usually to some extent in the wrong, neither party will be given his costs, although the plaintiff

Several Counts or Issues.—If several issues are joined, some of which are found for the defendant, he is allowed no costs on them, if the general result of the trial is for the plaintiff, and damages are given him on the issues found in his favor.³¹ On the other hand, if the plaintiff recovers no damages on any issue that was tried, but the defendant succeeds in all the issues that it was necessary to try in order to reach a decision on the rights of the parties, he will be given the costs of the trial.³²

(IV.) Rule in Equity.—(A.) **GENERAL CONSIDERATION.**—And the general rule in courts of equity also is that the prevailing party is entitled to costs if he is successful in his litigation over the subject-matter of the suit, and it is the duty of the court to enforce this rule unless the case discloses a reason why it should not be done.³³

iffs are largely successful at the trial. Each party should pay his own costs. *Ison v. Sturgill*, 57 Ore. 109, 110 Pac. 535, 109 Pac. 579.

31. *Postan v. Stanway*, 5 East 261, 102 Eng. Reprint 1069.

If in an action of replevin, the declaration contains one count covering several parcels declared to be unlawfully detained by the defendant, and the verdict is partly in favor of each, then each is entitled to the costs of the issue decided for him. *Besser v. Alpena Circuit Judge*, 155 Mich. 631, 119 N. W. 902; *Seymour v. Billings*, 12 Wend. (N. Y.) 285.

32. *Van Pelt v. Phillips*, 24 N. J. L. 560; *Elderten v. Emmens*, 4 M. & G. 479, 56 E. C. L. 478; *Cross v. Johnson*, 9 B. & C. 613, 17 E. C. L. 456; *Day v. Hanks*, 3 T. R. 654, 100 Eng. Reprint 786.

In Florida, where the verdict is in effect for the defendant on any one or more of the counts of a declaration, the costs should be taxed as the statute and rules direct. *Marianna Mfg. Co. v. Boone*, 55 Fla. 289, 45 So. 754.

33. **U. S.**—*Pennsylvania v. Wheeling Bridge & B. Co.*, 18 How. 421, 15 L. ed. 435; *Westfeldt v. N. C. Min. Co.*, 177 Fed. 132, 100 C. C. A. 552; *Warren v. Burnham*, 32 Fed. 579; *Hunter v. Marlboro*, 2 Woodb. & M. 168, 12 Fed. Cas. No. 6,908; *Brooks v. Byam*, 2 Story 553, 4 Fed. Cas. No. 1,949. **Ala.**—*Gray v. Gray*, 15 Ala. 779. **Ark.**—*Temple v. Lawson*, 19 Ark. 148. **Conn.**—*Cowles v. Whitman*, 10 Conn. 121. **Fla.**—*Moyers v. Cainer*, 22 Fla. 422; *Lewis v. Yale*, 4 Fla. 441. **Ga.**—*Pearce v. Chastain*, 3 Kelly 226. **Ill.**—*McArtee v. Engart*, 13 Ill. 242; *Frisby v. Ballance*, 5 Ill. 287. **Ky.**—*Boremy v.*

Faris, 31 Ky. L. Rep. 1265, 104 S. W. 1022. **Me.**—*Stone v. Locke*, 48 Me. 425. **Md.**—*Lee v. Prindle*, 12 Gill & J. 288, 305. **Mass.**—*Bryant v. Russell*, 23 Pick. 508; *Clark v. Reed*, 11 Pick. 446. **N. H.**—*Clement v. Wheeler*, 25 N. H. 361. **N. J.**—*Bowker v. Gleason* (N. J. Eq.), 11 Atl. 324; *Carpenter v. Easton A. R. Co.*, 28 N. J. Eq. 390; *Decker v. Caskey*, 3 N. J. Eq. 446. **N. Y.**—*Travis v. Waters*, 12 Johns. 500; *Glenn v. Fisher*, 6 Johns. Ch. 33, 10 Am. Dec. 310; *Trustees of M. E. Church v. Jacques*, 1 Johns. Ch. 65; *Robinson v. Cropsey*, 2 Edw. Ch. 138; *Hunn v. Norton*, Hopk. Ch. 344; *Elridge v. Strenz*, 7 Jones & S. 295; *Belmont v. Ponvert*, 6 Jones & S. 425; *Couch v. Millard*, 41 Hun 212; *Harvey v. Beckman*, 64 Misc. 395, 118 N. Y. Supp. 602, 607. **Pa.**—*Swentzel v. Pennsylvania Bank*, 147 Pa. 140, 23 Atl. 405, 415, 30 Am. St. Rep. 718, 15 L. R. A. 305; *Hess v. Beates*, 78 Pa. 429; *In re Danner's Estate*, 2 Lehigh Val. L. Rep. 422. **Tex.**—*Latham v. Taylor*, 15 Tex. 247; *Walling v. Kinnard*, 10 Tex. 508, 60 Am. Dec. 216. **Vt.**—*Doty v. Village of Johnson*, 77 Atl. 866; *Howard v. Scott*, 50 Vt. 48; *Thrall v. Chittenden*, 31 Vt. 183; *Stearns v. Wrisley*, 30 Vt. 661. **Wis.**—*Davis v. Davis*, 132 Wis. 54, 111 N. W. 503, 1129; *Pietsch v. Milbrath*, 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, 107 Am. St. Rep. 1017; *Massing v. Ames*, 38 Wis. 285. **Eng.**—*Colburn v. Simms*, 2 Hare 543, 7 Jur. 1104, 12 L. J. Ch. 388, 24 Eng. Ch. 543, 67 Eng. Reprint 224; *Vancouver v. Bliss*, 11 Ves. Jr. 458, 8 R. R. 207, 32 Eng. Reprint 1164.

Where the defendant prevails as to the entire cause in equity he should

Bearing of Good Faith.—As a general rule where a defendant is honest in defending his claim or cause of action, the chancellor will not tax him with all the costs.⁵⁴

Unreasonable Defense.—But if he makes an unreasonable defense of a cause of action he is as a general rule liable for costs.⁵⁵

Unnecessary or Vexatious Suits.—A complainant who brings an unnecessary suit for the protection or enforcement of his rights is not entitled to recover costs.⁵⁶

Mistake as to Remedy.—Where a defendant brings forward demands in equity which cannot be properly litigated, he is responsible for costs.⁵⁷ But where a complainant is compelled by the improper

have costs, although the plaintiff proceeded in good faith. *Pietsch v. Milbrath*, 123 Wis. 647, 101 N. W. 388, 102 Wis. 342, 68 L. R. A. 945.

In *South Carolina*, by express terms of the statute costs in chancery cases do not follow the event of the suit, except where the court does not otherwise order. *Matheson v. Rogers*, 84 S. C. 458, 65 S. E. 1054, 67 S. E. 476, construing Code Civ. Proc. 1902, §323.

34. *McBurnie v. Semple*, 14 Ky. L. Rep. 30, 19 S. W. 183 (defendant contesting dissolution of partnership); *Myer v. Hart*, 40 Mich. 517 (defending novel issue on advice of counsel).

In an action on a note where a set-off is denied by plaintiff, and established by defendant, the plaintiff should pay costs, though he recover on the note. *Eichenlaub v. Gardner*, 2 Cin. Rep. (Ohio) 249.

If misled by former decision, defendant will not be taxed with costs. *Washburn v. Bank of Bellows Falls*, 19 Vt. 278.

35. Ill.—*Downing v. Plate*, 90 Ill. 263. N. H.—*Lawrence v. Lawrence*, 42 N. H. 109. N. Y.—*Vroom v. Ditmas*, 4 Paige 526; *Fort v. Gooding*, 9 Barb. 388; *Darling v. Halsey*, 2 Abb. N. C. 105.

One requiring proof of facts known to himself should pay all the costs. *Grimes v. March*, 3 A. K. Marsh (Ky.) 367.

In a suit to reform a deed for mistake in description whereby the whole of a certain tract was conveyed, when the intention of the parties was merely a conveyance of a part, when it appears that the grantees, after notice of the mistake and knowledge thereof, refused to correct it, and persistently defended the suit, they may be charged with costs. *Loss v. Obry*, 22 N. J. Eq. 52.

Stockholder Contesting Claim Where Made Liable by Statute.—Where a creditor of a corporation proceeds against a stockholder under the statute making the stockholder liable to creditors for the full amount of his stock, and the stockholder contests his liability, it is not error to tax the costs of the proceeding against him when the contest is decided against him. *Abbey v. Long*, 44 Kan. 688, 24 Pac. 1111.

Defendant who resists plaintiff's claim, alleging that he has not shown himself to be the person entitled to claim, though the latter has afforded proof sufficient to satisfy any reasonable man, will be mulcted in costs. *Rosseau v. Chase*, 2 La. 496.

Title to Land.—Where parties have no title or color of title to the tract of land in controversy, but have litigated their pretenses in that respect by their answer to plaintiff's bill to enforce specific execution of a parol contract for the sale of the land, costs should be decreed against them. *Tracy v. Tracy's Heirs*, 14 W. Va. 243.

36. Ala.—*Langdon v. Roane*, 6 Ala. 518. Ark.—*Meadows v. Rogers*, 17 Ark. 361; *Blakeney v. Ferguson*, 14 Ark. 640. Ind.—*Fitzpatrick v. Papa*, 89 Ind. 17. Ky.—*Harland's Heirs v. Eastland*, Hard. 590.

A complainant in equity who brings an unnecessary suit for specific performance, which only serves to complicate the situation, will be liable to the defendants for their costs. *Allen v. City of Detroit (Mich.)*, 133 N. W. 317.

37. *Green v. Storm*, 3 Sandf. Ch. (N. Y.) 305; *Smith v. Auldridge*, 3 N. C. 382 (plaintiff mistakenly bringing ejectment).

conduct of the defendant to come into court for any purpose, he will be entitled to recover costs.³⁸ If in equity a party pursues a remedy which is more expensive than is necessary he is responsible for costs.³⁹

(B.) APPORTIONMENT. — (1.) *The Rule*. — The rule as to the apportionment of costs in actions at law does not apply in equity, but a court of equity, having discretion as to costs, may impose them all upon one party or may divide them in such manner as it sees fit.⁴⁰ But

Course and Conduct of Losing Party.

In a court of equity, the general rule that costs follow the result of the suit is departed from, when the failing party can show to the court any circumstances which would render it unjust that he should pay the costs of the proceedings. The rule will not be departed from, however, in a case where the course and conduct of the losing party have been the chief cause of great accumulation of costs. *Lewis v. Yale*, 4 Fla. 441.

Action on Note and Mortgage After Application To Sell Land.

—When a note secured by a mortgage is allowed in the probate court, against the estate of the maker, and the land described in the mortgage is sold, and out of the proceeds the administrators pay the note in full, with interest, the holder cannot recover costs in an action in the district court on the note and mortgage commenced after he had made application in the probate court to sell the land. *Graham v. Graham*, 38 Kan. 440, 17 Pac. 152.

Discharge on Note by Previous Payment of Indorser.—A defendant who has been discharged from liability on a note by previous payment by an indorser cannot, in an action thereon by the holder, be liable for costs. *Nugent v. Delhomme*, 2 Mart. O. S. (La.) 307.

Order of Reference.—In a bill filed by a single creditor against the administrator and heirs of the decedent, to subject the real estate descended to the heirs to the payment of his claim, an order of reference operates as a suspension of all other suits against the estate of decedent; and, hence, if a creditor, with a knowledge that such an order has been made in another suit, brings a separate suit for his claim, he will be compelled to pay the costs of his suit. *Laidley v. Kline's Admr.*, 23 W. Va. 565.

38. *Carrington v. Lentz*, 40 Fed. 18; *In re Pettit*, 19 Fed. Cas. No. 11,047.

Fault of partner making a settlement necessary. *Ind.*—*Kimble v. Seal*, 92 Ind. 276. *Ky.*—*Moore v. Story*, 8 Dana 226. *Mitch.*—*Ward v. Jewett*, Walk. Ch. 45.

The mortgagee of a chattel who has unreasonably refused redemption. *Pratt v. Stiles*, 9 Abb. Pr. (N. Y.) 150.

In Missouri, the defendant is entitled, of course, to his costs which accrued solely in the defense of the counts upon which he prevailed. *Ozias v. Haley*, 141 Mo. App. 637, 125 S. W. 556; *Buckman v. Missouri, etc., R. Co.*, 121 Mo. App. 299, 98 S. W. 820.

39. *Outtriv v. Graves*, 1 Barb. Ch. (N. Y.) 49; *Clerk v. Bundx*, 6 Paige (N. Y.) 432 (holding that where a special application for a commission to examine witnesses was made to the chancellor instead of to the clerk or register, the applicant will not be allowed costs).

40. *U. S.*—*Kittredge v. Race*, 92 U. S. 116, 23 L. ed. 488. *Ala.*—*Randolph v. Rosser*, 7 Port. 249; *Hunt v. Lewin*, 4 Stew. & P. 138. See also *Decatur Land Co. v. Cook*, 125 Ala. 708, 27 So. 1022. *Cal.*—*Cerf v. Ashley*, 68 Cal. 419, 9 Pac. 658. *Ill.*—*Waterman v. Alden*, 144 Ill. 90, 32 N. E. 972; *Keks v. Wolgemuth*, 146 Ill. App. 74; *Joliet First Nat. Bank v. Adam*, 34 Ill. App. 159. *Ia.*—*Harvey v. Pinkerton*, 101 Iowa 246, 70 N. W. 192; *Boone Co. v. Wilson*, 41 Iowa 70; *Bush v. Yeoman*, 30 Iowa 479; *Brinek v. Neiweg*, 29 Iowa 444. *Ky.*—*Kaye v. Louisville Bank*, 9 Dana 261; *Moody v. Dowdal's Exrs.*, 2 A. K. Marsh. 212. *Mass.*—*Saunders v. Frost*, 5 Pick. 259, 16 Am. Dec. 394. *Mo.*—*Bender v. Zimmerman*, 135 Mo. 53, 36 S. W. 210; *Bobbs v. Wolff*, 54 Mo. App. 515. *N. J.*—*Van Tine v. Van Tine* (N. J. Eq.), 15 Atl. 249, 1 L. R. A. 155. *N. Y.*—*Matter v. Hemiup*, 3 Paige 305; *Nicoll v. Huntington*, 1 Johns. Ch. 166. *Ohio.*—*Compton v. Griffith*, Wright 321; *Walpole v. Griffin*, Wright 95. *Pa.*—*Greenmount Cem. Co.'s Appeal*, 4 Atl. 528;

the discretion is held to be a sound one to be exercised in view of the special circumstances of each case.⁴¹

(2.) *Parties in Pari Delicto*.—While the prevailing party is *prima facie* entitled to costs, the allowance of costs in equity is in the sound discretion of the court, and where both parties are wrong in part the court may leave each to pay his own costs,⁴² or when costs are awarded

Graver's Appeal, 1 Lanc. L. Rev. 227; John's Estate, 2 Chest. Co. Rep. 281. S. C.—Webb v. Chisolm, 24 S. C. 487. Tenn.—Clark v. Clark, 4 Hayw. 36; Bryant v. Puckett, 3 Hayw. 252.

Thus, "in some cases where a successful party has overloaded the record unnecessarily with irrelevant and immaterial testimony, and in others where, through the fault of both parties, an unnecessarily large and expensive record has been made, and still in others, in which large interests are involved, the law affecting them being unsettled, and there is consequently a reasonable basis for the suits, courts of equity have divided the costs, or apportioned them among the parties equitably." Westfeldt v. North Carolina Mining Co., 177 Fed. 132, 100 C. A. 552.

In Missouri, the apportionment of costs in cases where there are several defenses or counterclaims is discretionary with the trial court. Schawacker v. McLaughlin, 139 Mo. 333, 40 S. W. 935; Turner v. Johnson, 95 Mo. 431, 7 S. W. 570.

Accounting.—While as a general rule in a proceeding for an accounting, the costs are borne equally by payment from the common fund or otherwise, the court is not bound to follow this rule if the result would be inequitable under the circumstances, but may award them either to the plaintiff or defendant. Mead v. Owen, 83 Vt. 132, 74 Atl. 1053.

"In an action for an accounting, the statute (in Oklahoma) confers discretionary power on the court to apportion the costs as it may think right and equitable." Walker v. Walker, 17 Okla. 467, 88 Pac. 1127.

As a Matter of Course.—When various claims are made, some of which are allowed and some rejected, neither party is entitled to costs, as of course. They can be obtained by either party from the other only under a special order of court. Chaplin v. Jenkins, 2 Strobb. Eq. (S. C.) 96.

In Hatch v. Judd, 29 Iowa 95, an equitable apportionment of costs was held proper, the matter being largely in the discretion of the court, and the plaintiff having increased costs by going into equity.

In City of Houston v. Finnigan (Tex. Civ. App.), 85 S. W. 470, plaintiff sued for one parcel of land and failed, and defendant sued by cross-action for another parcel and failed, and each was charged with his own costs.

41. Westfeldt v. N. C. Min. Co., 177 Fed. 132, 100 C. A. 552.

Enjoin Judgment.—Where an application is made to the district court to enjoin a judgment rendered by it, and at the hearing of the application a perpetual injunction is allowed enjoining the judgment, for the reason that it was rendered in vacation, and it is adjudged that each party pay the cost made by such party, held that as the record does not contain or purport to contain all the evidence offered at the hearing, the appellate court cannot say that the court below abused its discretion in apportioning the costs between the parties. Davis v. Cannaday, 37 Kan. 296, 15 Pac. 225.

Accounting.—As a general rule in a proceeding for an accounting costs should be borne equally by payment from the common fund or otherwise, but the court is not bound to follow the rule if the result would be inequitable in the circumstances. Mead v. Owen, 83 Vt. 132, 74 Atl. 1053.

Demand Exorbitant.—If one files a bill to enforce an exorbitant claim and obtains a decree for much less than he claimed, though more than was admitted, each party should pay his own costs. Kaye v. Bank of Louisville, 9 Dana (Ky.) 261.

42. U. S.—Blassengame v. Boyd, 178 Fed. 1, 101 C. C. A. 129; Loveridge v. Larned, 7 Fed. 294. Ill.—Wilson v. Lyon, 51 Ill. 530. Ky.—Hamilton v. Hamilton, 13 B. Mon. 502. Md.—Dorsey v. Smith, 7 Har. & J. 345; Nowland v. Glenn, 2 Md. Ch. 368. Mass.—Bart-

each party is required to pay an equal share of the whole amount.⁴³

(3.) *Where Each Party Has Been Partially Successful.*—A court of equity in the exercise of its discretion may, where each party is successful in part, apportion the costs,⁴⁴ or refuse to allow them to either party,⁴⁵

lett v. Johnson, 9 Allen 530; Bogle v. Bogle, 3 Allen 158; Saunders v. Frost, 5 Pick. 259, 16 Am. Dec. 394. Mich. Summers v. Bromley, 28 Mich. 125. N. J.—Harrison v. Righter, 11 N. J. Eq. 389. See also Vanderhoven v. Romaine, 56 N. J. Eq. 1, 39 Atl. 129. N. Y.—Johnson v. Taber, 10 N. Y. 319; Spencer v. Spencer, 11 Paige 299; Newburgh v. Miller, 5 Johns. Ch. 101, 9 Am. Dec. 274; House v. Eisenlord, 30 Hun 90; Harvey v. Beckman, 64 Misc. 395, 118 N. Y. Supp. 602. Pa.—Coleman v. Brooke, 15 Phila. 302, 39 Leg. Int. 158; Jones v. Wadsworth, 11 Phila. 239, 33 Leg. Int. 416. Tenn.—See Glasgow v. Hood (Tenn. Ch. App.), 57 S. W. 162. Vt.—Pinnock v. Clough, 16 Vt. 500, 42 Am. Dec. 521; Keeler v. Eastman, 11 Vt. 293; Mower v. Hutchinson, 9 Vt. 242; Wright v. Lynde, 1 Aik. 383. Va.—Beverly v. Brooke, 4 Gratt. 187. Wis.—Mowry v. Baraboo First Nat. Bank, 66 Wis. 539, 29 N. W. 559; Green v. Wescott, 13 Wis. 606.

If each claims more than he sustains, and each succeeds in part, each should pay his own costs. Beverley v. Brooke, 4 Gratt. (Va.) 187. See also Caldwell v. Leiber, 7 Paige (N. Y.) 433.

43. Ala.—Waller v. Jones, 107 Ala. 331, 18 So. 277; Hudson v. Kelly, 70 Ala. 393; Smith v. Kennard's Exrs., 38 Ala. 695. Fla.—Chandler v. Sherman, 16 Fla. 99; White v. Walker, 5 Fla. 478. Ky.—Jones v. Morehead, 3 B. Mon. 377. N. Y.—Scott v. Thorp, 4 Edw. Ch. 1. Pa.—Pile v. Pedrick, 137 Pa. 296, 31 Atl. 646, 46 Am. St. Rep. 677; Zell's Appeal, 126 Pa. 329, 17 Atl. 647, 24 W. N. C. 68; Pittsburgh Brass Co. v. Adler, 2 Mona. (Pa.) 235; Perkins v. Nichols, 2 Chest. Co. (Pa.) 229.

In a suit for dissolution of a partnership where neither party is blameless the costs should be divided. Chandler v. Sherman, 16 Fla. 99.

In proceedings to subject chattels to levy, where both parties are in fault—the plaintiff in levying on too much of the property, and the claimant in claiming too much—one-half of the costs should be entered against each.

Postell v. Chapman, 80 Ga. 679, 7 S. E. 119.

44. U. S.—Tesla Elec. Co. v. Scott, 101 Fed. 524. Ala.—McDaniel v. Tennessee Coal, etc., Co., 153 Ala. 493, 45 So. 159. Colo.—Stewart v. McLaughlin, 11 Colo. 458, 18 Pac. 619. Ill.—Lansing v. Bates, 11 Ill. 550. Ia. Dorr v. Dudley, 135 Iowa 20, 112 N. W. 203; Hatch v. Judd, 29 Iowa 95. Ky.—White v. Glazer, 32 Ky. L. Rep. 570, 106 S. W. 289. Mass.—Ramsay v. Warner, 97 Mass. 8. Mo.—Roll v. St. Louis, etc., Smelt. Co., 52 Mo. App. 60. Ohio—Burekhardt v. Burekhardt, 8 Ohio Dec. Rep. 496. Tex.—Galveston, etc., R. Co. v. Dowe, 70 Tex. 1, 8 S. W. 790; Morrow v. Terrell, 21 Tex. Civ. App. 28, 50 S. W. 734, affirmed, 93 Tex. 715 (no opinion). Vt. Briggs v. Brewster, 23 Vt. 100.

Although when "both parties are partially successful, the discretion of the court in an equity action as to allowance of costs is usually exercised to allow costs to both parties, or to deny costs to both," yet if an unusual situation exists, as where the defendants make ungrounded charges of fraud, the court will exercise its discretion and award costs to the plaintiff only. Brackett v. Seavey, 131 N. Y. Supp. 664.

Quieting Title.—Where the chancery court awarded the complainant relief in a suit to quiet title only as to a small portion of the land, it had the discretion to divide the costs between the parties. Brown v. Powers, 167 Ala. 518, 52 So. 647; McDaniel v. Tennessee Co., 153 Ala. 493, 45 So. 159. See Wilcox v. Smith, 38 Wash. 585, 80 Pac. 803.

In an action to compel a conveyance of land to the plaintiff, where the defendant has obtained an acknowledgment in the decree of an interest not recognized in the complaint, and to that extent has defeated the claim set up by plaintiff, the costs should be borne equally. Stewart v. McLaughlin, 11 Colo. 458, 18 Pac. 619.

45. U. S.—Marks Adjustable Folding Chair Co. v. Wilson, 43 Fed. 302.

as where each party succeeds on one or more of the issues,⁴⁶ more especially where neither party has been entirely blameless in bringing about and continuing the litigation.⁴⁷ But if the plaintiff in equity prevails only as to a part of the recovery, he is entitled to costs, especially in suits involving the title to land.⁴⁸

e. *Where Action Is in Name of Other or Non-existent Persons.*—

(I.) *The Rule.*—If a suit is instituted in a fictitious name, or in the name of a person without his privity and consent, or in the name of a deceased person, the party instituting the suit, or even the attorney in the case, may be held liable for costs.⁴⁹

(II.) *Actions for Benefit of Others.*—(A.) *PERSON BENEFITED LIABLE.*—As a general rule, where an action is brought in the name of one person for the use or benefit of another, the person beneficially interested is liable for the costs,⁵⁰ and judgment for costs may be entered against

III.—Phy v. Clark, 35 Ill. 377. Ia.—Strayer v. Stone, 47 Iowa 333; Burton v. Mason, 26 Iowa 392. N. J.—Diocese of Trenton v. Toman, 74 N. J. Eq. 702, 70 Atl. 606; Lengyel v. Meyer, 70 N. J. Eq. 501, 62 Atl. 548 (where part of the costs was caused by a false charge of fraud in the bill). N. Y.—Morris v. Wheeler, 45 N. Y. 703; Crippen v. Heermance, 9 Paige 211; Davis v. Lambertson, 56 Barb. 480; Cross v. Smith, 85 Hun 49, 32 N. Y. Supp. 671, 66 N. Y. St. 55. Pa.—Baum v. Wicklein, 2 Woodw. 242. Tenn.—Bryant v. Puckett, 3 Hayw. 252. Vt.—Eldridge v. Smith, 34 Vt. 484; Griswold v. Smith, 10 Vt. 452. Wis.—Hammond v. Erickson, 135 Wis. 570, 116 N. W. 173.

Where there is a reconventional demand, and both parties are cast, each must pay the costs occasioned by the demand of the other. Hunter Canal Co. v. Robertson's Heirs, 113 La. 833, 37 So. 771.

In an action to try title, if plaintiff recovers two out of three tracts which defendant claimed, judgment should not be entered against him for any part of the costs. Vanderbilt v. Johnson, 141 N. C. 370, 54 S. E. 298, 46. Thompson v. Normanden (Iowa), 108 N. W. 315.

An issue within the meaning of Rev. St. (Mo.), 1899, §§1549, 1550, referring to the apportionment of costs, means an issue arising "from a fact arising in the pleading of one party and controverted in the pleading of another." Schumacher v. Mehlberg, 96 Mo. App. 598, 70 S. W. 910.

Where there are several defenses or

counterclaims, the apportionment of costs is within the discretionary purview of the trial court. Schawacher v. McLaughlin, 139 Mo. 333, 40 S. W. 935.

Discretion Not Arbitrary.—The discretion conferred on the court by Code Civ. Proc. (Neb.), §623, in the matter of taxing costs, is not an arbitrary one; and where two defendants are enjoined on the commission of a tort, and each acted independently and answered separately, the costs on judgment for plaintiff should be equally divided. Albers v. Dillavou, 4 Neb. (Unof.) 340, 93 N. W. 937.

47. Crawford v. Osmun, 90 Mich. 77, 51 N. W. 356. See Schnepfe v. Schnepfe, 108 Md. 139, 69 Atl. 829.

48. U. S.—Kittredge v. Race, 92 U. S. 116, 23 L. ed. 488; Consolidated Coal, etc., Co. v. Baker, 131 Fed. 939. Nev.—Morris v. Baltimore & O. Tel. Co., 38 N. J. Eq. 301. N. Y.—Kelly v. New York, etc., R. Co., 81 N. Y. 233; Hubbell v. Rochester, 8 Cow. 115. Vt.—Powers v. Leach, 22 Vt. 226.

49. Mo.—German Lutheran Church v. Walther, 42 Mo. App. 68. N. Y.—People v. Bradt, 7 Johns. 539; Peeple v. Bradt, 6 Johns. 318; Ketcham v. Clark, 4 Johns. 484. Va.—Howard v. Rawson, 2 Leigh 733. Eng.—Gynn v. Kirby, 1 Strange 402, 93 Eng. Reprint 594.

50. Ill.—Foreman Shoe Co. v. Lewis, 92 Ill. App. 554, affirmed, 191 Ill. 155, 60 N. E. 971. Ind.—State v. Beem, 3 Blackf. 222. Md.—Wilson v. Williams, 106 Md. 657, 68 Atl. 598 (extending the statute in that state to chancery proceedings); Buddell v. Green, 104 Md.

him without including the nominal plaintiff, provided such beneficial plaintiff appears upon the record as a party really interested in the prosecution of the suit.⁵¹ This liability of the *cestui que use* becomes

371, 65 Atl. 42. **Mass.**—Paine v. Hapgood, 13 Pick. 152. **Mich.**—Baumgarth v. Fireman's Fund Ins. Co., 159 Mich. 207, 123 N. W. 592. **N. Y.**—Slauson v. Watkins, 95 N. Y. 369; Wheeler v. Wright, 23 How. Pr. 228; Goodrich v. Pendleton, 3 Johns. Ch. 520; Whitney v. Cooper, 1 Hill 629; Elliott v. Lewicky, 19 Jones & S. 51; Tucker v. Gilman, 58 Hun 167, 11 N. Y. Supp. 555, *affirmed*, 125 N. Y. 714, 26 N. E. 756; Metropolitan Addressing, etc., Co. v. Goodenough, 18 N. Y. Supp. 212. **Pa.**—Horlacher v. Gernert, 11 Pa. Co. Ct. 410. **S. C.**—Myers v. James, 2 Bailey 547. **Tenn.**—Smith's Exrs. v. Mabry, 9 Yerg. 313; Hargis v. Ayers, 8 Yerg. 467; Anderson v. Bradie, 7 Yerg. 297. **Va.**—Hayes v. Virginia Mut. Protective Assn., 76 Vt. 225; Pates v. St. Clair, 11 Gratt. 22. **W. Va.**—Morgan v. Hale, 12 W. Va. 713.

So at common law. Hiscock v. Tuck, 106 N. Y. Supp. 700, *citing* Colvard v. Oliver, 7 Wend. (N. Y.) 497; Jackson v. Van Antwerp, 1 Wend. (N. Y.) 295; Norton v. Rich, 20 Johns. (N. Y.) 475; Schoolcraft v. Lathrop, 5 Cow. (N. Y.) 17; Waring v. Barret, 2 Cow. (N. Y.) 460.

"In a suit in chancery erroneously brought by A for the use of B, and B not being a party to a suit, an order of the circuit court directing the costs to be taxed against the beneficiary B, and not against A, is void as against B, and does not make him a party to the suit. First Nat. Bank v. Cook, 55 W. Va. 220, 46 S. E. 1027."

An action brought in behalf of a bank in the name of its president, is not an action in *autre droit* so as to excuse the plaintiff from paying costs. Lowerre v. Vail, 5 Abb. Pr. (N. Y.) 229.

Effect of Stipulation of Parties.—A person who brings and prosecutes a suit in the name of another, under an agreement with the nominal party to carry on the suit at his own expense, is liable for the costs recovered against the nominal party. Giles v. Halbert, 12 N. Y. 32.

Conclusiveness of Record.—A statement in the writ that the plaintiff "sues in his own right, but with in-

tent to benefit J. S.," does not relieve the plaintiff from liability for costs. Lapham v. Almy, 105 Mass. 391.

Extent of Beneficial Plaintiff's Interest.—These "statutes include a case where the entry of the use is made merely for the purpose of giving to the *cestui que use* a collateral security for a subsisting debt." They do not distinguish "between an entry which assigns an unqualified interest in the subject of the suit, and one which creates a conditional or secondary interest by way of collateral security." Ruddell v. Green, 104 Md. 371, 65 Atl. 42.

But the rule is probably otherwise under the New York and Wisconsin statutes. 2 Rev. St. (N. Y.) 1852 (4th ed.), pp. 3, 537, ch. 4, §321; Rev. St. (Wis.) 1853, ch. 133, §50.

Indemnity Required.—Where a person prosecutes a suit in the name of another he is bound to indemnify and protect him against the payment of costs, but in order to obtain such protection it is the duty of the nominal plaintiff to make an application to the court where the case is pending for an order on the beneficial plaintiff to indemnify him. Keystone Mfg. Co. v. Watts, 100 Ill. App. 11, *citing*, Young v. Campbell, 9 Ill. 156; Buckmaster v. Beames, 8 Ill. 156.

Effect of Appeal.—"The party beneficially interested is liable for costs incurred where the nominal party prevails in the court below." Baumgarth v. Firemen's Fund Ins. Co., 159 Mich. 207, 123 N. W. 592, *explaining* Bender-nagle v. Cocks, 19 Wend. (N. Y.) 151. But this case was reversed on appeal because the writ of error was a continuation of the original suit and not a new suit.

51. Griffin v. Smith, 14 Ala. 571; Coalter v. Bell, 2 Stew. & P. (Ala.) 358.

Where a party brings a suit for his own benefit, though in the name of another, and afterwards abandons his action, a judgment for the defendant's costs may be rendered directly against him. Pates v. St. Clair, 11 Gratt. (Va.) 22.

fixed the moment the case is marked to his use with his knowledge and consent and continues as long as the liability of the legal plaintiff lasts.⁵² But in other jurisdictions it is held that in the absence of statute costs cannot be given against one to whose use a suit is brought, if he is not a party to the suit. Costs must be adjudged against the legal plaintiff on the record.⁵³

If a suit is properly continued in the name of the original plaintiff after he has conveyed to another, the mere fact that the defendant purchases from the latter after the issue has been found against him, does not relieve him from payment of costs.⁵⁴

(B.) UNDER THE NEW YORK STATUTE. — The New York statute provides that where an action is brought in the name of another by a transferee of the cause of action, or by the other person who is beneficially interested therein, the transferree or other person so interested is liable for the costs to the same extent as if he were a party;⁵⁵ and though he

52. *Ruddell v. Green*, 104 Md. 371, 65 Atl. 42.

53. Md.—*Foley v. Mason*, 6 Md. 37 (former rule in Maryland); *Selby v. Clayton*, 7 Gill 241 (holding, however, that the successful defendant may proceed against either the legal or beneficial plaintiff under the statute). N. C. *Lea v. Brooks*, 49 N. C. 423; *disapproving Ashe v. Smith*, 3 N. C. 303. Wis. *Stevens v. Brooks*, 22 Wis. 695.

54. *Christoffersen v. Craghead*, 26 Utah 483, 73 Pac. 639.

55. Code Civ. Proc. (N. Y.), §3247; *Bliss v. Otis*, 1 Denio (N. Y.) 656; *Pierson v. Clark*, 101 N. Y. Supp. 719; *In re Harwood*, 21 N. Y. Supp. 572; *Metropolitan Concert Co. v. Sperry*, 12 N. Y. Supp. 494.

A person to whom a judgment is to be paid if a recovery is had is not liable for costs where the suit is prosecuted without his knowledge or consent. Such a person is not the party "beneficially interested" in the recovery. *Elliott v. Lewicky*, 19 Jones & S. (N. Y.) 51.

Persons who prosecute a suit in the name of another as trustee of the plaintiff but without his authority are liable for the costs. *Baptist Church v. Parker*, 36 Barb. (N. Y.) 171; *First Gen. Baptist Soc. v. Loomis*, 3 N. Y. Supp. 572.

Likewise a person bringing an action for a penalty in the name of the overseer of the poor, without complying with the statute regulating such action, may be held liable for the costs. *Jobbitt v. Giles*, 22 Hun (N. Y.) 274.

If the legal title to the claim is put in the assignee to avoid the necessity of giving security for costs and for the purposes of his suit, and costs cannot be collected from the assignee after using due diligence, the assignor is chargeable with costs, because the equitable and beneficial interest remains in him. *Hiscock v. Tuck*, 122 App. Div. 116, 106 N. Y. Supp. 700; *Pendleton v. Johnson*, 18 N. Y. Supp. 211; *Winants v. Blanchard*, 12 N. Y. St. 384.

The mere fact that attorneys are "beneficially interested in the cause of action did not render them liable for costs, where such beneficial interest consists of a right to a portion of the sum or property recovered as compensation for their services." *Banta v. Naughton*, 7 N. Y. St. 384.

Assignment as Collateral Security.—Nor is an assignment of a cause of action, made simply as collateral security for a pre-existing debt, such a transfer as makes the assignee liable for costs under the New York statute. *Thorn v. Beard*, 139 N. Y. 482, 34 N. E. 1100, *affirming*, 71 Hun 112, 24 N. Y. Supp. 621; *Peek v. Yorks*, 75 N. Y. 421; *Wolcott v. Holcomb*, 31 N. Y. 125; *Dowling v. Bucking*, 15 Abb. Pr. N. S. (N. Y.) 190. But see *Slater Bank v. Sturdy*, 15 Abb. Pr. (N. Y.) 75.

And this is also the rule in other states. *Davis v. Higgins*, 92 N. C. 203; *De Witt v. Perkins*, 25 Wis. 438.

Parties Defending in Another's Name.—This statute applies only to the beneficial interest of or transfer to one

is only a partial assignee,⁵⁶ his liability is nevertheless absolute.⁵⁷

By the same statute, one who acquires the cause of action by transfer or otherwise after the commencement of the action, is liable for costs as if he were plaintiff.⁵⁸

But this statute does not impose the liability for costs upon one to whom such an assignment was made as collateral security.⁵⁹

The proper remedy by which to enforce the liability of the real party in interest under this statute is by motion.⁶⁰

(C.) ACTION BY ASSIGNEE IN ASSIGNOR'S NAME. — In some jurisdictions, even in the absence of statute it seems, and on equitable grounds, an assignee beneficially interested, suing in the name of his assignor, and failing in the action is liable to the defendant for costs,⁶¹ even though he is not assignee of the entire demand,⁶² and though the assignment is made pending the suit, if he afterwards proceeds in the action.⁶³

But in other jurisdictions in the absence of statute the assignor

prosecuting the action, not to one defending a suit in another's name (*Miller v. Adsit*, 18 Wend. (N. Y.) 672; *Ryers v. Hedges*, 1 Hill (N. Y.) 646; *Peetsch v. Quinn*, 12 Misc. 61, 33 N. Y. Supp. 87), or responding to an appeal (*Bendernagle v. Cocks*, 19 Wend. (N. Y.) 151).

Extent of Liability.—The assignee's liability under this statute extends to all costs, as well those accruing before as after the assignment. *Genet v. Davenport*, 58 N. Y. 607; *Olmstead v. Keyes*, 2 How. Pr. N. S. (N. Y.) 1; *Tucker v. Gilman*, 58 Hun 167, 11 N. Y. Supp. 555.

This was also the rule prior to the statute. *Jordan v. Sherwood*, 10 Wend. (N. Y.) 622.

56. *Bliss v. Otis*, 1 Denio (N. Y.) 656.

57. *Nelligan v. Groth*, 110 N. Y. Supp. 619.

58. But under this statute no matter to what extent the assignee or person beneficially interested, who is not a party, may be interested in the recovery, if in truth he is not chargeable with having brought the action, he is not chargeable with costs. *Wheeler v. Wright*, 14 Abb. Pr. (N. Y.) 353; *Greenwood v. Marvin*, 11 N. Y. St. 235.

59. *Thorn v. Beard*, 139 N. Y. 482, 34 N. E. 1100; *Dowling v. Bucking*, 52 N. Y. 658, 15 Abb. Pr. (N. S.) 190.

60. *Henricus v. Englert*, 17 N. Y. Supp. 237.

61. *Mo.*—*Mitchell v. White*, 47 Mo.

App. 316. *N. J.*—*Davenport v. City of Elizabeth*, 43 N. J. L. 149. *N. Y.*—*Norton v. Rich*, 20 Johns. 475; *Jordan v. Sherwood*, 10 Wend. 622; *Schoolcraft v. Lathrop*, 5 Cow. 17. *N. C.*—*Ashe v. Smith*, 3 N. C. 305. *Ohio.* *Rice v. Goodenow*, Tapp. 126. *Pa.*—*Beatty v. R. Co.*, 4 Lanc. L. Rev. 1. *S. C.*—Code Civ. Proc., 1902, §334; *Walker v. Doty*, 76 S. C. 464, 57 S. E. 181.

In North Carolina, a statute makes the assignee liable whenever he might be substituted for the original plaintiff. *Davis v. Higgins*, 92 N. C. 203.

In an application to charge an assignee not a party to the suit, with costs, the movant holds the affirmative of the issue and must make out a satisfactory case. *Wolcott v. Holcomb*, 31 N. Y. 125.

62. *Bliss v. Otis*, 1 Denio (N. Y.) 656.

But the rule is otherwise under the North Carolina statute. *Davis v. Higgins*, 92 N. C. 203.

63. *Schoolcraft v. Lathrop*, 5 Cow. (N. Y.) 17; *Harrington v. Slade*, 22 Barb. (N. Y.) 161; *Walker v. Doty*, 76 S. C. 464, 57 S. E. 181. Compare, *Freeman v. Cram*, 13 Me. 255; *Grosfent v. Tallman*, 2 How. Pr. (N. Y.) 147.

But the mere fact of taking an assignment pending the suit will not make the assignee liable for costs, unless he afterwards carries it on. *Miller v. Franklin*, 20 Wend. (N. Y.) 631.

is liable for the costs in case the suit fails, whether the cause of action was a negotiable or non-negotiable chose in action, nor can he recover them back from the assignee.⁶⁴

f. *Persons in Representative Capacity.*—(I.) *Generally Not Liable.* As a general rule persons suing in a representative capacity are exempted from personal liability for costs.⁶⁵

(II.) *Agents and Attorneys.*—An agent who causes litigation by his disobedience to instructions or incompetency is liable for the costs, although he disclaims any interest in the subject-matter of the litigation.⁶⁶

Attorneys.—The right to hold an attorney personally liable for the costs of the action rests largely in the sound discretion of the court, but this discretion is sometimes exercised to hold him liable, where he has been guilty of a gross neglect or breach of duty towards his client or the court.⁶⁷ Thus, an attorney who brings a suit without

64. *Freeman v. Cram*, 13 Me. 255; *Myers v. James*, 2 Bailey (S. C.) 547; *Lomax v. Baker*, 1 Spear (S. C.) 161; *Bennett v. McFall*, 2 Mill's Const. (S. C.) 198. Reprint 802; *Lord v. Kellett*, 2 Myl. & K. 1, 39 Eng. Reprint 845; *Wright v. Castle*, 3 Meriv. 12, 36 Eng. Reprint 5.

But it has been held that if the nominal plaintiff dies, the suit progresses in the name of the real plaintiff, who is liable for costs. *Bales v. Terrell*, 7 Ala. 129.

65. See the statutes in the various jurisdictions.

An assignee in bankruptcy is a "trustee of an express trust" and exempt. *Reade v. Waterhouse*, 52 N. Y. 587; *Bedell v. Barnes*, 29 Hun (N. Y.) 589.

Only when the actions are necessarily brought by them in such capacities. *Carnahan v. Pond*, 15 Abb. Pr. (N. Y.) 194; *Bedell v. Barnes*, 29 Hun (N. Y.) 589.

66. Pa.—*Burke v. Teller*, 11 Pa. Co. Ct. 59. S. C.—*Harrison v. Long*, 4 Desaus. 110. Tenn.—*Ray v. Haag*, 1 Tenn. Ch. App. 249.

An assignee cannot be made liable for the costs of a judgment against the assignor under the principle of agency. *Bennett v. McFall*, 3 Brev. (S. C.) 558.

67. Ga.—*Longman v. Bradford*, 108 Ga. 572, 33 S. E. 916. N. Y.—*Struppmann v. Muller*, 55 How. Pr. 427; *American Ins. Co. v. Oakley*, 9 Paige 496; *Kane v. Van Vranken*, 5 Paige 62; *Scott v. Young*, 4 Paige Ch. 542. N. C.—*Ex parte Robbins*, 63 N. C. 309. Ohio.—*Kerr v. Bank of Chillicothe*, *Wright* 737. Pa.—*Paterson v. McPherson*, 32 Leg. Int. 320, 1 W. N. C. 454. Eng.—*Ellis v. King*, 5 Madd. 21, 56 Eng.

The costs of a motion made by an attorney for his own benefit and not for that of his client are properly imposed on him. *Eisner v. Hamel*, 6 Hun (N. Y.) 234.

Scandal and Impertinence.—An attorney as well as his client is liable for the costs incurred in expunging scandalous or impertinent matter from his pleadings (Ark.—*Burr v. Burton*, 18 Ark. 214, 235, citing *Story's Eq. Pl.*, §266. N. J.—*Camden & A. R. Co. v. Stewart*, 19 N. J. Eq. 343. N. Y.—*Cushman v. Brown*, 6 Paige 539; *Powell v. Kane*, 5 Paige 265; *People v. Murray*, 23 Civ. Proc. 53; *McVey v. Cantrell*, 8 Hun 522. N. C.—*Powell v. Cobb*, 56 N. C. 1); and if such costs are adjudged against the attorney he cannot claim reimbursement from his client (*Powell v. Kane*, 5 Paige [N. Y.] 265).

But if the attorney had no hand in drawing the objectionable pleading and he apologizes to the court, the costs will be taxed against the one drawing it. *Mason v. Mason*, 4 Hen. & M. (Va.) 414.

A court in its discretion may tax an attorney with costs because of the unnecessary grossness and indelicacy of a petition filed by him, and of his improper deportment in reading it. *Brown v. Brown*, 4 Ind. 627.

The rule by statute in the United States courts is that if an attorney,

authority from any existing principal or client is liable to the successful defendant for costs, though he acted in perfect good faith.⁶⁸

Attorney for Non-residents.—In some states, the attorney for a non-resident is liable for costs.⁶⁹

(III.) Executors and Administrators.—An executor or administrator who successfully prosecutes or defends an action in the right of his testator or intestate, is entitled to costs.⁷⁰

proctor or other person admitted to conduct proceedings in any court of the United States, or any territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required by order of the court to satisfy any excess of costs so increased. Rev. St. (U. S.), §982, Act of July 22, 1813, ch. 14; Act of Feb. 26, 1853, ch. 80.

If an attorney endorses a writ so as to make him personally liable and not his client, he must pay costs. *Chapman v. Phillips*, 8 Pick. (Mass.) 25.

In New York, an attorney is only liable where the defendant could have required security for costs to be filed. *Hulburt v. Newell*, 4 How. Pr. (N. Y.) 93.

An attorney appearing in a surrogate's court is not liable for costs under §3278 of the New York Code, "for the reason that it is expressly provided by §3347 of the code, subd. 13, that title 3, of which §3278 is a part, is applicable only to the courts specified in subd. 4 of §3347." *In re Rasch's Estate*, 28 Civ. Proc. 98, 55 N. Y. Supp. 434.

In Hawaii, under rule of court providing that "attorneys shall be liable for costs of court incurred by their respective clients," it was held that a party in whose favor a judgment for costs has been entered in the circuit court, cannot sue in assumpsit the attorney of the opposite party for the costs, upon his failure to pay the costs himself. *Kanahele v. Wakefield*, 11 Hawaii 258.

68. *Attleboro Nat. Bank v. Wendell*, 64 Hun 208, 19 N. Y. Supp. 45.

69. Only where the plaintiff is a non-resident at the commencement of the suit, and not where he subsequently becomes a non-resident. *Long v. Hall*, 3 Sandf. (N. Y.) 729. See also *Moir v. Brown*, 9 How. Pr. 270.

By New York Code of Civ. Proc.,

§3278, the liability of plaintiff's attorney is limited to \$100 "until security is given." He may relieve himself from this liability though the defendant may not require security, "by filing and procuring the allowance of an undertaking as if an order had been made" to give security. Construed in *Hubbard v. Gicquel*, 15 N. Y. St. 397, 14 Civ. Proc. 15; *Boyce v. Bates*, 8 How. Pr. 495.

In Georgia, an attorney is liable for the costs in any suit instituted in behalf of persons residing out of the state or county when they can be collected from the defendant, and this extends to all costs including witness' fees, costs paid by the defendant to enter an appeal, and costs of all ancillary proceedings. Officers of Court v. Hines, 33 Ga. 516; *Ross v. Harvey*, 32 Ga. 388; *Mackey v. Blake*, 15 Ga. 402; *Car-michael v. Pendleton*, Dud. 173. But the statute only applies when all the plaintiffs are nonresident. *Barrie v. Atkinson*, 114 Ga. 708, 40 S. E. 708.

Construction of Statute.—This statute, being somewhat in the nature of a penal statute, must be strictly construed. *Barrie v. Atkinson*, 114 Ga. 708, 40 S. E. 708.

70. *Williams on Executors* (16th Am. ed.), pp. 1895, 1896; 1 Bac. 517, and the following cases: Cal.—*Stevens v. San Francisco, etc., R. Co.*, 103 Cal. 252, 37 Pac. 146. Conn.—*Appeal of Clement*, 49 Conn. 519. Ind.—*Wheeler v. Calvert's Admr.*, 25 Ind. 365. Ky.—*Barnes v. Burton*, 1 A. K. Marsh. 349. N. Y.—*Osterhout v. Hardenbergh*, 19 Johns. 266; *In re Heather's Estate*, 15 Abb. N. C. 194; *Ladies' Union Benev. Soc. v. Van Natta*, 88 N. Y. Supp. 1083. N. C.—*Wellborn v. Gordon's Admr.*, 5 N. C. 502. R. I.—*Bowlin v. Rhode Island Hospital Trust Co.*, 76 Atl. 770. S. C.—*Frink v. Luyten*, 2 Bay 166. Va.—*Eidson v. Fontaine*, 9 Gratt. 286; *Timberlake v. Binson*, 2 Va. Cas. 348. Wis.—*Wisconsin Trust Co.*

Liability for Costs.—The general rule is well settled that an executor or administrator suing in good faith and in his representative capacity on a cause of action that accrued to his testator in his lifetime, or which is founded on, or grows out of, a contract made with the testator, or an injury done to him in his lifetime, is not liable for the costs in case he fails in the action.⁷¹ But such costs are payable out of the estate or fund in controversy.⁷²

v. Chapman, 121 Wis. 479, 99 N. W. 341.

But under special circumstances the court may refuse to award costs to even a successful administrator defendant. *Wade v. Dick*, 36 N. C. 313.

By statute in New York an unsuccessful executor or administrator as party defendant cannot recover costs though they may not go to the plaintiff, because of other statutory prohibitions. *Hopkins v. Lott*, 111 N. Y. 577, 19 N. E. 273.

71. *Ark.*—*Warren, etc., R. Co. v. Waldrop*, 93 Ark. 127, 123 S. W. 792. *Ga.*—*Justices of Inferior Court v. Haygood*, 20 Ga. 847. *Ill.*—*McKay v. Riley*, 135 Ill. 586, 26 N. E. 525; *Gibbons v. Johnson*, 4 Ill. 61; *Shepherd v. Rhodes*, 10 Ill. App. 557. *Ind.*—*Mackey v. Ballow*, 112 Ind. 198, 13 N. E. 715; *Cavanaugh v. Toledo, etc., R. Co.*, 49 Ind. 149; *Harrison v. Warner*, 1 Blackf. 385. *Ia.*—*Linton v. Crosby*, 61 Iowa 293, 16 N. W. 113. *Ky.*—*Arnold's Exrs. v. Crooks*, 8 Dana 37; *Hutcheratt's Exrs. v. Gentry*, 2 J. J. Marsh. 499. *Mont.*—*In re Davis' Estate*, 35 Mont. 273, 88 Pac. 957. *N. H.*—*Folsom v. Blaisdell*, 38 N. H. 100. *N. J.*—*Bell v. Samuels*, 60 N. J. L. 370, 37 Atl. 613. *N. Y.*—*Robert v. Ditmas*, 7 Wend. 522; *Dean v. Roseboom*, 37 Hun 310; *McGovern v. McGovern*, 18 Jones & S. 390. *N. C.*—*Collins v. Roberts*, 28 N. C. 201; *Arrington v. Coleman*, 5 N. C. 102. *Pa.*—*Smith's Estate*, 11 Pa. Co. Ct. 448; *Myers v. Barton*, 3 Clark 257. *S. C.*—*Clark v. Wright*, 26 S. C. 196, 1 S. E. 814; *Murrell's Admr. v. Duncan*, 1 Brev. 384; *Swift v. Roalurne*, 1 Brev. 175. *Va.*—*Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. 371. *Wis.*—*Knox v. Bigelow*, 15 Wis. 415. *Eng.*—*Comber v. Hardecastle*, 3 Bos. & P. 115.

The reason of this rule is that the law does not presume him to be sufficiently cognizant of the nature and formation of the claims he has to as-

sert. *Buckland v. Gallup*, 105 N. Y. 453, 11 N. E. 843.

Distinction Between Plaintiff and Defendant.—A distinction is also made between cases where the executor or administrator is plaintiff and where he is defendant; in the former case, they are not liable for costs, but in the latter, they are, and the judgment should be *de bonis testatoris*. *Ky.*—*Hughes v. Standeford's Admr.*, 3 Dana 285. *N. C.*—*King v. Howard*, 15 N. C. 581. *S. C.*—*Frink v. Luyten*, 2 Bay 166.

But this distinction it seems is not recognized by courts of equity. *Linthicum v. Linthicum*, 2 Md. Ch. 21; *Shepherd's Exrs. v. McClain*, 13 N. J. Eq. 128.

The rule in equity is that whether or not an executor who was an unsuccessful defendant in the court of chancery should pay costs is within the discretion of the court. *Walton v. Taylor (N. J.)*, 79 Atl. 437, following *Getman v. Beardsley*, 2 Johns. Ch. (N. Y.) 274, and *disapproving*, *Gifford v. Thorn*, 9 N. J. Eq. 702.

72. *N. J.*—*Gulick's Exrs. v. Gulick*, 25 N. J. Eq. 324; *Stack v. Bird*, 23 N. J. Eq. 238; *Halsted v. Meeker's Exrs.*, 18 N. J. Eq. 136; *Annin's Exrs. v. Vandornen's Admr.*, 14 N. J. Eq. 135. *N. Y.*—*Judah v. Stagg's Exrs.*, 22 Wend. 641; *Woodruff v. Cook*, 14 How. Pr. 481. *S. C.*—*Gage v. Rogers*, 1 Strobb. Eq. 370. *Tenn.*—*Lassiter v. Travis*, 98 Tenn. 330, 39 S. W. 226; *Abington v. Tyler*, 6 Coldw. 502; *Bradberry v. Martin*, 3 Shann. Cas. 469.

If an executor prosecutes an appeal in good faith, it is not improper to order the costs occasioned thereby to be paid by the executor in due course of administration. *Leischner v. Kaiser*, 156 Ill. App. 123.

In Probate Proceedings.—“An executor, as a general rule, is allowed his costs out of the estate, though the will be not established, because it is his duty to offer the will for probate;

And although executors and administrators may not be expressly excepted from the statutes giving costs generally to the prevailing party, they are saved from the payment of costs in all cases by an equitable construction of such enactments.⁷³

In like manner, if an executor or administrator defends as such in good faith to protect the interests of the estate, costs may be taxed against him only in that capacity.⁷⁴

But if an executor or administrator is guilty of bad faith, neglect of duty, or gross negligence,⁷⁵ or where he sues without legal author-

but if a will is offered for probate by a legatee, he will, if unsuccessful, be condemned in costs." *Perrine v. Applegate*, 14 N. J. Eq. 531, 534.

73. *Norcross v. Burton*, 16 N. J. L. 310.

By statute in New York costs may be awarded the successful defendant to be collected out of the estate in an action brought by an executor in his representative capacity just as in an action by a person prosecuting in his own right. *Woodruff v. Cook*, 14 How. Pr. 481; *Cohu v. Husson*, 5 N. Y. Supp. 7.

Costs are also awarded to the successful plaintiff in actions against executors and administrators under Code Civ. Proc. (N. Y.), §3228. *Dunn v. Arkenburgh*, 165 N. Y. 669, 59 N. E. 1122; *Hopkins v. Lott*, 111 N. Y. 577, 19 N. E. 273; *Syms v. New York*, 105 N. Y. 153, 11 N. E. 369; *Boynton v. Laddy*, 57 Hun 589, 10 N. Y. Supp. 622.

In North Carolina, no costs can be recovered in an action against an executor or administrator unless it appears that payment was unreasonably delayed or neglected, or he refused to refer the matter in controversy. And all presumptions will be indulged in the fiduciary's favor. *Whitaker v. Whitaker*, 138 N. C. 205, 50 S. E. 630; *Morris v. Morris*, 94 N. C. 613; *May v. Darden*, 83 N. C. 237.

But this section (1429 of the code) does not apply to protect the administrator from costs if the proceeding is to subject him to liability for misapplication of the funds, and not to recover a debt out of the estate. *Valentine v. Britton*, 127 N. C. 57, 37 S. E. 74.

In New York, a similar statute exists (Code Civ. Proc., §§1835, 1836). *Gardner v. Pitcher*, 135 N. Y. 534, 77 N. E. 1187; *Benjamin v. Ver Nooy*,

168 N. Y. 578, 61 N. E. 971; *Demarest v. Smith*, 127 N. Y. Supp. 659; *Pauley v. Millsbaugh*, 88 N. Y. Supp. 565; *O'Brien v. Jackson*, 58 N. Y. Supp. 1044. But no costs can be so taxed under the above sections unless the demand is presented as required by the statute and "unreasonably resisted or neglected." And if the action is brought in the supreme court the facts must be certified by the judge or referee before whom the trial took place. *Cornwell v. Sheldon*, 118 N. Y. Supp. 707. And appeal from judgment, as it does not take up the question of costs, is no barrier to a motion to strike the costs from the judgment. *Cornwell v. Sheldon*, *supra*.

74. *De Bow v. Wollenberger*, 52 Ore. 404, 96 Pac. 536, 97 Pac. 717.

Although a defendant claims in his executorial capacity, yet if he is sued as an individual and the verdict is against him as an individual, it is proper to render judgment for costs against him individually. *Fugua v. Moseley*, 12 Ky. L. Rep. 989.

75. U. S.—*Harrison v. Perea*, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. ed. 478. D. C.—*Andrews v. Hunt*, 7 Mackey 311. Ill.—*Burnap v. Dennis*, 4 Ill. 478. Ind.—*Harrison v. Warner*, 1 Blackf. 385. Ky.—*Hutchcraft's Exrs. v. Gentry*, 2 J. J. Marsh. 499. La.—*Porchie v. Succession of John Banks*, 8 La. Ann. 65. Mo.—*Garr v. Harding*, 45 Mo. App. 618. N. J.—*Wiggins v. Wiggins*, 65 N. J. Eq. 417, 53 Atl. 148; *Shepherd's Exrs. v. McClain*, 18 N. J. Eq. 123; *Neville v. Fitzgerald*, 2 N. J. L. 155. N. Y.—*Savage v. Gould*, 60 How. Pr. 217; *Boughton v. Philips*, 6 Paige 334; *Williams v. Harden*, 1 Barb. Ch. 293. N. C.—*Parker v. Stephens*, 2 N. C. 218. S. C.—*Ex parte Brady*, 19 S. C. 605. Tenn.—*Wade v. Fisher*, 10 Heisk. 490. Va.—*Sorrel v. Proctor*, 4 Hen. & M. 431. Wis.—*Roberts v. Lamberton*, 117

ity,⁷⁶ or sues or defends in his private and not in his representative capacity, and then fails,⁷⁷ or knowingly and intentionally subjects the opposition to expenses additional to what otherwise would be necessary to protect his rights in the controversy,⁷⁸ he may be held liable personally for the costs.

Manner of Taxing.—Where the verdict of a jury is against an administrator in his representative character, a judgment for costs against him should be in the same character, and not *de bonis propriis*.⁷⁹

Wis. 635, 94 N. W. 650. **Eng.**—Pietz v. Stace, 4 Ves. Jr. 620, 31 Eng. Reprint 319; Seers v. Hind, 1 Ves. 294, 30 Eng. Reprint 351.

An executor who brings an action as such, where the cause of action, whether *ex contractu* or *ex delicto*, arose after the testator's death, is personally liable for costs if he fails. **N. J.**—Irvins v. Jacob, 67 N. J. Eq. 387, 58 Atl. 941. **N. Y.**—Buckland v. Gallup, 105 N. Y. 453, 11 N. E. 453; Reynolds v. Collins, 3 Hill 441; Mann v. Baker, 5 Cow. 267; Burhans v. Blanchard, 1 Denio 626. **Pa.**—Muntorf v. Muntorf, 2 Rawle 180. **S. C.**—Frink v. Luyten, 2 Bay 166. **Va.**—Carr's Exr. v. Anson, 2 Hen. & M. 361. **Eng.**—Hollis v. Smith, 10 East 293, 103 Eng. Reprint 786; Bonafous v. Walker, 2 T. R. 126, 100 Eng. Reprint 69; Marsh v. Yellowby, 2 Str. 1106, 93 Eng. Reprint 1062; Grimstead v. Shirley, 2 Taunt 116; Comber v. Hardcastle, 3 Bos. & P. 115.

Likewise he is liable for costs where the action accrued to him upon his own transactions as executor (Norcross v. Boulton, 16 N. J. L. 310), or in his private right (Feig v. Wray, 64 How. Pr. (N. Y.) 391).

In groundless and vexatious suits brought by executors and administrators they must pay costs, especially in equity. **Ala.**—Reynolds v. Carter, 32 Ala. 444. **Ark.**—Blaisdell v. Sumpter, 66 Ark. 7, 48 S. W. 491. **Mich.**—Hill v. Mitchell, 40 Mich. 389. **N. Y.**—Getman v. Beardsley, 2 Johns. Ch. 274. **Pa.**—Show v. Conway, 7 Pa. 136.

Where the estate is very small, an executor who makes costs by relying upon an unreasonable objection, will be decreed to pay them personally. Beunick v. Bowman, 56 N. C. 314.

In California there is no necessity for finding of mismanagement and bad faith on the executor's part before awarding costs against him personally.

Meyer v. O'Rourke, 150 Cal. 177, 88 Pac. 706.

76. Lewis v. McCabe, 16 Mo. App. 398.

77. **N. J.**—Beatty v. Trustees, 39 N. J. Eq. 452. **N. Y.**—Buckland v. Gallup, 105 N. Y. 453, 11 N. E. 843. **Tex.**—Lanius v. Fletcher (Tex. Civ. App.), 99 S. W. 169, reversed on another point, 100 Tex. 550, 101 S. W. 1076.

The true rule is simply this: if it is not necessary for the plaintiff to name himself executor or administrator, then he shall pay costs, but if his title to the action comes to him in his representative character, and he can sue only as such, then he is excused if he fails in the action. **Ind.**—Harrison v. Warner, 1 Blackf. 385. **N. J.**—Norcross v. Boulton, 16 N. J. L. 310. **N. Y.**—Lyon v. Marshall, 11 Barb. 241; Lakin v. Sutton, 116 N. Y. Supp. 820. **S. C.**—Frink v. Luyten, 2 Bay 166. **Eng.**—Smith v. Barrow, 2 T. R. 476, 100 Eng. Reprint 256; Bangs v. Bangs, Barnes 119, 94 Eng. Reprint 835; Jenkins v. Plome, 11 Mod. 174, 88 Eng. Reprint 971.

78. **Ala.**—Reynolds v. Carter, 32 Ala. 444. **Mich.**—Hill v. Mitchell, 40 Mich. 389; Taylor v. Whitmore, 35 Mich. 97. **Ore.**—De Bow v. Wollenberg, 52 Ore. 404, 96 Pac. 536, 97 Pac. 717. **Pa.**—Pennypacker's Appeal, 57 Pa. 114.

79. **U. S.**—Bagnell v. Broderick, 13 Pet. 436, 10 L. ed. 235. **Ala.**—Stewart v. Hood, 10 Ala. 600; Craig v. Orton, 1 Minor 111. **Colo.**—Kilpatrick v. Haley, 14 Colo. App. 399, 60 Pac. 361. **Ga.**—Clements v. Maloney, 17 Ga. 289. **Ill.**—Jones v. Illinois Cent. R. Co., 106 Ill. App. 597; Masters v. Masters, 13 Ill. App. 611. **Ind.**—Pollard v. Buttery, 3 Blackf. 239. **N. H.**—Moulton v. Wendell, 37 N. H. 406. **R. I.**—Lynch v. Webster, 17 R. I. 513, 23 Atl. 27. **S. C.**—Giles v. Pratt, 1 Hill L. 239.

In the absence of statute the rule

(IV.) **Guardians.**—Where a guardian acts in good faith in the interests of his ward and the litigation is not due to any fault of his, he should not be charged personally with the costs of proceedings affecting his trust, but the same will be charged against the ward's estate in his hands.⁸⁰

(V.) **Receivers.**—In some jurisdictions a receiver in certain actions by him is entitled to recover his costs.⁸¹

In awarding costs in actions by receivers, the court may determine whether they shall be paid out of the funds in the receiver's hands,

is settled in some states that the costs should be imposed upon the executor individually, and not upon the state, nor upon him in his representative capacity. There is left to him the right to seek an allowance from the estate in a proper case. *Meyer v. O'Rourke*, 150 Cal. 177, 88 Pac. 706, citing *Mass. Hardy v. Call*, 16 Mass. 530. *Miss. Williamson v. Childress*, 26 Miss. 328. *E. I.—Lynch v. Webster*, 17 R. I. 513, 23 Atl. 27, 14 L. R. A. 696. *Vt.—O'Hear v. Skeeles*, 22 Vt. 152.

In some states if the judgment is against an executor or administrator, but such costs are not by the judgment made chargeable only upon the estate, the administrator is personally liable therefor. *Stevens v. San Francisco, etc. R. Co.*, 103 Cal. 252, 37 Pac. 146. See *State v. Ritter*, 20 Ind. 406; *McCarthy v. Speed*, 16 S. D. 584, 94 N. W. 411.

An executor may make a motion in his individual capacity to set aside an execution sale of his property to satisfy a judgment for costs. *McCarthy v. Speed*, *supra*.

But in some states "in an action against an executor or administrator, wherein judgment is rendered for debt and damages, and for costs also, two executions should be awarded, one for the debt or damages, against the goods or estate of the deceased in the hands of the executor or administrator, and the other for the costs, against the goods, estate, and body of the executor or administrator." *Ticonic Nat. Bank v. Turner*, 96 Me. 380, 52 Atl. 793; *Greenwood v. McGilvray*, 120 Mass. 516.

80. *Mass.—Blake v. Pegram*, 109 Mass. 541. *Mo.—Supreme Council Legion of Honor v. Nidelet*, 85 Mo. App. 283. *Pa.—McElhenny's Appeal*, 46 Pa. 347; *Shadle's Estate*, 30 Pa. Super. 160.

"A special guardian appearing for his ward is entitled to an allowance of costs, as his ward was made a party to, and cited in, this proceeding," for an accounting against an administrator, "and the account contains an allegation that she filed her claim with the administratrix, that the same was rejected, and that the claim is barred by the statute of limitations." *In re Rosch's Estate*, 28 Civ. Proc. 98, 55 N. Y. Supp. 434.

Proceedings for Accounting.—In New Jersey where a guardian fails to account at the time required by law, and is cited to do so, he must pay the costs of citation and the proceedings thereon, unless the court is induced by substantial reasons, to order otherwise. *Pyatt v. Pyatt*, 44 N. J. Eq. 491, 15 Atl. 421.

In New York, the allowance from the ward's estate of expenses of an accounting by a guardian is discretionary with the court. *In re Schneider's Estate*, 36 N. Y. Supp. 972; *In re Carman*, 4 N. Y. Supp. 690.

Appearance in Dual Capacity.—Where one appears as guardian *ad litem* and as general guardian, by one attorney, and the complaint is dismissed as to him in his capacity as general guardian because no cause of action is shown, the complaint should be dismissed as to him as general guardian without costs. *Davis v. Davis*, 27 Misc. 455, 59 N. Y. Supp. 223.

81. *Wardler v. Townsend*, 75 Mich. 385, 42 N. W. 950; *Bacon v. Clyne*, 70 Mich. 183, 38 N. W. 207 (action by receiver to recover assessment); *In re Silver Val. Mines*, L. R. 21 Ch. Div. 381.

A receiver heard on motions affecting his trust after leave of court obtained, may recover reasonable attorney's fees. *Hardt v. Levy*, 20 App. Div. 400, 46 N. Y. Supp. 815.

or by him personally.⁸² But in the absence of a showing of fraud and bad faith or mismanagement, a receiver will not be held personally liable for costs.⁸³

(VI.) **Trustees.**—As a general rule a trustee suing as such who has acted honestly and in good faith is entitled to his costs and sometimes even his attorney's fees, from the opposite party or out of the fund if there is one in court,⁸⁴ even though he will be ultimately benefited by the recovery.⁸⁵ But his costs must be taxed. A trustee cannot claim his costs out of the funds in his hands, except by the judgment of the court.⁸⁶

Liability for Costs.—And as a general rule, a trustee suing or defending as such cannot be adjudged liable for costs if unsuccessful, unless it is shown that he was guilty of mismanagement or bad faith, but such costs are chargeable on the estate or fund represented.⁸⁷

82. *In re Castle*, 2 N. Y. St. 362.

83. *Ala.*—*Saulsbury v. Lady Ensley Coal Co.*, 110 Ala. 585, 20 So. 72. *Ill.*—*Highley v. Deane*, 168 Ill. 266, 48 N. E. 50. *Ia.*—*Radford v. Folsom*, 55 Iowa 276, 7 N. W. 604, costs of reference to settle accounts. *N. Y.*—*Hardt v. Levy*, 20 App. Div. 400, 46 N. Y. Supp. 815.

If a proceeding is instituted by the receiver carelessly and without permission of the court, costs may be awarded against him personally, and no affirmative motion to that effect is necessary. *Matter of Castle*, 2 N. Y. St. 362.

In New York, an application to compel a receiver to make disbursements of funds in his hands is a special proceeding for the enforcement of a right, in which the award of costs is discretionary with the court. *People v. City Bank*, 86 N. Y. 32.

A state court cannot adjudge the receiver of a national bank liable for costs, because he is not an officer of the court, and is bound to pay over all money collected into the United States treasury. *Ocean Nat. Bank v. Carll*, 7 Hun (N. Y.) 237.

Taxation.—Before a receiver can be held liable for costs in an action in which he has appeared and defended as party defendant, notice must be given him that an application is to be made to charge him personally with the costs. *First Nat. Bank v. Washburn*, 20 App. Div. 518, 47 N. Y. Supp. 117.

84. *U. S.*—*Brigel v. Tug River Coal, etc. Co.*, 73 Fed. 13. *Mass.*—*Blake v. Pegram*, 109 Mass. 541. *N. Y.*—*Countant v. Catlin*, 2 Sandf. Ch. 435; *Alger*

v. Conger, 17 Hun 45. *Tenn.*—*De Grafenreid v. Green*, 1 Coldw. 109; *Perkins v. McGavock*, 3 Hayw. 255. *Wis.*—*In re Cole's Estate*, 102 Wis. 1, 78 N. W. 402.

In order to entitle a trustee to costs he must comply with any conditions the statute may prescribe for making such award. *Chapman v. Phillips*, 8 Pick. (Mass.) 25, must answer under oath.

Dismissal of Trustee's Bill.—In New Jersey no costs will be awarded a complainant trustee on the dismissal of his bill for the construction of any other kind of an instrument but a will. *Larkin v. Wikoff* (N. J. Eq.), 81 Atl. 365.

"The English cases are all in accord with *Dan. Ch. Pr.* 1426, where, in referring to the exception to the general rule in the allowance of costs to the complainant on the dismissal of his bill, it is said that 'the rule applies only to cases under wills; it does not apply where difficulties arise upon the construction of deeds.' *Hampton v. Bandwood*, 1 Mad. 218; *Patheing v. Dobbins*, Kay 1, 15." *Larkin v. Wikoff* (N. J.), 81 Atl. 365.

85. *American Life Ins. Co. v. Van Eps*, 56 N. Y. 601.

86. *McLaughlin v. Western R. Co.*, 12 Cush. (Mass.) 131.

87. *Cal.*—*Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305. *N. Y.*—*Hone v. De Peyster*, 106 N. Y. 645, 13 N. E. 778; *Dodge v. Crandall*, 30 N. Y. 294; *Smith v. A. D. Farmer Type Foundry Co.*, 18 Misc. 434, 41 N. Y. Supp. 788. *N. C.*—*Sugg v. Bernard*, 122 N. C. 155, 29 S. E. 221.

In North Carolina it is error to tax

But a trustee who is guilty of a neglect of duty or bad faith towards his trust,⁸⁸ or who is not proceeding in his representative capacity, but for his own benefit and to further his personal interests,⁸⁹ may be adjudged personally liable for costs.⁹⁰

(VII.) *Assignees*.—The assignee of the cause of action is also entitled to the costs allowed in the action.⁹¹

g. *Public Officers*.—In most states public officers are exempted from personal liability for costs, where they are acting in good faith in their representative capacity.⁹² But public officers guilty of mis-

trustees of an express trust who are parties to the action with the costs, unless the court has adjudged that they were guilty of mismanagement or bad faith in such action. *Smith v. King*, 107 N. C. 273, 12 S. E. 57; *Hockaday v. Lawrence* (N. C.), 72 S. E. 387.

A mere reversal of the lower court's finding raises no inference of bad faith. *Smith v. A. D. Farmer Type Founding Co.*, 13 Misc. 434, 41 N. Y. Supp. 788.

Taxation of Costs.—If a trust estate is liable for the costs it must be subjected therefor by an order of the chancellor and not by execution sale. *Ratcliff v. Elam*, 14 Ky. L. Rep. 772, 21 S. W. 352.

If a trustee in a deed of trust was justified in making an unsuccessful defense, he is not liable for costs, especially where he was mainly successful in the cause. *Emmons v. Curlett* (Del.), 81 Atl. 508.

88. *Ia.*—*Booth v. Bradford*, 114 Iowa 562, 87 N. W. 685. *N. J.*—*Frey v. Frey*, 17 N. J. Eq. 71. *N. Y.*—*Kimberlyn v. Stewart*, 22 How. Pr. 281; *Sibell v. Remsen*, 30 Barb. 441; *Cunningham v. McGregor*, 5 Duer 648; *Farrington v. Farmers' Loan, etc. Co.*, 66 Hun 632, 21 N. Y. Supp. 194. *N. C.*—*Sugg v. Bernard*, 122 N. C. 155, 29 S. E. 221. *Ore.*—*Royal v. Royal*, 30 Ore. 448, 47 Pac. 828, 48 Pac. 695. *Utah.*—*Waddell v. Waddell*, 36 Utah 435, 104 Pac. 743, trustee *de son tort*. *Vt.*—*Chamberlain v. Estey*, 55 Vt. 378.

If the *cestui que trust* is driven into litigation to establish the amount of the trust fund (*Warbass v. Armstrong*, 10 N. J. Eq. 263; *Franklin v. Frith*, 3 Bro. C. C. 433, 29 Eng. Reprint 627; *Newton v. Bennett*, 1 Bro. C. C. 359, 28 Eng. Reprint 1177), or if the trustees do not invest according to the terms of the trust (*Warbass v. Arm-*

strong, *supra*), in either case the trustee will be compelled to pay the costs.

89. *Ill.*—*Billings v. Warren*, 216 Ill. 281, 74 N. E. 1050. *N. Y.*—*American Life Ins. Co. v. Van Eps*, 56 N. Y. 601; *Carnahan v. Pond*, 15 Abb. Pr. 194. *N. C.*—*Ingram v. Kirkpatrick*, 43 N. C. 62. *Pa.*—*Raybold v. Raybold*, 20 Pa. 308.

90. A substituted trustee is not personally liable for costs in a proceeding instituted by him, although it is declared afterwards that his appointment was illegal. *Hughes v. Cuming*, 63 App. Div. 363, 71 N. Y. Supp. 599.

An application in New York to charge a trustee personally with costs requires a special motion upon notice. *Smith v. A. D. Farmer Type Founding Co.*, 13 Misc. 434, 41 N. Y. Supp. 788, citing *Slocum v. Barry*, 38 N. Y. 46.

91. *Clifford v. Northern P. R. Co.*, 55 Minn. 150, 56 N. W. 590.

Assignee for Creditors.—An assignee for the benefit of creditors will not be charged personally with the costs of an action, unless mismanagement or bad faith be shown. *Cunningham v. McGregor*, 12 How. Pr. (N. Y.) 303; *Jack v. Robie*, 48 Hun (N. Y.) 181.

92. *Ga.*—*Nunnally v. Road Comrs.*, Dud. 192, liability of road commissioners. *Mass.*—*Brown v. Austin*, 1 Mass. 208. *Mich.*—*Serafford v. Gladwin*, 42 Mich. 464, 4 N. W. 167. *Miss.*—*Adams v. Evans*, 74 Miss. 886, 21 So. 921, revenue agents. *N. Y.*—*Avery v. Stack*, 19 Wend. 50.

"Unless it affirmatively appears that public officers have acted with gross negligence, in bad faith, or with malice, costs should not be charged against them in proceedings or actions relating to their official duties." *O'Connor v. Walsh*, 83 App. Div. 179, 82 N. Y. Supp. 499.

A public officer of a state holding funds in that capacity, and sued in

feasance or even nonfeasance may be held personally liable for costs.⁹³ Nor can an officer doing an act without authority escape liability for costs because he happens to be a state officer.⁹⁴

Rule in Mandamus Proceedings.—A public officer made defendant in a mandamus proceeding to compel him to perform a legal duty, may be adjudged liable for costs, where the suit is successful.⁹⁵ But a public officer who acts in good faith and in the honest exercise of his duties as officer in resisting a mandamus, cannot be made liable for the costs, though he acts under a mistake.⁹⁶

h. Infants.—At common law in the absence of statute no judgment for costs can be rendered against an infant plaintiff,⁹⁷ especially

his official capacity, is not personally liable for the costs of the plaintiff, if he is charged with delinquency. *Hauenstein v. Lynham*, 131 U. S. xcxi, 28 L. ed. 125.

A county judge and county clerk, though acting in their official capacity, may be held liable in their individual capacity for costs for refusing to issue a warrant against a county, where it is not shown that they have any funds in their hands as such officers with which to pay the costs. *Bush & Co. v. Cauffield* (Tex. Civ. App.), 138 S. W. 1108.

A county judge may be held personally liable for the costs of a proceeding to obtain a writ of prohibition against him. *Mooney v. Denhardt*, 144 Ky. 263, 137 S. W. 1059.

93. *United State v. Schurz*, 102 U. S. 378, 407, 26 L. ed. 219.

Necessity for Taking Indemnity.—In some jurisdictions a public officer who brings suit in his own name may be adjudged liable for costs, unless he takes indemnity as required by the statute. *Smith v. Carter*, 30 Wis. 424.

94. *Bartles Oil Co. v. Lynch*, 109 Minn. 487, 124 N. W. 994.

In a proceeding to prevent officers from acting under an unconstitutional statute, they may be charged personally with the costs, because they are acting by their own wrong. *Corscadden v. Haswell*, 88 App. Div. 158, 84 N. Y. Supp. 597.

95. *U. S.—United State v. Schurz*, 102 U. S. 378, 26 L. ed. 219 (mandamus against the secretary of interior); *United States v. Boutwell*, 17 Wall. (U. S.) 604, 21 L. ed. 721 (mismanagement by secretary of treasury); *Kendall v. United States*, 12 Pet. (U. S.) 524, 9 L. ed. 1181. *Ill.—Rowe v. People*, 96 Ill. App. 438. *Tex.—Busch &*

Co. v. Cauffield (Tex. Civ. App.), 38 S. W. 1108.

If a judge improperly excludes an attorney from practice and refuses to put the order on record, or allow him to appeal, he is a proper defendant to a mandamus and liable for costs. *Ingersoll v. Howard*, 1 Heisk. (Tenn.) 247.

Where after an application to dissolve an injunction on a bond set down for hearing is successfully resisted by the plaintiff in injunction, a writ of mandamus is obtained "directing the trial judge to dissolve the injunction on bond, the matter is one which concerns the plaintiff in injunction, not the judge, and the former may be condemned, in a proper proceeding to pay the costs." *Johnson v. New Orleans*, 109 La. 696, 33 So. 735.

96. *Kloeb v. Comrs.*, 26 Ohio C. C. 152.

97. *Ala.—Perryman v. Burgster*, 6 Port. 99. *Ga.—Platt v. Southern Photo Material Co.*, 4 Ga. App. 159, 60 S. E. 1068. *Ind.—Bouche v. Ryan*, 3 Blackf. 472. *Ky.—Sproule v. Botts*, 5 J. J. Marsh. 162. *Neb.—Kleffel v. Bullock*, 8 Neb. 336.

An infant is not liable to a judgment for costs after arriving at full age, in an action brought without a guardian or next friend, but not terminated during infancy, if on reaching his majority he promptly disclaims all benefit from the proceeding and refused to proceed further. *Kleffel v. Bullock*, 8 Neb. 336.

But he cannot be discharged on motion from a judgment against him for costs; it is matter of error. *Gardiner v. Holt*, 2 Str. 1217, 93 Eng. Reprint. 1140.

Costs on Appeal.—Where it appears from the record that infant appellees are not represented by guardian or next

in a court of equity.⁹⁸ But in some states either by statute or practice of the courts, an infant defendant if unsuccessful incurs the same liability for costs as an adult.⁹⁹

i. *Husband and Wife.*—*Liability of Husband.*—If a husband joins in a suit by or against his wife voluntarily, he is liable to have costs adjudged against him as any other party. But if he is a party, not by his own act, but because of the legal requirements that he shall be, no judgment for costs can be rendered against him.¹

Liability of Wife.—Under the married woman's law existing in most states allowing a married woman to sue as a *feme sole*, a judgment may be rendered against her for costs where she sues as sole plaintiff, enforceable against her separate estate.² But in some jurisdictions, she is personally liable for costs if the suit relates to her separate estate.³

j. *Intervenors and Stakeholders.*—*Intervenors.*—An intervenor who is successful in his intervention is entitled to recover his costs as in any ordinary civil suit,⁴ provided his intervention was neces-

friend, the costs of the appeal will be taxed against the appellants. *Ex parte Cooper*, 136 N. C. 130, 48 S. E. 581.

If an infant sues without a next friend, judgment cannot be entered for that reason against the infant for costs of an appeal. *Annapolis, etc. R. Co. v. State*, 104 Md. 659, 65 Atl. 434.

98. *Smith v. Smith*, 13 Mich. 258; *Turner v. Turner*, 1 Str. 708, 93 Eng. Reprint 798; *Perkins v. Hammond*, 1 Dick. 287, 21 Eng. Reprint 279.

In an action to obtain title from minor heirs costs should not be decreed against him, because they are unable to convey the same. *Clark v. Clark*, 21 Neb. 402, 32 N. W. 157; *Carter v. Montgomery*, 2 Tenn. Ch. 455. See *Fleming v. McHale*, 47 Ill. 282.

99. Ill.—*Myers v. Rehkopf*, 30 Ill. App. 209. Mass.—*Smith v. Floyd*, 1 Pick. 275. Minn.—*Bryant v. Livermore*, 20 Minn. 313. Tenn.—*Dial v. Wood*, 9 Baxt. 296; *State v. Dillon*, 1 Head 389; *Beasley v. State*, 2 Yerg. 481.

In some English cases, in actions at law, it has been held that an infant is liable for costs. *Lane's Lessee v. Norris*, 1 Har. & McH. (Md.) 459; *Finley v. Jowle*, 13 East 6, 104 Eng. Reprint 267; *Hamlen v. Hamlen*, 1 Bulst. 189, 97 Eng. Reprint 877; *Thrustout v. Percival*, Barnes 183, 94 Eng. Reprint 867; *Gardiner v. Holt*, 2 Str. 1212, 93 Eng. Reprint 1140.

1. *Davis v. Lumpkin*, 58 Miss. 327.

2. Ala.—*Balkum v. Kellum*, 83 Ala. 449, 3 So. 696. Cal.—*Leonard v. Townsend*, 26 Cal. 435. Ill.—*Musgrave v. Musgrave*, 54 Ill. 186. Ind.—*Adams v. Waters*, 50 Ind. 325. N. Y.—*Baldwin v. Kimmel*, 16 Abb. Pr. 353. R. I.—*Burdick v. Burdick*, 16 R. I. 495, 17 Atl. 859, joint tort action against husband and wife.

At common law it is error to decree costs against a *feme covert*. *Musgrave v. Musgrave*, 54 Ill. 186; *Reavis v. Reavis*, 2 Ill. 242; *Hubbard v. Barcus*, 38 Md. 166.

The court in its discretion may tax a married woman with costs, where she appears in the cause and makes defense, but does not file any disclaimer. *Pflugar v. Pultz* (N. J. Eq.), 16 Atl. 172.

In a jointaction against husband and wife in Texas, judgment for costs cannot be entered against the wife. *Walker v. Dickey*, 44 Tex. Civ. App. 110, 98 S. W. 658.

3. *Askew v. Renfroe*, 81 Ala. 360, 1 So. 47.

Where a judgment in an action of ejectment is obtained against a married woman and her husband for costs, such judgment cannot be enforced by suit in equity against the separate estate of the wife. *Thorn v. Sprouse*, 39 W. Va. 706, 20 S. E. 676.

4. Missouri, etc. R. Co. v. Texas, etc. R. Co., 38 Fed. 775; *Central Trust Co. v. Wabash, etc. R. Co.*, 32 Fed. 684;

sary and proper.⁵ And in like manner an intervener is liable for costs in case he is not successful, either alone,⁶ or jointly with his co-defendants,⁷ in case the action fails. But if the intervener afterwards withdraws or dismisses his petition of intervention, he ceases to be a party to the record, and no judgment for costs can be entered against him.⁸

Stakeholders.—A stakeholder is entitled to his costs and sometimes even to his attorney's fees.⁹

In re St. John, 6 Hill (N. Y.) 356; *Jackson v. Lytle*, 4 Cow. (N. Y.) 16. Compare *Jackson v. Fawkes* (Tex.), 20 S. W. 136.

"Where an intervener comes into a case and joins the defendant in resisting the demand of the plaintiff, and there is judgment in the trial court against both defendant and intervener, from which they appeal," securing a reversal in toto, "and the plaintiff's demand is rejected at his cost in both courts, the intervener is a party to and beneficiary of such judgment, and is entitled to recover his costs." *Johnson v. New Orleans*, 109 La. 696, 33 So. 735.

5. *Reed v. Provident Sav. Life Assur. Soc.*, 190 N. Y. 111, 82 N. E. 734; *Springer v. Ayer*, 50 Wash. 642, 97 Pac. 774.

If the intervener's appearance relates only to his own interests, no attorney's fee will be allowed out of the general fund. *Ex parte Gray*, 157 Ala. 358, 47 So. 286.

6. **U. S.**—*Craig v. Leitensdorfer*, 127 U. S. 764, 8 Sup. Ct. 1393, 32 L. ed. 322. **Ia.**—*Gifford v. Workman*, 15 Iowa 34. **Ky.**—*Davis v. Sharron*, 15 B. Mon. 64. **N. Y.**—*West v. West Bradley, etc. Mfg. Co.*, 7 N. Y. St. 386. **Pa.**—*Manning v. Shoop*, 170 Pa. 236, 32 Atl. 412, church held liable. **S. C.**—*Regenstein v. Pearlstein*, 32 S. C. 437, 11 S. E. 298. **Wash.**—*Cushing v. Houston*, 53 Wash. 379, 102 Pac. 29.

If one volunteers himself as a party defendant and brings a cross-bill instead of the more summary and less expensive proceeding of petition of intervention, he may be adjudged to pay all the costs. *Gregory v. Pike*, 67 Fed. 837, 15 C. C. A. 33.

On dismissal of the intervention proceedings costs may be taxed against the intervener. *Reay v. Butler*, 99 Cal.

477, 33 Pac. 1134; *Kinnear v. Flanders*, 17 Colo. 11, 28 Pac. 327.

A mortgagee who intervenes and defends his mortgagor's title in an action of ejectment against the latter may be adjudged to pay the costs. *Sand v. Church*, 32 App. Div. 139, 52 N. Y. Supp. 854.

But if a defendant mortgagee is compelled to intervene and defend his right to property because of the unwarranted interference of others with it, he cannot be made liable for costs. *Appeal of Yard (Pa.)*, 12 Atl. 359.

Taxable Costs.—In no event are interveners liable for costs which accrued before they intervened. *Bailsback v. Patton*, 34 Neb. 490, 52 N. W. 277; *Williams v. Washington*, 43 S. C. 355, 21 S. E. 259.

7. *Spruill v. Arrington*, 109 N. C. 192, 13 S. E. 779.

8. *Guinn v. Iowa, etc. R. Co.*, 125 Iowa 301, 101 N. W. 94.

But in Texas it has been held that one who intervenes in a suit may on final judgment be decreed to pay the costs incurred by him, although at the trial he withdraws his plea of intervention. *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101.

9. *Dowdall v. Lenox*, 2 Edw. Ch. (N. Y.) 267; *Red River Nat. Bank v. De Berry*, 47 Tex. Civ. App. 96, 105 S. W. 998; *Hatch v. Hatch*, 35 Tex. Civ. App. 373, 80 S. W. 411 (writ of error denied by supreme court).

"An innocent stakeholder, without any interest in the pending litigation, depositing in court, by consent of the judge thereof, the full amount he owes, or is in his hands, and which is the object of dispute between contesting claimants, the rightfulness of whose claims is the subject of litigation," is not liable for costs subsequently accruing. *Lambert v. Penn Mut. Life Ins. Co.*, 50 La. Ann. 1027, 24 So. 16.

k. *The State and Its Subsidiaries.*—At common law and in the absence of express statute the state, like any other sovereign, neither pays nor receives costs in civil actions.¹⁰ But there can be no doubt as to the power and authority of the legislature to make a state liable for costs.¹¹ A statute of this kind, however, must be clear and ex-

10. U. S.—Stanley v. Schwalby, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. ed. 960; The Antelope, 12 Wheat. 546, 6 L. ed. 723; United States v. Barker, 2 Wheat. 395, 4 L. ed. 271; Carlisle v. Cooper, 64 Fed. 472, 12 C. C. A. 235. Ala.—Collier v. Powell, 23 Ala. 579. Cal.—People v. Kirkpatrick, 57 Cal. 353. Ga.—Mill v. State, 2 Ga. App. 398, 58 S. E. 673. Ill.—People v. Pierce, 6 Ill. 553. Ind.—*Ex parte* Fitzpatrick, 171 Ind. 557, 86 N. E. 964. Ky.—Com. v. Todd, 9 Bush 708. La.—Succession of Townsend, 40 La. Ann. 66, 3 So. 488; State v. Taylor, 34 La. Ann. 978; State v. Taylor, 33 La. Ann. 1270. Md. State v. Williams, 101 Md. 529, 61 Atl. 297, explaining State v. Maryland, etc. Assn., 98 Md. 216, 56 Atl. 484. Mich. Courtright v. Kirchner, 43 Mich. 411, 5 N. W. 441. Minn.—State v. Village of Dover, 130 N. W. 539; Bartles Oil Co. v. Lynch, 124 N. W. 994. Pa.—Com. v. Yeakel, 1 Woodw. Dec. 143. Tenn. Henley v. State, 98 Tenn. 665, 41 S. W. 352. Vt.—State v. Bradford, etc. Co., 71 Vt. 234, 44 Atl. 349. Wash.—Romine v. State, 7 Wash. 215, 34 Pac. 924. Wis.—Sandberg v. State, 113 Wis. 578, 89 N. W. 504, explaining Noyes v. State, 46 Wis. 250, 1 N. W. 1, 32 Am. Rep. 710.

"The rule was that the king should neither pay nor receive costs. The former was his prerogative and the latter was beneath his dignity. The same rule is applied in the United States in suits, either civil or criminal, in which the federal or state governments, including county and municipal corporations, when acting as an arm or agency of the state, are parties; and they are accordingly only liable for costs when the law-making power by statute has made them so. Hence a court cannot, *ex officio*, give costs for or against anyone." Henley v. State, 98 Tenn. 665, 41 S. W. 352; *Ex parte* Griffin, 88 Tenn. 547, 13 S. W. 75; Morgan v. Pickard, 86 Tenn. 208, 9 S. W. 690; Gatewood v. Palmer, 10 Humph. (Tenn.) 466; Mooneys v. State, 2 Yerg. (Tenn.) 578.

In controversies between states in the United States Supreme Court costs may be allowed the prevailing party. Missouri v. Illinois, 202 U. S. 598, 26 Sup. Ct. 713, 50 L. ed. 1160.

"The United States has not been above taking costs." Pine River Logging & Imp. Co. v. United States, 156 U. S. 279, 22 Sup. Ct. 920, 46 L. ed. 1164; United States v. Sanborn, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. ed. 112.

In Louisiana, "all costs for which the state may become liable is to be paid out of the fund" appropriated for judicial expenses. State v. New Orleans Debenture Redemption Co., 112 La. 1, 36 So. 205.

Proceedings Through Attorney General.—Where quo warranto proceedings are instituted by the attorney general as the representative of the sovereignty of the state, to redress an alleged usurpation of office or corporate franchises, he is not liable officially or otherwise to the defendant for costs in case the proceedings failed. Ill. Attorney General v. Illinois College, 85 Ill. 516. Minn.—State v. Village of Dover, 130 N. W. 539. N. C.—Houston v. Neuse River Nav. Co., 53 N. C. 476. Vt.—State v. Boston, etc. R. Co., 25 Vt. 433.

11. State v. Simmons, 119 N. C. 50, 25 S. E. 789.

By statute in some jurisdictions. Deenen v. Unverzagt, 225 Ill. 378, 80 N. E. 321; State v. Harlow, 26 Me. 74.

A party who makes good his defense in a suit by the state cannot recover costs against it, but should not be burdened with the general costs of the litigation. Com. v. Todd, 9 Bush (Ky.) 708.

When the State is plaintiff it is liable, in some jurisdictions just as would be a private party. Mich.—*In re* Fox's Estate, 162 Mich. 531, 127 N. W. 668; People v. Crucible Steel Co., 151 Mich. 618, 115 N. W. 705 (state not liable in action on penal statute); Flint, etc. R. Co. v. State Auditors, 102 Mich. 500, 60 N. W. 971. N. C.—State v. Sim-

plinit, for the state cannot be made a debtor by implication.¹²

Public Bodies.—Costs are not generally given against public bodies where it appears that they have acted in good faith.¹³

1. **Creditors Before Masters.**—While a creditor is not allowed the costs of proving his original claim before a master,¹⁴ yet a creditor complaining of the proceedings before the master in the settlement of the receivers' accounts may be allowed his costs, to be paid out of the fund, or by the receivers, at the discretion of the court.¹⁵

m. **Mortagor and Mortgagee.**¹⁶—**Redemption Suits.**—While as a general rule the mortgagor in a redemption suit pays costs to the mortgagee, although he is the successful party,¹⁷ unless he establishes a prior tender of the amount due on the mortgage,¹⁸ yet the

mons County, 120 N. C. 19, 26 S. E. 649; State v. Simmons, 119 N. C. 50, 25 S. E. 789. **Tenn.**—State v. Buchanan (Tenn. Ch. App.), 62 S. W. 287.

In New York "the Code of Civil Procedure expressly provides that the people of the state may be made a party defendant to an action for the partition of real property in the same manner as a private person (section 1594), and in such action the court may in its discretion render judgment against any party to the action for the costs and expenses thereof (section 1579)." *Haley v. Sheridan*, 190 N. Y. 331, 83 N. E. 296, 299.

Municipal corporations are liable in some states. *Uhl v. Taxing Dist.*, 6 Lea (Tenn.) 610.

12. **Ill.**—*Galpin v. Chicago*, 249 Ill. 554, 94 N. E. 961. **Ky.**—*Davis v. Norman*, 101 Ky. 599, 42 S. W. 108. **Mich.**—*Auditor General v. Baker*, 84 Mich. 113, 47 N. W. 515.

In **Minnesota** the state is liable if it fails, under a statute awarding costs to the prevailing party. *State v. Buckman*, 95 Minn. 272, 104 N. W. 289.

13. *Scrafford v. Gladwin Supervisors*, 42 Mich. 464, 4 N. W. 167 (county supervisors); *State v. Bonner*, 44 N. C. 257.

School Trustees.—In *People v. Yeazel*, 84 Ill. 539, the people were plaintiffs suing for the use of trustees of school districts. As against the municipal plaintiffs no costs could be awarded, and the beneficiaries, under statute, were not liable.

Cost of Opinions of Courts.—Requiring a state board to pay the costs of opinions of the appellate courts is not requiring the state to pay, in the ordinary sense, even though the board pays from a fund derived from the

state. *Ex parte Fitzpatrick*, 171 Ind. 557, 86 N. E. 964.

14. *Abell v. Screech*, 10 Ves. 355, 32 Eng. Reprint 882. See the title "References."

15. *Richards v. Morris Canal & B. Co.*, 4 N. J. Eq. 428.

16. See the titles "Chattel Mortgages;" "Mortgages;" "Redemption."

17. 2 Spence's Eq. 669; 3 Danl. Ch. Pr. 1579, and the following cases: **Ala.** *Blum & Co. v. Mitchell*, 59 Ala. 535. **Mass.**—*Gerrish v. Black*, 113 Mass. 486. **Mich.**—*Lamb v. Jeffrey*, 47 Mich. 28, 10 N. W. 63. **N. J.**—*Phillips v. Hulsizer*, 20 N. J. Eq. 308. **N. Y.**—*Slee v. Manhattan County*, 1 Paige 48, 81; *Shearer v. Field*, 6 Misc. 189, 27 N. Y. Supp. 29. **Pa.**—*Winton v. Mott*, 4 Luz. Leg. Reg. 71. **R. I.**—*Sessions v. Richmond*, 1 R. I. 298. **Vt.**—*Thrall v. Chittenden*, 31 Vt. 183; *Mott v. Harrington*, 15 Vt. 185. **Va.**—*Turner v. Turner*, 3 Munf. 66. **Wis.**—*Lynch v. Ryan*, 137 Wis. 13, 118 N. W. 174.

But the mortgagor is not liable for costs of an appeal. *Liskey v. Snyder*, 56 W. Va. 610, 49 S. E. 515.

"In a suit by a subsequent incumbrancer to redeem, it is the rule that the party redeeming shall pay the costs of the suit, unless the defendant improperly resists the assertion of the right of redemption." *Naylor v. Colville*, 20 App. Div. 581, 47 N. Y. Supp. 267; *Belden v. Slade*, 26 Hun (N. Y.) 635.

A junior incumbrancer may redeem from a sale on a senior mortgage, without paying costs, where he was not made a party to the foreclosure suit. *Gaskell v. Viquesney*, 122 Ind. 244, 23 N. E. 791.

18. **Ark.**—*Longino v. Ball-Warren Com. Co.*, 84 Ark. 521, 106 S. W. 682.

mortgagee may, by misconduct, lose the benefit of this rule, and not only lose his own costs, but be made to pay costs.¹⁹

Foreclosure Proceedings.—The successful defendant in a proceeding to foreclose a mortgage may be awarded costs in the discretion of the court.²⁰

Mortgages.—As a general rule a mortgagee is entitled to his costs, unless he appears and interposes claims in bad faith,²¹ to be paid out of the surplus money after the foreclosure sale, unless insufficient,²² in which case the mortgagor is personally liable for any un-

Mass.—Putnam v. Putnam, 13 Pick. 129. **Mich.**—Lamb v. Jeffrey, 47 Mich. 28, 10 N. W. 65. **N. J.**—Shields v. Lozeau, 22 N. J. Eq. 447. **N. Y.**—Bridgman v. Carhartt, Hopk. 234. **W. Va.**—Liskey v. Snyder, 56 W. Va. 610, 49 S. E. 515.

19. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813. **Me.**—Kittridge v. McLaughlin, 45 N. H. 211. **Mass.**—Rand v. Cutler, 155 Mass. 451, 29 N. E. 1085. **N. H.**—Brown v. Simons, 45 N. H. 211; McNeil v. Call, 19 N. H. 403. **N. J.**—Griffin v. Cooper, 73 N. J. Eq. 465, 68 Atl. 1095; Winters v. Earl, 52 N. J. Eq. 52, 28 Atl. 15. **N. Y.**—Brockway v. Wells, 1 Paige 617. **N. C.**—Bruner v. Threadgill, 93 N. C. 225. **R. I.**—Ryer v. Morrison, 21 R. I. 127, 42 Atl. 509. **Wis.**—Lynch v. Ryan, 137 Wis. 13, 118 N. W. 174.

While as a general rule a mortgagee is entitled to costs on a bill to redeem, yet in cases of improper conduct on his part (Bowen v. Atwood, 10 R. I. 302, and of his denial of a right to redeem (Ryer v. Morrison, 21 R. I. 127, 42 Atl. 509; Costigan v. Costigan, 20 R. I. 535, 40 Atl. 341; Sessions v. Richmond, 1 R. I. 298), costs are not awarded to him.

"If the defendant is at fault, rendering expensive litigation necessary to establish plaintiff's right to redeem, the plaintiff may, in the discretion of the court, be allowed costs." Lynch v. Ryan, 137 Wis. 13, 118 N. W. 174, per Marshall, J.

In some cases costs will not be granted to either party, as where both are in fault. Loveridge v. Larned, 7 Fed. 294; Green v. Wescott, 13 Wis. 606.

One who resists the right to redeem from a tax sale must pay the costs of his unsuccessful defense. Kelley v. Chicago, etc. R. Co. (Iowa), 134 N. W. 566.

Taxation.—"Generally in a suit for redemption of mortgaged property and for an accounting if the circumstances are exceptional, warranting the imposition of costs upon the defendant, recovery should be contingent upon plaintiff exercising his right of redemption but under exceptional circumstances whereby the plaintiff by defendant's wrong is put to very burdensome expenses to establish his right, the recovery of costs may properly be made absolute." Lynch v. Ryan, 137 Wis. 13, 118 N. W. 174, per Marshall, J.

20. Brown v. Skotland, 12 N. D. 445, 97 N. W. 543.

"The costs or attorney's fee which may be allowed by the provisions of section 7176, Rev. Codes 1905, apply only to actions which are indisputably for the foreclosure of a mortgage upon real or personal property. The fact that the parties in equity stand in a relation that is practically that of mortgagor and mortgagee does not of itself require or authorize an allowance of costs under this section." Whitney v. Akin (N. D.), 125 N. W. 470, per Ellsworth, J.

21. Lewis v. Conover, 21 N. J. Eq. 230; Danbury v. Robinson, 14 N. J. Eq. 324; Concklin v. Coddington, 12 N. J. Eq. 250; Wetherell v. Collins, 3 Madd. 255, 56 Eng. Reprint 502; Detillin v. Gale, 7 Ves. 583, 32 Eng. Reprint 234; Gammon v. Stone, 1 Ves. Sr. 339, 27 Eng. Reprint 1068.

Amount of Costs.—A mortgagee who brings two suits to foreclose two mortgages on the same property, one being sufficient, can have costs in one only. N. J.—Demarest v. Berry, 16 N. J. Eq. 481. N. Y.—Roosevelt v. Ellithorp, 10 Paige Ch. 415. **Utah.**—Thompson v. Skeen, 14 Utah 209, 46 Pac. 1103.

22. Botsford v. Botsford, 49 Mich. 29, 12 N. W. 897; McPherson v. McHousel, 13 N. J. Eq. 299.

satisfied balance.²³ But if the mortgagee is guilty of misconduct or otherwise causes the litigation, he may be compelled to pay the costs.²⁴

n. *Relators*.—As a general rule the relator in a proceeding is entitled to costs if he is the successful party.²⁵

Liability for Costs.—And where a proceeding is instituted in the name of the state on the relation of private individuals, in their interest and for their benefit, costs may be adjudged against the relators, if unsuccessful.²⁶ But the statutes providing that relators shall be

23. *Boyd v. Dodge*, 10 Paige (N. Y.) 42.

24. *Carey v. Fulmer*, 74 Miss. 729, 21 So. 752; *Shuttleworth v. Lowther*, cited in *Detillin v. Gale*, 7 Ves. 583, 32 Eng. Reprint 234.

Where a mortgagee is made defendant in an action seeking to place the property of the mortgagor in the hands of a receiver, and is involuntarily prevented from foreclosing his mortgage, and does no more than contest the appointment of a receiver, he is not liable for the costs or expenses of the proceeding. *Bradford v. Cooledge*, 103 Ga. 753, 30 S. E. 579.

But if the mortgagee comes in and makes himself a party complainant and sets forth the fact of his mortgage and voluntarily litigates with the other creditors, he thus recognizes the necessity for the receivership, and becomes liable for his proportion of the costs and expenses of the litigation. *Garmany v. Lawton*, 124 Ga. 876, 53 S. E. 669, 110 Am. St. Rep. 207; *Central Trust Co. v. Thurman*, 94 Ga. 735, 20 S. E. 141; *Lewis v. Edwards*, 92 Ga. 533, 17 S. E. 920; *Lowry Bkg. Co. v. Abbott*, 87 Ga. 134, 13 S. E. 204.

25. *U. S.*—*Warner Val. Stock Co. v. Smith*, 165 U. S. 23, 17 Sup. Ct. 225, 41 L. ed. 621; *United States v. Schurz*, 102 U. S. 407, 26 L. ed. 219; *United States v. Boutwell*, 17 Wall. 604, 21 L. ed. 721. *Kan.*—*Moss v. Patterson*, 40 Kan. 726, 20 Pac. 457; *State v. Jefferson County*, 11 Kan. 66. *Mass.*—*Bliss v. American Bible Soc.*, 2 Allen 334. *Minn.*—*State v. Village of Dover*, 130 N. W. 539. *Mont.*—*State v. Newell*, 13 Mont. 302, 34 Pac. 28, relator in habeas corpus proceeding. *Neb.*—*State v. Newman*, 25 Neb. 35, 40 N. W. 603. *N. Y.*—*People v. Clute*, 52 N. Y. 576. *N. C.*—*State v. King*, 23 N. C. 22. *S. C.*—*State v. County Treasurer*, 10 S. C. 40. *Wash.*—*State ex rel. Cummings v. Superior Court*, 5 Wash. 518, 32 Pac.

457, 771. *Wis.*—*Wunderlich v. Kalkofen*, 134 Wis. 74, 113 N. W. 1091; *Risch v. Board of Trustees*, 121 Wis. 44, 98 N. W. 954; *State v. Jenkins*, 46 Wis. 616, 1 N. W. 241; *State ex rel. School Dist. v. Wolfrom*, 25 Wis. 468. *Eng.*—9 *Anne Ch.* 20, §5; *Rex v. Downes*, 1 T. R. 453, 99 Eng. Reprint 1193; *Osborne v. Denne*, 7 Ves. Jr. 424, 32 Eng. Reprint 172.

“Costs should not be awarded to relator on granting a writ of mandamus against a public officer, where it appears that his refusal to comply with the demand of the relator was conscientious, and founded on reasonable grounds.” *People v. Flagg*, 5 Abb. Pr. (N. Y.) 232.

A federal officer, substituted in place of his predecessor against whom a writ of mandamus had abated, is not liable for costs arising prior to his substitution. *New Mexico ex rel. Caledonian Coal Co. v. Baker*, 196 U. S. 432, 25 Sup. Ct. 375, 49 L. ed. 540.

26. *Ala.*—*State v. City Council*, 74 Ala. 226. *Ga.*—*Harris v. Sheffield*, 123 Ga. 299, 57 S. E. 305. *Ill.*—*People v. Board of Suprs.*, 23 Ill. App. 386. *Ind.*—*Ex parte Fitzpatrick*, 171 Ind. 557, 86 N. E. 964; *State v. Henderson*, 90 Ind. 406. *Mass.*—*Attorney General v. Butler*, 123 Mass. 304. *Mich.*—*Comp. Laws*, §11, 277; *Baldwin v. Branch Circ. Judge*, 48 Mich. 525, 12 N. W. 686. *Mo.*—*In re Green*, 40 Mo. App. 491. *Neb.*—*State v. Newman*, 25 Neb. 35, 40 N. W. 603. *N. Y.*—*People v. New York Common Pleas*, 1 How. Pr. 222. *Tenn.*—*State v. Watson* (Tenn. Ch.), 39 S. W. 536; *State v. Red River Tpk. Co.*, 112 Tenn. 615, 79 S. W. 798. *Tex.*—*State v. Broach* (Tex. Civ. App.), 35 S. W. 86. *Vt.*—*State v. Bradford*, 32 Vt. 50. *Eng.*—*Attorney General v. Vivian*, 1 Russ. 226, 38 Eng. Reprint 88; *Attorney General v. Smart*, 1 Ves. Sr. 72, 27 Eng. Reprint 898.

In the absence of statute, if “a mo-

entitled to and liable for costs, do not apply to a proceeding by the state on the relation of the attorney general.²⁷

o. Claimants of Funds and Deposits in Court.—The claimants of a fund in court who ultimately recover are entitled to costs; and if unsuccessful are liable for costs.²⁸

p. Next Friend and Guardian Ad Litem.— (1.) *Next Friend.*—At common law and in the absence of a statute to the contrary, one suing as next friend is liable in the first instance for the costs of a suit which is unsuccessful,²⁹ especially if the action be brought in a

tion for prohibition has been dismissed without order concerning the costs, the defendant is not entitled to recover costs against the relator." *Town Council of Beaufort v. Danner*, 1 Strobb. (S. C.) 176.

But if an application for mandamus is dismissed by the relator, he is liable for all the costs. *State v. New Orleans*, 44 La. Ann. 354, 10 So. 766.

By statute in Tennessee relators in a bill are liable for the costs. *State v. Watson* (Tenn. Ch. App.), 39 S. W. 536.

In Indiana, the relator is not liable for costs, where the suit is by the state. *State v. Lahue*, 7 Blackf. (Ind.) 604; *Jones v. State*, 5 Blackf. (Ind.) 141. Compare *Ex parte Fitzpatrick*, 171 Ind. 557, 86 N. E. 964.

Under the North Carolina statute "concerning writs of *Quo Warranto* and *Mandamus*, the defendant, though judgment is given for him, cannot recover his costs against the relator, where the public only is interested, for the act . . . must be confined to those cases only where the relator claims some office or franchise, and has therefore a personal interest in the suit." *State v. King*, 23 N. C. 22.

Where disbarment proceedings are instituted by private persons, it is not error to adjudge the costs against them, if they fail to sustain the charges. *State v. Kemp*, 82 Mo. 213.

But in other states "such costs should not be charged against the relators, but against the state, on whose relation, in whose behalf, and for whose benefit alone, the relators acted." *State v. Martin*, 45 Wash. 76, 87 Pac. 1054.

The relator in commitment proceedings against lunatics and drunkards is not liable for costs when the proceeding fails, if he acted in good faith. *In re White*, 17 N. J. Eq. 274. In

Pennsylvania, by statute, such liability is confined to "an unfounded application, where the judge holding the inquisition shall certify that it was without probable cause." *Com. v. Quinter*, 2 Woodw. Dec. (Pa.) 377.

In some states, however, he is liable. *Galbreath v. Black*, 89 Ind. 300; *In re Van Cott*, 1 Paige Ch. (N. Y.) 489.

27. *State v. Village of Dover* (Minn.), 130 N. W. 539.

28. *Kinn v. First Nat. Bank*, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012, a reward paid into court.

29. 2 Burrill's Pr. (2nd ed.), p. 81; 1 Tidd's Pr. 72, and the following cases: Ala.—*Hughes v. Hughes*, 44 Ala. 693; *Smith v. Gaffard*, 33 Ala. 168; *Perryman v. Burgster*, 6 Port. 99. But see *Ward v. Matthews*, 122 Ala. 188, 25 So. 50. Del.—*Ranche v. Blumenthal*, 4 Penne. 521, 57 Atl. 368. Ga.—*Thompson v. Rabun*, 131 Ga. 713, 63 S. E. 215; *Nance v. Stockburger*, 112 Ga. 90, 37 S. E. 125; *Platt v. Southern Photo Material Co.*, 4 Ga. App. 159, 60 S. E. 1068. Ia.—*Vance v. Fall*, 48 Iowa 364.

Ky.—*Wilson v. McGee*, 2 A. K. Marsh. 600; *Yeizer v. Stone's Heirs*, 7 T. B. Mon. 189 (costs in appellate court).

Mich.—*Crittenden v. Canfield*, 87 Mich. 152, 49 N. W. 554; *Haines v. Oatman*, 2 Doug. 430. Neb.—*Kleffel v. Bullock*, 8 Neb. 336. N. Y.—*Dalrymple v. Lamb*, 3 Wend. 424. N. C.—*Mason v. McCormick*, 75 N. C. 263. Tenn.—*Stephenson v. Stephenson*, 3 Hayw. 122. Tex.

Johnson v. Taylor, 43 Tex. 121; *Lewis v. Texas*, etc. R. Co., 47 Tex. Civ. App. 425, 105 S. W. 334. Va.—*Spencer v. Ford*, 1 Rob. 648; *Burwell v. Corbin*, 1 Rand. 131, 10 Am. Dec. 494. W. Va.

Fisher v. Bell, 65 W. Va. 10, 63 S. E. 620. Eng.—*Slaughter v. Talnot*, Barnes 128,

94 Eng. Reprint 839; *Frank v. Mainwaring*, 4 Beav. 37, 49 Eng. Reprint 251; *Hawkes v. Cottrell*, 3 H. & N. 243; *Sinclair v. Sinclair*, 13 M. & W. 640.

court of equity,³⁰ though he is no party to the suit in the technical sense of the term.³¹ But a next friend is entitled to be reimbursed out of the estate of the person in whose behalf he sues, if it appears that he acted in good faith and with reasonable caution, and simply with a view to protect the interests of a person unable to protect himself,³²

"Indeed one of the chief objects in requiring a next friend seems to be to supply the want of capacity in the infant, to afford in his own person a party on the record responsible for costs." *Sick v. Michigan Aid Assn.*, 49 Mich. 50, 12 N. W. 905; *Heft v. McGill*, 3 Pa. 256.

This is so in some states by statute. *Arkansas & L. R. Co. v. Luck*, 86 Ark. 564, 111 S. W. 1126; *Tague v. Hayward*, 25 Ind. 427; *Holmes v. Adkins*, 2 Ind. 398; *Klaus v. State*, 54 Miss. 644. But such statutes are merely declaratory of the common law. *Kleffel v. Bullock*, 8 Neb. 336.

In *New York* a next friend of an infant is chargeable with the costs of the suit only where the infant is sole plaintiff. *Hulburt v. Newell*, 4 How. Pr. (N. Y.) 93.

A next friend of a *feme covert* is answerable for costs in case the suit is instituted without any reasonable cause. *Ala.*—*Haney v. Lundie*, 58 Ala. 100. *Ga.*—*Harper v. Whitehead*, 33 Ga. 138. *N. Y.*—*Wood v. Wood*, 2 Paige Ch. 454. *Eng.*—*In re Glanwill*, 31 Ch. D. 532.

But a *feme covert* is only required to sue in equity by *prochein ami* in order that there may be some one responsible for the costs. Hence where the defendants are otherwise amply protected the rule does not apply. *Harper v. Whitehead*, 33 Ga. 138. See *Ga. Code*, §2475, and the various *Married Women's Acts*.

A pauper affidavit filed to avoid payment of costs in a case brought by an infant through his next friend, should verify the next friend's poverty and inability to pay costs, and not the infant's. *Walden v. Walden*, 128 Ga. 126, 57 S. E. 323; *Platt v. Southern Photo Material Co.*, 4 Ga. App. 159, 60 S. E. 1068; *Biggins v. Gulf*, etc. R. Co. (Tex. Civ. App.), 110 S. W. 561; *Lewis v. Texas*, etc. R. Co., 47 Tex. Civ. App. 425, 105 S. W. 334.

For Costs on Appeal.—The next friend or guardian of an infant plaintiff is liable. *Biggins v. Gulf*, etc. R. Co.

(Tex. Civ. App.), 110 S. W. 561; *Fisher v. Bell*, 65 W. Va. 10, 63 S. E. 620. See *Arkansas*, etc. R. Co. v. *Luck*, 86 Ark. 564, 111 S. W. 1126.

For scandal and impertinence in the pleadings a next friend may be taxed. *Coyle v. Cumming*, 40 L. T. N. S. 455, 27 W. R. 529; *In re Wills*, 9 Jur. N. S. 1225.

30. *Ky.*—*Sproule v. Botts*, 5 J. J. Marsh. 162. *Mich.*—*Sikes v. Crossman*, 35 Mich. 96. *N. Y.*—*Ryder's Case*, 11 Paige 185; *Waring v. Crane*, 2 Paige 79. *Eng.*—*Jones v. Lewis*, 1 DeG. & S. 245, 63 Eng. Reprint 1052.

31. *Baltimore*, etc. R. Co. v. *Fitzpatrick*, 36 Md. 619. Compare *Fisher v. Bell*, 65 W. Va. 10, 63 S. E. 620.

The judgment is entered in form against the infant plaintiff for the costs, to be enforced, however, against the guardian *ad litem*. *Schoen v. Schlessinger*, 57 How. Pr. (N. Y.) 490; *Burbach v. Milwaukee*, etc., R. Co., 119 Wis. 384, 96 N. W. 829.

In *North Carolina* it is error to tax next friends who are not parties without a finding "that they were guilty of 'mismanagement or bad faith in such action.' . . . The presumption, by virtue of their appointment by the court, is that they acted in good faith." *Hockaway v. Lawrence* (N. C.), 72 S. E. 387.

32. *Fla.*—*Sanderson v. Sanderson*, 20 Fla. 292. *Ga.*—*Nance v. Stockburger*, 112 Ga. 90, 37 S. E. 125. *N. J.*—*Voorhees v. Polhemus*, 36 N. J. Eq. 456 (*prochein ami* of habitual drunkard). *N. Y.*—*Union Ins. Co. v. Van Rensselaer*, 4 Paige 85. *Tenn.*—*Bowling v. Scales*, 1 Tenn. Ch. 618. *Eng.*—*Cross v. Cross*, 8 Beav. 455, 50 Eng. Reprint 179; *Crump v. Baker*, 18 Ves. Jr. 285, 34 Eng. Reprint 325; *Whittaker v. Marlar*, 1 Cox Ch. 285, 29 Eng. Reprint 1169; *Taner v. Ivie*, 2 Ves. Sr. 466, 28 Eng. Reprint 293.

But a *prochein ami* is not, as against an infant's estate, entitled to the costs of an unsuccessful suit, when it appears that he could, by the exercise of reasonable diligence, have ascertained,

because as between himself and the infant he is *prima facie* entitled to costs of the suit.³³

Minority Rule. — In a few jurisdictions an infant plaintiff and not his *prochein ami* is liable to judgment for costs.³⁴

(II.) Guardian Ad Litem. — Costs to guardians *ad litem* for infant defendants are allowed under the general equity powers of the court.³⁵ But a guardian *ad litem* is not personally liable for the costs of the action except in case of gross misconduct.³⁶

q. Several Plaintiffs and Several Defendants.—**(I.) Several Plaintiffs.** Where several plaintiffs sue jointly, those who succeed in their action are entitled to recover their costs,³⁷ but those who fail are liable

before suing, that there was no reasonable ground for suing (*Pearce v. Pearce*, 9 Ves. Jr. 548, 32 Eng. Reprint 715), or if the suit appears not to have been instituted for the infant's advantage (*Clayton v. Clarke*, 3 DeG. F. & J. 682, 45 Eng. Reprint 1042), for any reason, or if he has improperly taken proceedings in the name of the infant (*In re Fish*, L. R. (1893) 2 Ch. Div. 413, 422, per Lindley, J.).

33. *Clayton v. Clarke*, 3 DeG. F. & J. 682, 45 Eng. Reprint 1042.

34. *Leavitt v. Bangor*, 41 Me. 458.

In *Massachusetts*, in order to make the *prochein ami* liable for costs, he must endorse the writ therefor. *Crandall v. Slaid*, 11 Metc. 288; *Smith v. Floyd*, 1 Pick. 275.

North Carolina.—In *Smith v. Smith*, 108 N. C. 365, 13 S. E. 113, modifying 12 S. E. 1045, Judge Clark said: "While 'next friends' may not be embraced in the strict letter of the Code, §535, they come within the purview of that section. It was held error to tax trustees of an express trust who are parties to the action with the costs, unless the court had adjudged that they were guilty of 'mismanagement or bad faith in such action.' *Smith v. King*, 107 N. C. 273, 12 S. E. Rep. 57. *A fortiori* it is error to tax 'next friends' who are not parties, without at least a similar finding. This is not alleged here in the answer nor found by the court. Indeed, the presumption, by virtue of their appointment by the court, is that they acted in good faith, and they cannot be liable to costs, unless there is an express finding against them of the facts requisite to tax them with costs."

35. *Salls v. Salls*, 19 N. Y. Supp. 246.

The costs of a guardian *ad litem* ought to be taken on the footing that he is a successful party. Therefore, the

costs, even of an issue on which he has failed, ought not to be disallowed him. *Eady v. Elsdon*, L. R. (1901) 2 K. B. 460.

If a person beneficially interested in an estate is compelled to bring an infant into court, he must pay the taxable costs of the proceeding, including compensation to the guardian *ad litem*. *Carter v. Montgomery*, 2 Tenn. Ch. 455.

36. *Ala.*—*Perryman v. Burgster*, 6 Port. 99. *Tex.*—*Gaines v. Ann*, 26 Tex. 840. *Eng.*—*Morgan v. Morgan*, 11 Jur. N. S. 233.

But in *Alabama*, a guardian *ad litem* is now liable for costs, but is entitled to reimbursement from the estate of the minor as next friends are. *Ward v. Mathews*, 122 Ala. 188, 25 So. 50, explaining *Brown v. Williams*, 87 Ala. 353, 6 So. 111; *Perryman v. Burgster*, 6 Port. (Ala.) 99.

In *New York*, a judgment for costs in favor of a successful defendant may be forced by attachment against the guardian *ad litem* of an infant plaintiff, nor is the poverty of such guardian any defense. *Wice v. Commercial Fire Ins. Co.*, 8 Daly 70; *Schoen v. Schlesinger*, 57 How. Pr. 490; *Wead v. Cantwell*, 36 Hun 528.

37. *Hinman v. Booth*, 20 Wend. (N. Y.) 666.

Whether in actions *ex contractu* or *ex delicto*, if the plaintiff maintains his action against one of several defendants, he may have judgment against that one, and the other defendants may have judgment against plaintiff for costs. *Lull v. Anamosa Nat. Bank*, 110 Iowa 537, 81 N. W. 784, citing *Boswell v. Gates*, 56 Iowa 143, 8 N. W. 809; *Eyre v. Cook*, 9 Iowa 185; Code §§3465, 3547, 3548, 3773; and pointing out that *Barnes v. Ennenga*, 53 Iowa 497, 5 N. W. 597, was modified by *Boswell v. Gates*, *supra*.

to the defendant for the whole of the costs he is entitled to recover.³⁸

(II.) **Several Defendants.**—(A.) **RIGHT TO COSTS.**—Where there are several defendants to an action, and some succeed and some fail in their defense, the defendants prevailing are entitled to their costs from the plaintiff,³⁹ although they joined in the pleadings filed by the unsuccessful defendants,⁴⁰ but not from the unsuccessful defendant,⁴¹ when the plaintiff alone caused the suit.⁴²

Rule in New York.—This was formerly the rule in New York.⁴³ But by statute in that state, if the plaintiff in an action against two or more defendants is entitled to costs against one or more, but not against all of them, none of the defendants are entitled to costs of course, the awarding of costs being in the discretion of the court.⁴⁴

38. *Ga.*—*Cureton v. Taylor*, 89 *Ga.* 490, 15 S. E. 643. *Ia.*—*Brett v. Clark*, 136 *Iowa* 544, 114 N. W. 28. *N. Y.* *Hinman v. Booth*, 20 *Wend.* 666; *Maybury v. Evans*, 19 *Wend.* 625.

A co-plaintiff is liable for costs though he may have sold his interest in the subject-matter of the litigation. *Neal v. Elliott*, 18 B. Mon. (Ky.) 604.

Taxation of Costs.—Where some of the joint plaintiffs succeed and some fail, the defendant, in recovering costs from the failing plaintiffs, must deduct such portions of the costs of the defense as relate exclusively to the prevailing plaintiffs. *Hinman v. Booth*, 20 *Wend.* (N. Y.) 666.

Contribution.—If a plaintiff prosecutes a proceeding in behalf of himself and others who are parties to the record, but fails in the suit, such others must contribute their ratable proportion of the expenses of the suit. *Ga.*—*Cureton v. Taylor*, 89 *Ga.* 490, 15 S. E. 643. *Md.*—*Stevens v. Yeatman*, 19 *Md.* 480. *N. H.*—*Cass v. Stearns*, 66 *N. H.* 301. *N. Y.*—*Carpenter v. Nixon*, 5 *Hill* 260.

In an action by stockholders against directors to hold them liable, each stockholder should pay costs in proportion to the amount of his stock. *Dunn's Admr. v. Kyle's Exrs.*, 14 *Bush.* (Ky.) 134.

39. *Ala.*—*Neff v. Edwards*, 81 *Ala.* 246, 2 So. 88. *Conn.*—*Sanford v. French*, 45 *Conn.* 101. *Ga.*—*Cameron v. American Soda Fountain Co.*, 3 *Ga.* App. 425, 60 S. E. 109. *Ill.*—*Smith v. Forbes*, 14 *Ill. App.* 477. *Ind.*—*Hiday v. Gilmore*, 3 *Blackf.* 49. *Kan.*—*Union Pac. R. Co. v. Hornig*, 5 *Kan.* 340. *Mass.*—*Brown v. Stearns*, 13 *Mass.* 536; *Galloway v. Pitman*, 3 *Mass.* 408. *Mich.* *Black v. Carpenter*, 104 *Mich.* 286, 82

N. W. 369. *Minn.*—*Barry v. McGrade*, 14 *Minn.* 163. *Miss.*—*Binns v. Brittain*, 30 *Miss.* 693. *N. J.*—*Smith v. Umstead* (N. J. Eq.), 65 *Atl.* 442; *Abrams v. Flatt*, 5 N. J. L. 544 (there being no certificate of reasonable cause). *N. Y.* *Canfield v. Gaylord*, 12 *Wend.* 235. *N. C.* *Stockstill v. Shuford*, 5 N. C. 39. *Pa.* *Steele v. Lineburger*, 72 *Pa.* 239. *S. C.* *McClure v. Sutherland*, 4 *McCord* 153, following *Trapp v. McKenzie*, 2 *Nott & McC.* 571. *Tenn.*—*Sloan v. Parks*, 2 *Swan* 62.

Garnishee Action.—"The defendant in an action to which a garnishee action is incident, in which issue has been joined, is a joint defendant with the garnishee in the latter action, and under circumstances coming within the last clause of §2772, Rev. St. (Wis.), 1898, a judgment for costs may be rendered in favor of the two jointly." *Bank of Commerce v. Elliott*, 109 *Wis.* 648, 85 N. W. 417, per Marshall, J.

One of two defendants in replevin cannot recover his costs on acquittal. *Ramsdell v. Owens*, 12 *Pa. Co. Ct.* 416; *Ingles v. Wadworth*, 1 *Wm. Bl.* 355, 96 *Eng. Reprint* 198.

Terretenant.—*Maus v. Maus*, 10 *Watts* (Pa.) 87.

40. *Griswold v. Sedgwick*, 3 *Wend.* (N. Y.) 326; *Stone v. Duffy*, 3 *Sandf.* (N. Y.) 761.

41. *Swallow v. Ives*, 4 *Lanc. Law Rev.* (Pa.) 300.

42. *Texas, etc. R. Co. v. Shirley* (Tex. Civ. App.), 130 S. W. 687.

43. *Daniels v. Lyon*, 9 N. Y. 549; *Canfield v. Gaylord*, 12 *Wend.* (N. Y.) 235.

44. *Code Civ. Proc.*, §3229; *Williams v. Horgan*, 13 *How. Pr.* 138; *Sawyer v. Thurber*, 14 *Civ. Proc.* 204; *Park*

Taxation of Costs.—The general "rule, according to which costs are given, when there are several defendants, in a personal action, and the verdict is in favor of one or more of them, and against the others, is this:—the successful defendant is allowed *all* his *separate* costs, and *prima facie*, an aliquot part of the joint costs," unless the court is satisfied from special circumstances, that a different proportion should be allowed.⁴⁵

(B.) **LIABILITY FOR COSTS.**—Where there are several defendants equally liable, the judgment for costs should be joint against all of them,⁴⁶

v. Spaulding, 10 Hun 128; *Bruck v. Lambeck*, 63 Misc. 117, 116 N. Y. Supp. 784 (action against makers and indorsers of note); *Ljungqvist v. Hartmetz*, 104 N. Y. Supp. 498; *Kane v. Met.*, etc. R. Co., 7 N. Y. Supp. 653; *Hodgkins v. Mead*, 5 N. Y. Supp. 435.

The section above referred to (§3229) "takes the place of §§303, 306 of the Code of Procedure, which since 1880 has been superseded by the code of Civil Procedure. No substantial change has been made by it in the construction and effect of those two sections as they existed after 1851." See *Eastman v. Gray*, 81 Hun 362, 30 N. Y. Supp. 895. Under this section if the complaint is dismissed as to one defendant the court in the exercise of its discretion, may decline to award costs to him. *Sinskie v. Brust*, 66 App. Div. 34, 72 N. Y. Supp. 922, citing *Sawyer v. Gates*, 14 N. Y. St. 236; *Churchill v. Wagner*, 23 Misc. 595, 52 N. Y. Supp. 252; *Hodgkins v. Mead*, 5 N. Y. Supp. 435, 25 N. Y. St. 937; *Frazier v. Hunt*, 18 Wkly. Dig. 390.

This statute does not apply where some of the defendants default. *Eastman v. Gray*, 81 Hun 362, 30 N. Y. Supp. 895.

The right to costs under this statute is strictly confined to cases "where the successful defendant is not united in interest with those against whom the plaintiff recovers, and where they make separate defenses by separate answers." The fact of not being united in interest standing alone is not sufficient; a separate defense by a separate answer must have been interposed as well, as both these circumstances must exist before the costs can be awarded. *Allis v. Wheeler*, 56 N. Y. 50; *Kraft v. Wilson*, 3 How. Pr. N. S. (N. Y.) 18; *Hinds v. Myers*, 4 How. Pr. (N. Y.) 356; *Pixley v. Rockwell, Sheld.* (N. Y.) 267; *Park v. Spaulding*, 10 Hun (N. Y.) 128.

If all the defendants unite in one answer, none of them are entitled to costs unless all are. *Sawyer v. Thurber*, 14 Civ. Proc. 204; *Sawyer v. Gates*, 14 N. Y. St. 236.

45. U. S.—*American Box Mach. Co. v. Crossman*, 57 Fed. 1029. Me.—*Marsh v. Parks*, 75 Me. 356. S. C.—*McClure v. Sutherland*, 4 McCord 158. Eng. *Redway v. Webber*, 13 Scott (N. S.) 254, 106 E. C. L. 252; *Gambrell v. Falmouth*, 5 Ad. & El. 403, 31 E. C. L. 363; *Griffiths v. Kynaston*, 2 Tyrw. 757; *Griffiths v. Jones*, 2 C. M. & R. 333.

The rule may be found practically worked out in *Hughtington v. Grant*, 1 Beav. (Eng.) 230, and in other cases cited in 1 Seton's Decrees (4th ed.), p. 129.

But in a few jurisdictions the rule is that the defendant who is acquitted may recover of the plaintiff such costs only as accrued separately and properly on account of his being a defendant in the suit. The costs that are joint cannot be separated, and the plaintiff is entitled to recover them. *O'Connell v. Bryant*, 126 Mass. 232; *Sloan v. Parks*, 2 Swan (Tenn.) 62. Compare *Mason v. Waite*, 1 Pick. (Mass.) 452.

46. Ill.—*City of Chicago v. McCoy*, 136 Ill. 344, 26 N. E. 363. Ia.—*Dugan v. De Lizardi*, 5 Rob. 224. N. H. *Semes v. Stevens*, 26 N. H. 117. N. H. *Barrett v. Foley* (N. J. Eq.), 17 Atl. 687. N. Y.—*Warner v. Ford*, 17 How. Pr. 54; *Catlin v. Billings*, 13 How. Pr. 511; *LeRoy v. Servis*, 2 Caines Cas. 175; *Mechanic's, etc. Bank v. Winant*, 49 Hun 607, 1 N. Y. Supp. 659. Tex. *Moore v. Woodson*, 44 Tex. Civ. App. 503, 99 S. W. 116. Wis.—*Cunningham v. Brown*, 44 Wis. 72.

In the "case of several persons, severally bound, and severally sued," all are liable to satisfy the costs until one has actually paid them, and costs may

especially where the verdict of the jury is in favor of the plaintiff generally.⁴⁷ But if one of the defendants answers and denies all joint liability with his co-defendant in the cause of action, and admits a separate liability, a several judgment should be rendered against each defendant for costs and not a joint judgment.⁴⁸

If one of several defendants undertakes to file a cross action against one of his co-defendants, he may be adjudged liable for costs along with the unsuccessful plaintiff.⁴⁹ But the liability of a co-defendant ceases upon the termination of the proceeding against him. He cannot be taxed with the costs of further proceedings against the other defendant,⁵⁰ nor with costs that are not incident nor related to the litigation against him.⁵¹

The proportion of costs for which each of several defendants is liable is peculiarly within the discretion of the court.⁵²

be adjudged in all the suits. *Tarin v. Morris*, 2 Dall. (U. S.) 115, 1 L. ed. 312.

Where both defendants claim an interest in the property in litigation, it is not error to charge both defendants with the costs, even though they be husband and wife. *Collins v. O'Laverty*, 136 Cal. 31, 68 Pac. 327.

In a writ of right against tenants jointly, a joint judgment for costs may be rendered against the tenants. *Liter v. Green*, 2 Wheat. (U. S.) 306, 4 L. ed. 246.

Stockholders, defendants in a bill in equity to enforce their statutory personal liability, are jointly and severally liable for costs. *Burnap v. Haskins Steam Engine Co.*, 127 Mass. 586.

47. *Herndon v. Rice*, 21 Tex. 456.

But where one of several defendants tenders separate issues, all of which are found against him, there is no error in adjudging the costs thereof against him. *Boyd v. Jackson*, 82 Ind. 525.

48. *Hempy v. Ransom*, 33 Ohio St. 312. See *Coldren Land Co. v. Royal*, 140 Iowa 381, 118 N. W. 426.

49. *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 76 Pac. 243.

50. *Gaffney v. Wood*, 74 S. C. 323, 54 S. E. 573.

Although the recovery is only against one of two defendants, yet the plaintiff is entitled to a decree against both, if he was compelled to make both parties, one as the legal and the other as the equitable owner of the subject-matter of the suit. *Annan v. Merrit*, 13 Conn. 478.

51. La.—*Rabassa v. Passemont*, 2 La. 178. Pa.—*Guie v. Ash*, 1 Chest. Co. 400. Tenn.—*Sloan v. Parks*, 2 Swan 62. Tex.—*Dashiell v. Johnson*, 99 Tex. 546, 91 S. W. 1085.

One of two joint defendants cannot be taxed with the costs incurred by the plaintiff in an unsuccessful contest against his co-defendant. *Howk v. Bishop*, 10 Hun (N. Y.) 509; *Griffith v. Missouri, etc. R. Co.* (Tex. Civ. App.), 108 S. W. 756.

"There is no rule for taxing those costs against each defendant which he has incurred himself, but the general rule is to tax the whole of the costs against each and all of the defendants." *Braun v. Paulson* (Tex. Civ. App.), 95 S. W. 617 (writ of error denied by supreme court); *Middleton v. Johns*, 4 Gratt. (Va.) 129.

52. Ala.—*Decatur Land Co. v. Cook*, 27 So. 559. Cal.—*Hillman v. Newington*, 57 Cal. 56. Tenn.—*Traughber v. Smelser*, 108 Tenn. 347, 67 S. W. 475. Tex.—*Thomas v. Ellison*, 116 S. W. 1141.

"Costs incident to an unsuccessful special defense are imposed on those who make it, personally, together with full costs of an appeal based upon it alone; but such costs are merely incidental to the general proceeding," as unaffected by the special defense would not be imposed on them personally. *Michigan Mut. Life Ins. Co. v. Conant*, 40 Mich. 530.

Apportionment.—In an action against several defendants the costs are usually apportioned equally among them, and should not be assessed against one or

(C.) **JOINT OWNERS.**— If it is necessary to institute legal proceedings to compel one of several joint owners or tenants in common to account to the others, he should be visited personally with the costs.⁵³

(D.) **JOINT TRESPASSERS.**— Even though the plaintiff elects to bring separate actions for a joint trespass, he is, nevertheless, entitled to his costs in each of the suits.⁵⁴

(III.) **Single or Separate Bill of Costs.**— (A.) **TO PLAINTIFFS.**— Where the plaintiff recovers but one judgment, however numerous the defendants, or the defences or issues,⁵⁵ or, if the defendants are united in interest with respect to the subject-matter of the suit,⁵⁶ only one bill of costs should be taxed.⁵⁷

less than all of them. *Hay v. State Bank*, 5 Ark. 250; *Hillman v. Newington*, 57 Cal. 56.

Nor does the fact that some of them are exonerated lessen the proportion of liability resting on those that remain. *Johnson v. Miller*, 93 Iowa 165, 61 N. W. 422.

Where "an action is brought against more than one defendant, but the judgment is against one of them, it is error to adjudge all the costs against the losing defendant." *Union Pac. R. Co. v. Horney*, 5 Kan. 340. But the court will order a defendant whose wrongful act or claim has occasioned the suit to pay the costs of the plaintiff and of the other defendants. *Farley v. Blood*, 30 N. H. 354; *Martinius v. Helmuth*, 2 Ves. & B. 412, 35 Eng. Reprint 375; *Cowtan v. Williams*, 9 Ves. 107, 32 Eng. Reprint 542; *Dowson v. Harcastle*, 2 Cox 278, 30 Eng. Reprint 129.

Under the Indiana statute providing "that when there are several defendants, the costs shall be apportioned according to the judgment rendered upon the issue," the judgment of the court apportioning costs is presumed to be correct. *Whitesell v. Strickler*, 167 Ind. 602, 78 N. E. 845; *Miller v. Dill*, 149 Ind. 326, 49 N. E. 272. And if one of several defendants makes a separate issue, which shall be declared against him, he is liable for the costs. *Reynolds v. Bond*, 83 Ind. 36; *Boyd v. Jackson*, 82 Ind. 525.

53. *Crosdale v. Von Boyneburgk*, 206 Pa. 15, 55 Atl. 770.

54. *Ayer v. Ashmead*, 31 Conn. 447; *Livingston v. Bishop*, 1 Johns. (N. Y.) 290, opinion of Kent, C. J.

If in an action of trespass against several, some default and others are

found guilty by the jury, the costs should be taxed jointly against all the defendants. *Proprietors of the Kennebeck Purchase v. Boulton*, 4 Mass. 419.

55. *Buell v. Gay*, 13 How. Pr. (N. Y.) 331.

56. *Thomas v. Sever*, 12 Mass. 379; *Phipps v. Van Cott*, 15 How. Pr. (N. Y.) 110.

In Illinois, if the complainant dismisses his bill in equity, or the defendant dismisses the same for want of prosecution, the defendant recovers against the complainant full costs. *Burrows v. Merrifield*, 243 Ill. 362, 90 N. E. 750.

In an action against several persons misappropriating a trust fund, but one bill of costs can be recovered. *Otis v. Otis*, 167 Mass. 245, 45 N. E. 737.

"Plaintiff sued for a breach of warranty alleged to have been made by the defendants in the sale of a steam launch, of which defendants were the joint owners, and both of whom signed the written contract of sale. The defendants were united in interest, and one could not have been sued without joining the other." Only one bill of costs should be taxed. *Underwood v. Schulz*, 130 N. Y. Supp. 153.

Under chancery rule in Michigan, the prevailing complainant is entitled to only one bill of costs. *Webber v. Webber*, 109 Mich. 147, 66 N. W. 960.

57. The right to demand a single taxation of costs under the New York statute applies only to cases where the defendants may be sued jointly. Therefore such a motion will be denied in case of a judgment against executors and heirs in the separate suits for the same debt on the same bond. *Anonymous*, 2 Cow. (N. Y.) 591.

If several parties defendant appear by separate counsel,⁵⁸ or put in separate answers,⁵⁹ a separate bill of costs will be allowed against each.⁶⁰

(B.) TO DEFENDANTS. — The manner in which several defendants jointly sued in the same action, answer or demur, ordinarily determines the question as to their right to recover a separate bill of costs against the plaintiff.⁶¹ And the rule is that if they plead separately they are entitled to several costs, although their pleas or answers are identical,⁶²

58. *Olifiers v. Belmont*, 15 Misc. 120, 36 N. Y. Supp. 813, *affirmed* 159 N. Y. 550, 54 N. E. 1093; *Delaware, etc. R. Co. v. Burkard*, 40 Hun 625; *McIntyre v. Wynne*, 16 N. Y. Supp. 540; *Collyer v. Collyer*, 17 Abb. (N. C.) 328.

Where several defendants appear separately, serve separate answers and are represented by separate counsel, a separate bill of costs may be allowed to each set of defendants. *Adams v. City of Beloit*, 105 Wis. 363, 81 N. W. 869.

Where in an action against the sureties upon an undertaking given to obtain a warrant of attachment, the defendants appeared by separate attorneys, filed separate answers, made motions, and finally made separate offers of judgments, the plaintiffs may tax only one bill of costs, and the fact that defendants appeared by different attorneys, and served separate answers, does not alter the rule. But the same rule does not apply to parties defendant. *Codding v. Scott*, 21 N. Y. Supp. 473.

59. *Comstock v. Halleck*, 4 Sandf. (N. Y.) 671.

60. *Inhabitants of Readington v. Dilley*, 24 N. J. L. 209.

61. *Apple v. Russell*, 1 Root. (Conn.) 486 (several plea in trover); *Wilbur v. Wiltsey*, 13 How. Pr. (N. Y.) 506.

Each of several defendants improperly joined is entitled to costs. *Steward v. Brewster*, 1 Root (Conn.) 550.

In petitions against towns for highways, a separate bill of costs will be allowed, because the interests and defenses of the several towns are ordinarily dissimilar. *Currier v. Enfield*, 28 N. H. 73.

In California, "where an action has been commenced against several defendants, and there has been a judgment in their favor, they are not all entitled to recover separate costs,

. . . but can only recover jointly, as though there had been but one defendant." *Rice v. Leonard*, 5 Cal. 61.

In New York, the power to award a separate bill of costs in favor of each defendant rests in the discretion of the court. *McChesney v. City of Syracuse*, 75 Hun 503, 27 N. Y. Supp. 508.

The Michigan statute contemplates but one bill of costs in favor of defendants in actions of ejectment where the cause has gone to trial and all are acquitted. *Black v. Carpenter*, 104 Mich. 286, 62 N. W. 369.

Right of Substituted Parties to Separate Costs.—In New York, in an action against a sheriff for wrongful levy, where the sheriff's indemnitors are substituted as defendants on the sheriff's motion, if the indemnitors desire a separate bill of costs, they should present this question when the application to substitute is made. *Isaacs v. Cohen*, 86 Hun 119, 33 N. Y. Supp. 188.

62. *Mass.*—*George v. Reed*, 104 Mass. 266; *Clark v. Reed*, 11 Pick. 446; *Davis v. Hastings*, 8 Cush. 313. *Minn.*—*Slama v. Chicago, etc. R. Co.*, 57 Minn. 167, 58 N. W. 989. *N. H.*—*Crosby v. Lovejoy*, 6 N. H. 458. *N. J.*—*Garwood v. Hartley*, 39 N. J. Eq. 78, holding that separate answer though merely formal, will entitle to separate costs. *N. Y.* *Anonymous*, 2 Cow. 591; *Griswold v. Sedgwick*, 3 Wend. 326; *Costellanos v. Beauville*, 2 Sandf. 670.

But where defendants have no conflicting interests, which require protection by separate answers, and where no statement is made in the answer by one defendant, which the others cannot conscientiously swear to, they cannot sever in their defense and recover separate costs (*N. Y.*—*Stewart v. Schultz*, 33 How. Pr. 3; *Bailey v. Johnson*, 1 Daly 61; *Crippen v. Brown*, 11 Paige 628. *N. C.*—*Davis v. McNeil*, 36 N. C. 344. *Wis.*—*Terry v. Chandler*, 23 Wis. 456), especially where such

and though they answer jointly in the court below, if they sever on the appeal.⁶³ And if their defenses are separate and distinct, certainty requires that a separate bill of costs should be taxed.⁶⁴

But several pleading does not necessarily entitle the defendants who prevail to several costs. In other words, where several defendants prevail by the proof or disproof of substantially the same fact, the mere circumstance that they have pleaded severally will not entitle them as of course to more than one bill of costs.⁶⁵ And one of several

severance appears to be unnecessary and done to increase costs (Kaplan v. Olsen, 64 Misc. 437, 118 N. Y. Supp. 634; Williams v. Cassidy, 59 How. Pr. 490; Bridgeport Ins. Co. v. Wilson, 12 Abb. Pr. 209; Ravenel v. Lyles, Spear's Eq. [S. C.] 281).

So if separate answers are filed, setting up the same defence, there can be only one bill of costs (Haye v. Robertson, 38 N. Y. Super. 59), unless plaintiff's action makes separate answers necessary (Lindsley v. Deafendorf, 43 How. Pr. (N. Y.) 90).

It is otherwise, however, where they file separate answers in good faith without any intention of increasing the costs, as where the separate interests of the defendant's require separate proceedings. Olifers v. Belmont, 33 N. Y. Supp. 623; Royce v. Jones, 23 Hun 452; Terry v. Chandler, 23 Wis. 456.

But though a joint action is brought against the maker and the endorser of a promissory note, yet they must defend separately, and therefore, if they prevail, they are entitled to separate bills of costs. Taylor v. Jaques, 103 Mass. 270.

Copartners.—"If a trustee process is brought against two defendants and two trustees, describing them individually and not as partners, and the trustees are summoned as partners only, the latter are entitled to only one bill of costs, although they make four different answers." Gerry v. Gerry, 10 Allen (Mass.) 160.

Attorney's Fees.—Under 2 Ballinger's Ann. Codes and St. (Wash.), §5171, providing that "in all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such defendants as recover judgment in their favor, or either of them," statutory attorney's fees are allowable to

each defendant answering separately. Koyukuk Min. Co. v. Van De Vanter, 30 Wash. 385, 70 Pac. 966.

63. Bill v. Boynton, 158 Mass. 274, 33 N. E. 399.

In joint tort actions, from the time of pleading severally. Fales v. Stone, 9 Metc. (Mass.) 316; West v. Brock, 3 Pick. (Mass.) 303; Prescott v. Bartlett, 43 N. H. 298.

64. Wolf v. Di Lorenzo, 22 Misc. 323, 49 N. Y. Supp. 191.

Although several defendants appear by the same attorney, a separate bill of costs may be taxed in favor of each defendant, where the defense of some involves issues of fact and questions of law not included in that of the others, especially where the amount of his separate costs is to be ascertained and ultimately embodied in a judgment in his favor individually. Rosenheimer v. Krenn, 126 Wis. 617, 106 N. W. 20.

65. Mass. — Upton v. Pratt, 106 Mass. 344; Peabody v. Minot, 24 Pick. 328. N. H. — Prescott v. Bartlett, 43 N. H. 298 (trespass for assault and battery); Ticknor v. Harris, 15 N. H. 106. N. C. — McNamara v. Kerns, 24 N. C. 66.

If the defendants' defenses are identical, but one bill of costs will be allowed the prevailing party. Sanford v. French, 45 Conn. 101; Hanson v. Ossipee, 20 N. H. 523.

If separate answers are made, but otherwise the defenses are the same, they are each entitled to tax for an answer, but only for one bill of costs subsequently accruing. Stilson v. Leeman, 75 Me. 412; Miller v. Lincoln, 6 Gray (Mass.) 556; Clark v. Reed, 11 Pick. (Mass.) 446. And this is the rule even where the pleading is several if their defense is a joint one, applicable to all the defendants. Mathers v. Cobb, 3 Allen (Mass.) 467; Ward v. Johnson, 13 Mass. 143; Meagher v. Bachelard, 6 Mass. 444; North Bank

defendants who does not appear and answer and has made no showing that he is a separate party defendant, is not entitled to a separate judgment in his favor.⁶⁶

Effect of Appearing by Same or Different Counsel.—The manner in which the defendants appear by counsel is also a determining factor.⁶⁷

2. How Far Prior Presentation and Demand Controls.—There are many cases in which the court in awarding costs will take into consideration whether or not the plaintiff, before bringing his suit, made a presentation of his claim and demanded payment or satisfac-

v. Wood, 11 Vt. 194; *Town of Shrewsbury v. Strong*, 10 Vt. 591.

In actions *ex contractu* against several defendants, if there is no separate pleading and the ground of defense is common to all those discharged, the defendants thus discharged are not entitled to several bills of costs. *Ticknor v. Harris*, 15 N. H. 106.

Tort Actions.—There is no reason why the rule in actions on contracts, that where several defendants prevail, the same facts furnishing the same defense to each, they should ordinarily be entitled to but one bill of costs, should not equally apply in tort actions and such is the rule in some jurisdictions. *Barry v. McGrade*, 14 Minn. 236; *Prescott v. Bartlett*, 43 N. H. 298; *Crosby v. Lovejoy*, 6 N. H. 458.

In *Downer v. Flint*, 28 Vt. 527, each defendant was treated as a distinct party until by joining in a plea in bar with the others or in some other way he so identified his interests with others, that the success of the defense as to each one depended upon its success as to all. So defendants were allowed to tax separate travel and attendance before the justice, and separate travel and term fees in the county court.

66. *Morris v. Edwards*, 132 Wis. 91, 112 N. W. 248.

67. If several defendants defend by the same or by different attorneys who are partners, but one bill of costs can be allowed. (Me.—*Stilson v. Leeman*, 75 Me. 412. Minn.—*Menzel v. Tubbs*, 51 Minn. 364. N. Y.—*Crofts v. Rockefeller*, 6 How. Pr. 9; *Tracy v. Stone*, 5 How. Pr. 104; *Crippin v. Brown*, 11 Paige Ch. 628; *Braden v. Kakhaizer*, 3 Sandf. 760). But they are entitled to separate bills of costs where the attorneys are not partners (*Tenbroeck v. Paige*, 6 Hill (N. Y.) 267), or where they appear and answer by separate

attorneys, and there is no showing that they are united in interest or collusively appeared by separate attorneys in bad faith for the purpose of enhancing the costs (*Lane v. Van Orden*, 63 How. Pr. (N. Y.) 237; *Williams v. Cassady*, 59 How. Pr. (N. Y.) 490; *Bridgeport Fire & M. Ins. Co. v. Wilson*, 20 How. Pr. (N. Y.) 511; *Knickerbacker v. Colver*, 8 Cow. (N. Y.) 111; *Slater Bank v. Sturdy*, 15 Abb. Pr. (N. Y.) 75; *Delaware, etc., R. Co. v. Burkard*, 40 Hun (N. Y.) 625; *Jacobs v. Femstem*, 117 N. Y. Supp. 823; *Rowe v. Granger*, 103 N. Y. Supp. 439; *Wegge v. Madler*, 129 Wis. 412, 109 N. W. 223).

If the pleadings are separate, the fact that the defendants are represented by the same attorney is no reason for refusing to give separate costs in some states. Mass.—*O'Connell v. Bryant*, 126 Mass. 232. N. J.—*Garwood v. Hartley*, 39 N. J. Eq. 78; *Putnam v. Clark*, 34 N. J. Eq. 51. Wash.—*Wittler-Corbin Mach. Co. v. Martin*, 47 Wash. 123, 91 Pac. 629 (separate attorney's fees); *Koyukuk Min. Co. v. Van De Vanter*, 30 Wash. 385, 70 Pac. 966. See, however, *Heye v. Robertson*, 15 Abb. Pr. N. S. (N. Y.) 194; *Hall v. Lindo*, 8 Abb. Pr. (N. Y.) 341.

In Minnesota, when several defendants who appear by the same attorney, unite in the same answer, and there is one trial as to all, they are entitled jointly to statutory costs and not severally. *Barry v. McGrade*, 14 Minn. 163.

In South Dakota, it seems that although numerous defendants are represented by the same counsel, and the decision of one case is necessarily decisive of all, if no agreement is made that all the cases shall abide the result of one of them, separate costs may be taxed. *Kelly v. Oksall*, 17 S. D. 392, 97 N. W. 11.

tion.⁶⁸ This is especially true in courts of equity which, proceeding upon the principle that he who seeks equity must do equity, courts are not inclined to allow costs in favor of those prosecuting unnecessary and vexatious suits.⁶⁹

Where Demand Would Have Been Useless.—Where the defendant's course has been such that a presentation and demand would have been clearly useless, then upon his unsuccessful resistance of a suit the plaintiff will not be debarred of his right to costs by reason of his failure to demand payment or satisfaction before institution of suit.⁷⁰

Under Statutes.—In some states the doctrine of presentation of claim and demand of payment or satisfaction as a prerequisite to the right to recover costs has been made statutory, but even there the want of such amicable demand is no bar to a recovery, unless pleaded in *limine*,⁷¹ and *a fortiori* where the defendant has actively resisted the demand,⁷² or has resorted to fraud or concealment to prevent such a demand from being made.⁷³

Where, however, the statute expressly denies costs to the plaintiff in the absence of proof of such presentation and demand, proof thereof must be made to appear or costs will not be allowed in any event.⁷⁴

68. La.—Fox v. Beebe, 4 La. 104; Howard v. Columbia, 1 La. 417. Neb.—Carlson v. Beckman, 35 Neb. 392, 53 N. W. 203. Nev.—Shoecraft v. Beard, 20 Nev. 182, 19 Pac. 246. N. H.—Brown v. Glines, 42 N. H. 160. N. J.—Condict v. Wood, 25 N. J. L. 319; Conover v. Walling, 28 N. J. Eq. 333. Ohio.—Neilson v. Fry, 16 Ohio St. 552, action for contribution. Wash.—Seward v. Spurgeon, 9 Wash. 74, 37 Pac. 303.

In Condict v. Wood, 25 N. J. L. 319, the court said that a just rule was laid down in Townsend v. Lawrence, 9 Wend. (N. Y.) 458, where it was said: "The costs of motions of this kind will depend upon this principle: if a party is entitled to a discovery, and goes first to his adversary to ask for the documents he has in justice a right to, and is refused, and is compelled to move the court, he will be allowed the costs of his motion; but if he make his motion without first trying to get the discovery in that way in which men acting with each other ought first to ask their rights, he will be ordered to pay costs."

But in an action for money had and received, the defendant being bound to pay the same over within a reasonable time after receipt thereof, is not entitled to a presentation and demand of

payment before suit brought by the party entitled to receive the money. Chown v. Phelps, 26 Mont. 524, 69 Pac. 54.

69. Ala.—Pauling v. Creagh's Admr., 54 Ala. 646. Ill.—Gilham v. Cairns, 1 Ill. 164. Nev.—Tonopah, etc., R. Co. v. Fellenbaum, 32 Nev. 278, 107 Pac. 882; Welland v. Huber, 8 Nev. 203. N. H.—Brown v. Glines, 42 N. H. 160. N. J.—Conover v. Walling, 28 N. J. Eq. 333. Wash.—Seward v. Spurgeon, 9 Wash. 74, 37 Pac. 303.

70. Mass.—Bartlett v. Johnson, 9 Allen 530. Neb.—Carlson v. Beckman, 35 Neb. 392, 53 N. W. 203. Nev.—Shoecraft v. Beard, 20 Nev. 182, 19 Pac. 246. N. Y.—Cootes v. Shepherd, 3 N. Y. Leg. Obs. 404.

Where both parties claim priority in the proceeds of the sale of mortgaged property, no demand is necessary. Bank of Stockham v. Alter, 61 Neb. 359, 85 N. W. 300.

71. Fox v. Beebe, 4 La. 104; Howard v. Columbia, 1 La. 417; Fisk v. Friend, 3 Rob. (La.) 264; Police Jury of St. Helena v. Fluker, 1 Rob. (La.) 389; Westcott v. De Montreville, 30 Mo. 252.

72. Nelligan v. Musbach, 20 La. Ann. 547; Wood v. Hennen, 9 La. Ann. 264.

73. Torre v. Meservey, 4 La. 204.

74. Ind.—Shimer v. Bronnenburg, 18

3. How Far Manner of Disposing of Case Controls. — a. *Abatement of Suit.* — In those jurisdictions in which costs are but incident to the judgment, it follows that no judgment for costs can be rendered for the defendant where the suit abates by death, or otherwise, but each party must bear his own costs, because costs are not taxable or recoverable until a judicial determination is had in the action in which they have been incurred.⁷⁵ The rule is the same where the action abates after judgment and pending an appeal.⁷⁶

If, however, a plea or answer in abatement is filed and there is judgment thereon for the defendant, he is entitled to recover full costs.⁷⁷

By the English practice, the defendant could not have costs, nor can a plaintiff, on obtaining an interlocutory judgment, that the defendant's plea in abatement is bad, and that he answer further, have costs against the defendant.⁷⁸

b. *Dismissal, Discontinuance or Non-Suit.* — (I.) *On Plaintiff's Motion.* A plaintiff who voluntarily discontinues or dismisses his action is liable

Ind. 363; *Nelson v. Turner*, 7 Ind. 36. Me.—*Bessey v. Cook*, 92 Me. 261, 42 Atl. 405; *Topsham v. Blondell*, 82 Me. 152, 19 Atl. 93. N. Y.—*Brewster v. Hornellsville*, 54 N. Y. Supp. 915.

Claims Against Municipal Corporations.—*Brewster v. Hornellsville*, 54 N. Y. Supp. 915. See generally the title "Municipal Corporations."

75. U. S.—*McCullough v. Virginia*, 172 U. S. 102, 19 Sup. Ct. 134, 43 L. ed. 382. Ala.—*Crew v. Heard*, 146 Ala. 463, 40 So. 337. Cal.—*Begbie v. Begbie*, 128 Cal. 154, 60 Pac. 667. Ill.—*Harvey v. Harvey*, 87 Ill. 54. Ia.—*Hyde v. Cole*, 1 Iowa 106. Me.—*Ryden v. Robinson*, 2 Me. 127. N. J.—*Den v. Thompson*, 14 N. J. L. 193. N. Y.—*Johnson v. Thomas*, 2 Paige 377, 383; *Balbi v. Duvet*, 3 Edw. Ch. 418. N. C.—*Brown v. Rainor*, 108 N. C. 204, 12 S. E. 1028; *Officers v. Taylor*, 12 N. C. 99. Ohio.—*Farrier v. Cains*, 5 Ohio 45. S. C.—*Latta v. Surginer*, 2 McCord 430. Tex.—*Hollingsworth v. Bagley*, 35 Tex. 345; *Mills v. Alexander*, 21 Tex. 154; *Conkrite v. Hart*, 10 Tex. 140; *Martel v. Hershheim*, 9 Tex. 294. Vt.—*Gray v. Parker*, 16 Vt. 652.

"Where a court finds that a party to an action has been dead . . . so long that the action cannot be revived without the consent of parties, which is not given, the action abates and should be dismissed at the costs of plaintiff." *New Hampshire Bkg. Co. v. Ball*, 57 Kan. 812, 48 Pac. 137.

Death Before Inquisition Found.—

Where an alleged lunatic dies before inquisition found, costs cannot be awarded against the estate, since the proceedings in such case die with the person: *In re Ebling*, 9 Pa. Co. Ct. 138.

Costs Payable Out of Particular Fund.—"Where there has been no decree for costs, and the suit abates by the death of the party, the right to costs up to that time is extinguished, unless the costs are payable out of a particular fund, or are connected with a duty towards the party claiming costs." *Travis v. Waters*, 12 Johns. (N. Y.) 500. The "particular fund" must be one in court or one over which the court has control. *Sears v. Jackson*, 11 N. J. Eq. 45, citing *Hall v. Smith*, 1 B. C. R. 438.

Statutory Rule in Tennessee.—*Seatcherd v. Love*, 166 Fed. 53, 91 C. C. A. 639.

76. *Begbie v. Begbie*, 128 Cal. 154, 60 Pac. 667.

77. Ala.—*Massey v. Steele's Admr.*, 11 Ala. 340. Ia.—*Hyde v. Cole*, 1 Iowa 106. Wyo.—*Tutty v. Ryan*, 13 Wyo. 134, 78 Pac. 657, 79 Pac. 920.

He is the prevailing party. *Thomas v. White*, 12 Mass. 367; *Cutts v. Haskins*, 11 Mass. 56; *Hames v. Corliss*, 4 Mass. 659. And if in an action by husband and wife, the wife dies before judgment, the prevailing defendant may have judgment for costs against the husband. *Fowler v. Shearer*, 7 Mass. 31.

78. *Haines v. Corliss*, 4 Mass. 659.

to the defendant for his costs,⁷⁹ depending somewhat on the time of

79. **U. S.**—Missouri *v.* Illinois, 202 U. S. 598, 26 Sup. Ct. 713, 50 L. ed. 1160; *Scatcherd v. Love*, 166 Fed. 53, 91 C. C. A. 639 (stating the rule in Tennessee). **Cal.**—*Gaffey v. Mann*, 5 Cal. App. 712, 91 Pac. 172. **Conn.**—*Spencer v. Champion*, 13 Conn. 11. **Ga.**—*Langston v. Marks*, 68 Ga. 435. **Ill.**—*Burrows v. Merrifield*, 148 Ill. App. 594. **Ind.**—*Sebrell v. Fall Creek Tp.*, 27 Ind. 86. **Ky.**—*Com. v. Morrison*, 7 Ky. L. Rep. 665. **Me.**—*Watson v. Delano*, 86 Me. 508, 30 Atl. 114. **Mass.**—*Stevens v. Stevens*, 1 Metc. 279; *Gilbreth v. Brown*, 15 Mass. 178. **Mich.**—*Townsend v. Jackson*, Circ. Judge, 157 Mich. 231, 121 N. W. 483. **Mo.**—*Thompson v. Union Elev. Co.*, 77 Mo. 520. **N. J.**—*Ocean City Hotel Co. v. Sooy*, 76 Atl. 446. **N. M.**—*Martinez v. Lucero*, 1 N. M. 208. **N. Y.**—*Tanner v. Tibbits*, 19 Wend. 133; *Saxon v. Stowell*, 11 Paige 526; *Palmer v. Van Doren*, 2 Edw. Ch. 384 (though defendant has absconded); *Banta v. Marcellus*, 2 Barb. 373; *White v. Smith*, 4 Hill 166; *Goldstein v. Perlman*, 128 N. Y. Supp. 21; *Wetzler v. Silverman*, 123 N. Y. Supp. 794; *Weber, Bunke Lange Coal Co. v. Chellborg*, 139 App. Div. 602, 124 N. Y. Supp. 62; *Bloomington v. Luchow*, 75 N. Y. Supp. 28 (as against defendants opposing motion). **Ohio.**—*Miller v. Truman*, 7 Ohio Dec. (Reprint) 374, 2 Wkly. Law Bul. 241. **S. C.**—*Floyd v. White*, Dud. Eq. 40. **S. D.**—*Aultman, Miller & Co. v. Becker*, 10 S. D. 53, 71 N. W. 753. **Tenn.**—*Moore v. Tillman*, 106 Tenn. 361, 61 S. W. 61; *Partee v. Goldberg*, 101 Tenn. 664, 49 S. W. 758; *Allen v. Dayton Hotel Co.*, 95 Tenn. 480, 32 S. W. 962; *Stone v. Huggins*, 1 Shann. Cas. 564; *Gillespie v. McEwen*, 1 Shann. Cas. 400. **Tex.**—*Bruce v. Knodell* (Tex. Civ. App.), 103 S. W. 433. **Utah.**—*McCready v. Rio Grande Western R. Co.*, 30 Utah 1, 83 Pac. 331. **Vt.**—*Woods v. Darling*, 71 Vt. 348, 45 Atl. 750; *Ames v. Hilliard*, 25 Vt. 222. **Wash.**—*Thorndike v. Thorndike*, 1 Wash. Ter. 175. **W. Va.**—*Glascock v. Brandon*, 35 W. Va. 84, 12 S. E. 1102.

In *Murthey v. Burke*, 121 App. Div. 400, 106 N. Y. Supp. 98, Mr. Justice Hirschberg, writing for the court, said: "The order cannot be sustained. It is provided by section 822 of the Code of Civil Procedure that, where a plaintiff unreasonably neglects to proceed

in an action, the court may, in its discretion, upon application of the defendant, dismiss the complaint and render judgment accordingly. The discretion having been exercised in favor of the defendant, judgment in his favor necessarily follows. The judgment is a final one, and by virtue of the provisions of sections 3228 and 3229 of the Code of Civil Procedure costs belong to the defendant as a matter of right. This was held many years ago in *Tillpaugh v. Dick*, 8 How. Prac. 33; *Parker, J.*, saying: 'The dismissal of the complaint was a judgment in favor of the defendant, and entitled him to recover whatever items of cost are given by the code for services rendered.' " This was followed in *Wetzler v. Silverman*, 123 N. Y. Supp. 794, 795.

"Under §5919, Comp. Laws of Oklahoma, 1909, an action may not be dismissed without an order of court, except on the payment of the costs accrued." *Interstate Crude Oil Co. v. Young* (Okla.), 118 Pac. 257.

Discontinuance as to Some of Defendants.—The plaintiff has the right to discontinue as to any defendant upon the payment of costs to him only up to the time of the discontinuance. *Ganet v. Mears*, 4 Wis. 306.

In an action on a joint and several liability, if the action is severed and then dismissed as to one defendant, he is entitled to costs as of course, as in a separate action. *Tanzer v. Breen*, 116 N. Y. Supp. 110.

Plaintiff Not Entitled to Costs.—*Todhunter v. Marshall*, 32 Ind. 96.

Costs Taxable.—In civil cases generally the defendant is not entitled, upon a dismissal of a suit in good faith, to recover for expenses made by him in preparing his defense which are not taxable as costs in the case. *McCready v. Rio Grande Western R. Co.*, 30 Utah 1, 83 Pac. 331.

The term "reasonable costs" in the Vermont statute covers such costs as had accrued to the defendant before the suit was discontinued, though before the return day, as costs for summoning witnesses or in taking depositions. *Woods v. Darling*, 71 Vt. 348, 45 Atl. 750.

Right To Recommence Action.—"Where a plaintiff dismisses or discontinues his action, or suffers nonsuit, he

the discontinuance.⁸⁰ And the same rule applies to a defendant who files a cross-bill which is afterwards dismissed.⁸¹ But where the plaintiff had reasonable ground for filing the suit he is not liable.⁸²

A defendant who obtains judgment dismissing a declaration or complaint upon one defense is not precluded from recovering costs because he has pleaded other defenses wholly without merit.⁸³ It seems, however, that the exercise of judicial discretion as to the allowance of a discontinuance without costs depends upon a sufficient excuse in the instituting of the suit, or the occurrence of circumstances since the commencement of the suit which equitably entitle the plaintiff to a discontinuance.⁸⁴

has the privilege of recommencing the action only upon the payment of all the costs which accrued in the former suit, unless he files the pauper affidavit allowed by Civil Code, 1910, §5626. This condition as to payment of costs applies to all the costs, whether due to officers or to the opposite party, and applies whether a formal judgment taxing the costs has ever been entered or not." *Williams v. Holland* (Ga. App.), 71 S. E. 760.

"Where a suit has been dismissed by the plaintiff, in order to bring a second suit for the same cause of action, the plaintiff must pay the costs or file a pauper's affidavit showing his inability to do so. A failure in this regard furnishes ground for a plea in abatement." *White v. Bryant*, 136 Ga. 423, 71 S. E. 677.

"Where one had instituted proceedings to foreclose his livery stable keeper's lien, and dismissed the proceedings, and subsequently instituted other proceedings to foreclose the same lien, to which a plea in abatement was filed, setting up that the costs in the first case had not been paid, and that a pauper's affidavit in terms of the statute had not been filed, it was error to overrule the plea in abatement, after the introduction of evidence sustaining the material allegations of the plea." *White v. Bryant*, 136 Ga. 423, 71 S. E. 677.

80. Thus, a defendant will not be entitled to costs on quashing a plaintiff's writ before appearance (*Coxe v. James*, 9 N. J. L. 378; *Averill v. Patterson*, 10 N. Y. 500), but after entry of an action and appearance his right cannot be taken away (*Whitney v. Brown*, 30 Me. 557; *Smith v. White*, 7 Hill [N. Y.] 520; *Bedell v. Powell*, 13 Barb. [N. Y.] 183; *Robinson v.*

Taylor, 12 Wend. [N. Y.] 191 [where defendant retained an attorney]). So, on dismissal of plaintiff's action after a good plea in abatement. (*Hyde v. Cole*, 1 Iowa 106). So, where action is withdrawn on the day but before the hour fixed for trial defendant will be entitled to his costs. *Parmelee v. Town of Bethlehem*, 57 Conn. 270, 18 Atl. 94.

Before Answer.—A defendant will be required to pay costs, where a motion to dismiss a bill for want of equity was not made before answer was filed. *Holschumaker v. Etchells* (Del.), 74 Atl. 644.

81. *Teutonia Ins. Co. v. Russell* (Tenn.), 48 S. W. 703.

But an unnecessary cross-bill, in a case where the plaintiff in the original bill was also in fault, will be dismissed without cost to either party. *Bogle v. Bogle*, 3 Allen (Mass.) 158.

82. *Perine v. Swaim*, 2 Johns. Ch. (N. Y.) 475.

A color of claim may be dismissed by plaintiff without costs. *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

83. *Gold v. Gold* (C. C. A.), 187 Fed. 273.

84. *Petty v. Metropolitan St. R. Co.*, 33 Misc. 738, 68 N. Y. Supp. 730.

An administrator who commenced an action in good faith may discontinue without costs, upon the discovery of a good defense. *Fowler v. Starr*, 3 Denio (N. Y.) 164.

Commenced without authority of plaintiff. *Town v. Green*, 32 Kan. 143, 4 Pac. 156.

Insolvency of Defendant.—When after a suit is brought a defendant is discharged under the insolvent laws, a plaintiff may discontinue his case without costs. *Hart v. Storey*, 1 Johns. (N. Y.) 146; *Case v. Belknap*, 5 Cow.

(II.) **On Motion of Court or Defendant.**—If a cause is dismissed on the court's motion or on the motion of the defendant, because of the plaintiff's failure to appear and prosecute his action, the defendant is entitled to costs.⁸⁵ But if the fault is not his own the plaintiff is not obliged to pay costs.⁸⁶

(III.) **Want of Jurisdiction.**—While the decisions of the courts are not entirely harmonious, the decided weight of authority is in favor of the rule that where an action is dismissed for want of jurisdiction no costs can be awarded to either party unless expressly authorized by statute,⁸⁷ at least where such want of jurisdiction is apparent on

(N. Y.) 422; *Reeder v. Seely*, 4 Cow. (N. Y.) 548; *Merritt v. Arden*, 1 Wend. (N. Y.) 91; *Clark v. Scofield*, 16 Vt. 699.

A discontinuance without costs is not proper merely because the plaintiff is in reduced circumstances. *Petty v. Metropolitan Street R. Co.*, 33 Misc. 738, 68 N. Y. Supp. 730, where it was said that plaintiff might apply to sue *in forma pauperis*.

The death of the defendant is no excuse. *Bloomington v. Luchow*, 76 N. Y. Supp. 280.

Selling Subject-Matter of Litigation. But where his only ground of dismissal is that he has sold the subject-matter of the litigation he is liable for costs. *Lewis v. Germond*, 1 Paige (N. Y.) 300.

85. **Conn.**—*Parmalee v. Town of Bethlehem*, 57 Conn. 270, 18 Atl. 94, dismissal for want of jurisdiction. **Mass.**—*Brown v. Seymour*, 1 Pick. 32; *Haines v. Corliss*, 4 Mass. 659. **N. H.**—*Lyford v. Bryant*, 38 N. H. 88. **N. Y.**—*Dodd v. Curry*, 4 How. Pr. 123; *Corbell v. Clafin*, 17 Abb. Pr. 418; *Wetzler v. Silverman*, 123 N. Y. Supp. 794; *Murthey v. Burke*, 121 App. Div. 400, 108 N. Y. Supp. 98. **Ohio.**—*Falor v. Beerv*, 6 Ohio N. P. 290, 7 Ohio N. P. 645, 8 Ohio Dec. 306. **Tex.**—*Anderson v. McKinney*, 22 Tex. 653.

After notice of trial \$15 costs, \$30 trial fee, and term fees. *Bowery Nat. Bank v. Hart*, 132 N. Y. Supp. 1119.

86. *Cicero Lumb. Co. v. Cicero*, 178 Ill. 9, 51 N. E. 758; *Gibbons v. Ogden*, 7 N. J. L. 122.

87. **U. S.**—*Conley v. Ballinger*, 218 U. S. 84, 30 Sup. Ct. 224, 54 L. ed. 393; *Citizens' Bank v. Cannon*, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. ed. 451; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 11 Sup. Ct. 523, 35 L. ed. 151; *Smith v. Whitney*, 116 U. S. 167,

6 Sup. Ct. 570, 29 L. ed. 601; *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462; *Hornthall v. Collector*, 9 Wall. 560, 19 L. ed. 560; *Mayor v. Cooper*, 6 Wall. 247, 18 L. ed. 851; *Strader v. Graham*, 18 How. 602, 15 L. ed. 464; *McIver v. Wattles*, 9 Wheat. 650, 6 L. ed. 132; *Ingle v. Coolidge*, 2 Wheat. 363, 4 L. ed. 261; *Allen v. Consolidated Fruit Jar Co.*, 145 Fed. 948; *Parks County v. City of Decatur*, 138 Fed. 550, 70 C. C. A. 674; *International Wireless Tel. Co. v. Fessenden*, 131 Fed. 493; *In re Williams*, 120 Fed. 34; *Pentlarge v. Kirby*, 20 Fed. 898; *Abbey v. The Robert L. Stevens*, 22 How. Pr. 78, 1 Fed. Cas. No. 8. **Ark.**—*Denton v. Boyd*, 21 Ark. 264; *McKee v. Murphy*, 1 Ark. 55. **Colo.**—*Bartels v. Hoey*, 3 Colo. 279. **Conn.**—*Grumon v. Raymond*, 1 Conn. 40. **Ky.**—*Ormsby v. Lynch*, Litt. Sel. Cas. 303. **Mass.**—*Clark v. Rockwell*, 15 Mass. 221; *Williams v. Blunt*, 2 Mass. 207. **N. J.**—*Montgomery v. Bruere*, 11 N. J. L. 168. **N. Y.**—*Humiston v. Ballard*, 63 Barb. 9; *People v. Judges of Madison*, 7 Cow. 423; *Ex parte Benson*, 6 Cow. 592; *Ex parte Davis*, 5 Cow. 33. These cases state the former rule in New York. **Ohio.**—*Moore v. Boyer*, 42 Ohio St. 312; *Rothwell v. Winterstein*, 42 Ohio St. 249; *O'Neal v. Blessing*, 34 Ohio St. 33; *Burke v. Jackson*, 22 Ohio St. 268; *Norton v. McLeary*, 8 Ohio St. 205; *Paine v. Portage County Comrs.*, Wright 417. **Pa.**—*In re Shick's Bill of Costs*, 1 Leg. Gaz. 62. **R. I.**—*Hopkins v. Brown*, 5 R. I. 357. **Tenn.**—*Walker v. Snowden*, 1 Swan 193; *Turner v. Farley*, 3 Yerg. 300; *Faul's Admr. v. Collinsworth*, 2 Yerg. 579. **Utah.**—*Wall v. Hodge*, 3 Utah 168, 2 Pac. 206. **Vt.**—*Barlow v. Burr*, 1 Vt. 488. **W. Va.**—*Hall v. Hall*, 30 W. Va. 779, 5 S. E. 260.

Cause of Conflict in Decisions.—"The

the face of the pleadings.⁸⁸ These cases proceed upon the theory that, as the court is without power to adjudicate upon the merits, it possesses no jurisdiction or power to give costs to either party, and can only strike the case from its docket.⁸⁹

But in other jurisdictions the defendant is entitled to a judgment for costs in all cases in which an action is dismissed for want of jurisdiction in the court in which it is commenced, on the ground that costs are a proper and necessary incident to such a judgment,⁹⁰ and

rule or practice of courts, in different states, is sometimes different in respect to the taxation of costs, where a proceeding fails for want of jurisdiction. It is not uniform, whether it be in equity or law. Nor has it been only one way in several of the states, at different periods of their own judicial history. Sometimes the difference arises under the circumstances, that their statutes on the subject are different; and sometimes, probably, from analogies and reasons coming to the notice of the courts in one state and at one period, which did not in others, and hence influenced them to a different result." *Burnham v. Rangeley*, 2 Woodb. & M. 417, 4 Fed. Cas. No. 2,177.

Burnham v. Badgley, *supra*, also points out that there has been much conflict as to this practice, even in the same jurisdiction.

The rule of the federal courts is that when a case is dismissed from the court in which it is instituted because the court is without jurisdiction, no judgment for costs can be awarded. *Bradstreet Co. v. Higgins*, 114 U. S. 262, 5 Sup. Ct. 880, 29 L. ed. 176; *Burnham v. Rangeley*, 2 Woodb. & M. 417, 4 Fed. Cas. No. 2,177 (reviewing the whole question at great length); *Bank of Cumberland v. Willis*, 3 Sumn. 472, 2 Fed. Cas. No. 885.

Dismissal on Plea in Abatement.—A dismissal of a case on a plea of another suit pending between the same parties involving the same subject-matter, does not come within the rule that where the action is dismissed for want of jurisdiction, no judgment for costs can be entered. *Westfeldt v. North Carolina Min. Co.*, 177 Fed. 132.

In the municipal court of New York costs cannot be imposed against plaintiff on a judgment for defendant because of want of service. *Averbuck v. Hochlick*, 117 N. Y. Supp. 187.

If the cause is dismissed because of repeal of the statute upon which it is founded, neither party recovers costs. *Ind.*—*Hunt v. Jennings*, 5 Blackf. 195. *Me.*—*Saco v. Gurney*, 34 Me. 14. *N. Y.*—*Butler v. Palmer*, 1 Hill 324. *Wash.*—*Thurston County v. Scammel*, 7 Wash. 94, 34 Pac. 470.

88. *Hornthall v. The Collector*, 9 Wall. (U. S.) 560, 19 L. ed. 560; *Harriot v. New Jersey R. & T. Co.*, 1 Daly (N. Y.) 377.

Where a change of venue, prohibited by the constitution, is ordered, and the court to which the change is made, in consequence, has no jurisdiction, it can render no judgment for the costs of a trial which has taken place there; nor can the court of the county from which the cause came. *State v. Logston*, 3 Heisk. (Tenn.) 27d.

89. See *Citizens' Bank v. Cannon*, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. ed. 451; *Pentlarge v. Kirby*, 20 Fed. 898; *Burnham v. Rangeley*, 2 Woodb. & M. 417, 4 Fed. Cas. No. 2,177; *Kent v. Board of County Comrs.*, 42 Kan. 534, 22 Pac. 610.

90. *Ala.*—*Hillard v. Brown*, 103 Ala. 318, 15 So. 605; *Mazange v. Slocum*, 23 Ala. 669 (stating former rule). *Cal.* *Blair v. Cummings*, 39 Cal. 667. *Colo.* *Denver R. Co. v. Church*, 7 Colo. 143, 2 Pac. 218. *Ga.*—*Parker v. Belcher*, 87 Ga. 110, 13 S. E. 314. *Ill.*—*Kinman v. Bennett*, 2 Ill. 326. *Ind.*—*Dixon v. Hill*, 8 Ind. 147. *Kan.*—*Kent v. Board of County Comrs.*, 42 Kan. 534, 22 Pac. 610. *Ky.*—*Moran v. Master-son*, 11 B. Mon. 17. *Me.*—*Brown v. Allen*, 54 Me. 436; *Call v. Mitchell*, 39 Me. 465; *Reynolds v. Plummer*, 19 Me. 23. *Mass.*—*Elder v. Dwight Mfg. Co.*, 4 Gray 201; *Hunt v. Hanover*, 8 Metc. 343; *Jordan v. Dennis*, 7 Metc. 590. *Miss.*—*Work v. Mallory*, 25 Miss. 172; *Balfour v. Mitchell*, 12 Smed. & M. 629. *Mo.*—*State v. Thompson*, 81 Mo. 163; *Ensworth v. Curd*, 68 Mo. 282.

the further ground that the costs were occasioned by the plaintiff's act.⁹¹

Where the court has jurisdiction of the parties, though not of the

N. H.—*State v. Kinne*, 41 N. H. 238; *West v. Wentworth*, 26 N. H. 203; *Barron v. Ashley*, 4 N. H. 279. **N. Y.** *Cumberland Coal & Iron Co. v. Coal Co.*, 39 Barb. 16; *Hempsted v. White Sewing Mach. Co.*, 119 N. Y. Supp. 620. **Vt.**—*Universal Fashion Co. v. Morrison*, 61 Vt. 546, 17 Atl. 1006; *Chadwick v. Batchelder*, 46 Vt. 724; *Colony v. Maecck*, 8 Vt. 114. *Compare Barlow v. Burr*, 1 Vt. 488. **Wis.**—*Paine v. Chase*, 14 Wis. 711.

"Where an action or proceeding of any kind is commenced in a court of record, and it appears on the trial or hearing that the court is without jurisdiction, owing either to want of authority to hear or dispose of the subject-matter of the controversy, or to the lack of some preliminary procedure required in order to confer jurisdiction, it cannot be doubted that, if such action or proceeding is dismissed on either ground, the moving party is liable for a full bill of costs." *In re Terry*, 67 Misc. 514, 123 N. Y. Supp. 258, order affirmed, 142 App. Div. 921, 127 N. Y. Supp. 1147.

In Day v. Sun Ins. Office, 40 App. Div. 305, 307, 57 N. Y. Supp. 1033, 1035, the court said: "Although the courts have no jurisdiction to entertain this action, yet they have the power, where the question of the jurisdiction of the subject-matter has been presented to them, to award costs, even when they decide that they have no jurisdiction of the action. *Thiem v. Madden*, 27 Hun 371. Where a party brings into court a case over which the court has no jurisdiction, and the suit is dismissed for the lack of jurisdiction, costs may be awarded against him; for he, by bringing his action, has submitted himself to the jurisdiction of the court. *Simmons v. Simmons*, 32 Hun 551. The affirmance, therefore, must be with costs against the plaintiff." This case was followed in *Hempsted v. White Sewing Mach. Co.*, 119 N. Y. Supp. 620, 621.

In Tennessee it is held that the courts have the power, only under the statute, to adjudicate all costs. *Shannon's Code*, §4957; *Nashville v. Wilson*, 88 Tenn. 407, 12 S. W. 1082; *Jack-*

son v. Baxter, 5 Lea 344; *Cartmell v. McClaren*, 12 Heisk. 41 (citing and distinguishing *Faul's Admr. v. Collinsworth*, 2 Yerg. 579, overruling *Walker v. Snowden*, 1 Swan 193); *Cannon v. McAdams*, 7 Heisk. 376, 378; *Evans v. Shields*, 3 Head 70; *Welsh v. Marshall*, 6 Yerg. 455; *Turner v. Farley*, 3 Yerg. 300. See *Douglass v. Neguelona*, 88 Tenn. 769, 41 S. W. 283.

Even the state may be held liable on dismissing for want of jurisdiction a suit instituted by it. *Dupree v. State*, 48 Tex. Civ. App. 272, 107 S. W. 926.

In Massachusetts the decisions appear to have fluctuated at different times, and in some cases to have rested on the peculiar language of their statutes. Their earliest precedents seem to have been against the allowance of costs in any case which failed for want of jurisdiction. *Williams v. Blunt*, 2 Mass. 207.

In Massachusetts under the broad language of the statute giving costs to the prevailing party. *Jordan v. Dennis*, 7 Met. (Mass.) 590, following *Cary v. Daniels*, 5 Met. (Mass.) 236.

In Illinois a court, as incident to its power to dismiss a case for want of jurisdiction, may make such order as it wishes. *Le Moyne v. Harding*, 132 Ill. 78, 23 N. E. 416; *Bangs v. Brown*, 110 Ill. 96; *Brueggemann v. Young*, 128 Ill. App. 200.

91. *Moran v. Masterson*, 11 B. Mon. (Ky.) 17.

"A party cannot attempt to invoke the jurisdiction of a court by a suit and say he is exempt from the costs of the proceeding on the ground that the court had no jurisdiction." *Baines v. Mensing Bros.*, 75 Tex. 200, 12 S. W. 984.

Many of these decisions are placed to some extent upon statutes awarding costs to the successful party in the litigation, or, as the court in its discretion may deem just. *Kent v. Board of County Comrs.*, 42 Kan. 534, 22 Pac. 610, citing *Dixon v. Hill*, 8 Ind. 147; *State v. Thompson*, 81 Mo. 163.

Costs of Motion.—*Bradstreet Co. v. Higgins*, 114 U. S. 262, 5 Sup. Ct. 860, 29 L. ed. 176.

subject-matter, costs are frequently given,⁹² especially where the lack of jurisdiction does not appear on the face of the writ, and is a fair subject of discussion.⁹³

(IV.) *Want of Equity*.—Costs as a general rule will be allowed the defendant when the bill is dismissed for want of equity.⁹⁴

(V.) *Nonsuit*.—As a general rule a defendant is entitled to costs, where the plaintiff takes a nonsuit,⁹⁵ and no further proceedings should be allowed in the case until such payment.⁹⁶ But where the action is only dismissed as to some of the issues, the defendant is not entitled to a judgment for costs until the remaining issues are finally disposed of.⁹⁷ And where a plaintiff is taken by surprise, costs resulting from nonsuit should abide the result of the suit.⁹⁸

(VI.) *Taxation of Costs*.—If a suit is dismissed as to some of several defendants, and there is a recovery against the others, the latter cannot be made to pay the costs incurred by those against whom the suit was dismissed.⁹⁹

92. *Ky.*—*Moran v. Masterson*, 11 B. Mon. 17. *Me.*—*Brown v. Allen*, 54 Me. 436; *Harris v. Hutchins*, 28 Me. 102. *Mass.*—*Elder v. Dwight Mfg. Co.*, 4 Gray 201; *Hunt v. Hanover*, 8 Met. 343; *Jordan v. Dennis*, 7 Met. 590. *Mo.* *State v. Thompson*, 81 Mo. 163; *Ens-worth v. Curd*, 68 Mo. 282. *N. H.* *State v. Kinne*, 41 N. H. 238. *N. Y.* *Cumberland, etc. Co. v. Hoffman*, 39 Barb. 16. *Wis.*—*Pain v. Chase*, 14 Wis. 653.

See also *Winchester v. Jackson*, 3 Cranch (U. S.) 514, 2 L. ed. 516.

93. *Ind.*—*Dixon v. Hill*, 8 Ind. 147. *Me.*—*Call v. Mitchell*, 39 Me. 465. *Mass.* *Cary v. Daniels*, 5 Met. 236; *Osgood v. Thurston*, 23 Pick. 110; *Thomas v. White*, 12 Mass. 367. *Miss.*—*Balfour v. Mitchell*, 12 Smed. & M. 629. *N. Y.* *Chambers v. Feron*, 56 N. Y. Supp. 338. 94. *U. S.*—*Barr v. Pittsburgh Plate Glass Co.*, 57 Fed. 86, 6 C. C. A. 260, 17 U. S. App. 124. *N. J.*—*Cammann v. Traphagan*, 1 N. J. Eq. 230. *N. Y.* *Evans v. Vance*, 2 Barb. 598, bill considered by court as mere "fishing bill."

But if a motion to dismiss on this ground is made after answer filed, the defendant will be required to pay costs. *Holschumaker v. Etchells* (Del.), 74 Atl. 644.

95. *U. S.*—*Thomason v. Southern R. Co.*, 113 Fed. 80, 51 C. C. A. 67. *Cal.* *Fairchild v. King*, 102 Cal. 320, 36 Pac. 649; *Lukes v. Logan*, 66 Cal. 33, 4 Pac. 883; *Rice v. Leonard*, 5 Cal. 61. *Del.*—*Wright v. Hayes*, 2 Harr. 389.

Ga.—*Stirk v. Central R. & B. Co.*, 79 Ga. 495, 5 S. E. 105. *Ia.*—*Burlington, etc. Co. v. Sater*, 1 Iowa 421. *Ky.* *Dana v. Gill*, 5 J. J. Marsh. 242, 20 Am. Dec. 255. *Me.*—*Smith v. Allen*, 79 Me. 536, 12 Atl. 542; *Wesley v. Sargent*, 38 Me. 315; *Fuller v. Kipple*, 15 Me. 53. *Mass.*—*Inhab. of Weston v. Railway Comrs.*, 205 Mass. 94, 91 N. E. 303. *Miss.*—*Mississippi, etc. R. Co. v. Beatty*, 35 Miss. 668. *Mo.*—*Rives v. Columbia*, 80 Mo. App. 170. *Neb.* *Sheedy v. McMurtry*, 44 Neb. 499, 63 N. W. 21. *N. H.*—*Costa v. Nutter*, 27 N. H. 515. *N. Y.*—*Hogeboom v. Clark*, 17 Johns. 268; *Brown v. Lambert*, 16 Johns. 148. *Pa.*—*Keeler v. Knapp*, 1 Pa. 213. *S. C.*—*Benbow v. Richardson*, 21 S. C. 601. *Wis.*—*Combs v. Dunlap*, 19 Wis. 591.

Action on Judgment.—Where plaintiff was nonsuited in an action on a judgment because the judgment was reversed after the action was commenced, the plaintiff is liable for full costs. *Fuller v. Whipple*, 15 Me. 53.

96. *Lukes v. Logan*, 66 Cal. 33, 4 Pac. 883.

97. *Flannagan v. City of New York*, 140 App. Div. 900, 125 N. Y. Supp. 243.

98. *Austin v. Turner*, 10 Tex. 24, cited and followed in *Peck v. McKellar*, 33 Tex. 234, where plaintiff in a suit for land was unable to introduce his deed because of the mistake of the clerk in using the wrong seal.

99. *Clark v. Adams*, 80 Tex. 674, 16 S. W. 552.

c. *Where Judgment Rendered Without Trial.*—Whether the plaintiff is entitled to recover his costs upon a judgment in his favor without a trial depends upon the circumstances.¹

4. *How Far Offer of Judgment Controls.*—a. *Origin or Derivation of Right.*—The right of a defendant to make an offer of judgment and thus prevent the accumulation of costs against him, does not exist at common law, but is wholly dependent on some statute conferring such right.² But in many of the jurisdictions there are statutes authorizing the defendant to offer judgment to the plaintiff after the action is brought, thereby stopping the accumulation of costs from the time of the offer and making him liable for the defendant's costs from such time, if he refuses to accept the offer, goes to trial and fails to recover a more favorable judgment.³ Such a provision is inconsistent with any discretion in the

1. In equity, where a bill is taken as confessed and adverse judgment rendered, costs should ordinarily be awarded. *Harvey v. Crawford*, 2 Blackf. (Ind.) 43. But if after a bill is taken or confessed, the plaintiff proceeds to take testimony to support it, such proceeding is irregular and the costs occasioned thereby cannot be recovered. *Covell v. Cole*, 16 Mich. 223.

Where a judgment for damages is awarded upon a confession under a warrant of attorney, costs are given the plaintiff although there is nothing contained in the warrant with reference to costs. *Whitton v. Whitton*, 64 Ill. App. 53.

In the case of a judgment by default in a real action in the nature of an action of ejectment, the plaintiff is not entitled to costs unless it is affirmatively shown that the defendant was in actual possession of the premises, or some part thereof, at the commencement of the suit. *Sims v. Thompson*, 30 Ala. 158; *Hunt v. O'Neill*, 44 N. J. L. 564.

Judgment on Pleadings.—Motion costs only can be allowed the party prevailing. N. Y. Code Civ. Proc. §537. See also *Bell v. Noah*, 24 How. Pr. (N. Y.) 478; *Butchers & Drovers Bank v. Jacobson*, 22 How. Pr. (N. Y.) 470; *Rochester Bank v. Rapelje*, 12 How. Pr. 26; *Roberts v. Clark*, 10 How. Pr. (N. Y.) 451.

But where the application is granted absolutely and without leave to plead over, the successful party is entitled to costs both before and after notice.

Hill v. Simpson, 11 Abb. Pr. N. S. (N. Y.) 343.

In a summary proceeding by motion for judgment upon a replevin bond, the plaintiff is entitled to the costs of the motion. *Cooke v. Myers*, 1 Cranch C. C. 166, 6 Fed. Cas. No. 3,175.

2. *J. Thompson & Sons Mfg. Co. v. Ferch*, 78 Minn. 520, 81 N. W. 520.

3. **Ark.**—*Petsinger v. Beaver*, 44 Ark. 562. **Cal.**—Code Civ. Proc., §997; *Douthitt v. Finch*, 84 Cal. 214, 24 Pac. 929. **Colo.**—*Mill's Ann. Code*, §281. **Conn.**—*Anderson v. New Canaan*, 66 Conn. 54, 33 Atl. 393; *Wordin v. Bemis*, 33 Conn. 216; *People's Sav. Bank v. Collins*, 27 Conn. 142. **Ind.**—*Adams v. Pittsburg*, etc. R. Co., 165 Ind. 648, 74 N. E. 991; *Burns' Ann. St.*, 1901, §552.

Ia.—Code, §3818. **Kan.**—Comp. Laws, 1885, §523, ch. 80. **Ky.**—Civ. Code Pr., §640; *Boggs v. Turner*, 145 Ky. 333, 141 S. W. 420. **Me.**—*Higgins v. Rines*, 72 Me. 440; *Boyd v. Cronan*, 71 Me. 286 (in this state it is designated an "offer of default"); *Rev. St.*, 1835, ch. 165, §6. **Mass.**—*Greve v. Wood-Harmon Co.*, 173 Mass. 45, 52 N. E. 1070; *Madden v. Brown*, 97 Mass. 148; *Pub. St.*, ch. 167, §65. **Mich.**—2 How. St., §7372. **Minn.**—*Gen. St.*, 1894, §4976. **Mo.**—*Rosenberger v. Harper*, 83 Mo. App. 169; *Rev. St.*, 1889, §2191; *Rev. St.*, 1899, §751, as amended by Session Acts, 1907, p. 121. **Mont.**—*Gans v. Woolfolk*, 2 Mont. 458. **Neb.**—*Flower v. Nichols*, 55 Neb. 314, 75 N. W. 864; *Wachsmutt v. Orient Ins. Co.*, 49 Neb. 590, 68 N. W. 935; *Elsanger v. Grovjohn*, 29 Neb. 139, 45 N. W. 273; *Code Civ. Proc.*, §§565, 1004. **N. H.**—*Richey v. Cooper*, 45 N. H. 414. **N. Y.**—*Burnett v. Westfall*, 15

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matter,⁴ nor is this right in any way affected by an appeal, more especially where such appeal is from the judgment of an intermediate appellate court.⁵

b. *Construction of Statutes.*—These statutes are to be construed,⁶ and are not to be extended further than their warrant.⁷ But as their object is to discourage unnecessary litigation, they should be construed so as to secure that whenever it can be done fairly without doing violence to the employed.⁸

c. *Purpose or Object of Offer.*—The object of the offer is to cure the party on whom it is served, an adjudication of rights without the intervention of an action,⁹ also to give the party an option to stop the litigation at any time, and make its cost after a reasonable offer, at the peril of costs on the plaintiff.

d. *Distinguished From Tender.*—The conditions and effect of an offer under the statute are so different from those of a tender under the common law that the principles in relation to the latter do not bear.¹¹

e. *Right To Make Offer as Dependent on Character of*

(1.) *Scope of Statutes in General.*—The language of the statutes of the states limits the right to offer judgment to "action for recovery of money."¹² But in some states an offer may be

How. Pr. 432; *Magnin v. Dinsmore*, 15 Abb. Pr. (N. S.) 331; Code Civ. Proc., §§736, 738. N. C.—Revisal 1905, §860. Ohio.—*Armstrong v. Spears*, 18 Ohio St. 373. Okla.—*Colcord v. Conger*, 10 Okla. 458, 62 Pac. 276; Hill's Code, §520; Code Civ. Proc., §539. Pa.—*Driesbach v. Morris*, 94 Pa. 23; *Gardner v. Davis*, 15 Pa. 41. S. C.—*Williford v. Garsden*, 27 S. C. 87, 23 S. E. 858. S. D.—Comp. Laws, §6108. Utah.—*Orth v. Zion's Co-op. Assn.*, 5 Utah 419, 16 Pac. 590; Rev. St., §3217; Rev. St., 1881, §514. Wis.—*Montgomery v. American Cent. Ins. Co.*, 108 Wis. 143, 84 N. W. 175; *Chicago, etc. R. Co. v. Groh*, 85 Wis. 641, 55 N. W. 714; *Collins v. Lowry*, 78 Wis. 329, 47 N. W. 612; Rev. St., §§2920, 2789.

In Pennsylvania by rule of court, if the plaintiff files an affidavit of defense admitting a certain sum to be due, and no judgment is entered and there can be no recovery beyond such sum, the plaintiff must pay all the costs accruing in the case subsequent to the filing of the affidavit. *McLane v. Hoffman*, 164 Pa. 491, 30 Atl. 399; *Heckman v. Schmeck*, 35 Pa. Super. 397.

4. *Wilcox v. Laffin, etc. Powder Co.*, 44 Mich. 35, 5 N. W. 1091.

5. Ark.—*Shafstall v. 1 Ark. 5*, 112 S. W. 176; *1 Beaver*, 44 Ark. 562. *In v. Hays*, 20 Ind. 252. N. J.—*Falls Suspension Bridge Co. v. man*, 4 Lans. 523. Ohio.—*Kineon*, 46 Ohio St. 590, 22 *citing Courtright v. Stagge* St. 511. S. C.—*Williford v. S. C. 87*, 2 S. E. 858.

See *infra*, p. 860.

6. *Rosenberger v. Harp*, App. 169. *Compare Bathgate* 63 N. Y. 261.

7. *Lee v. Stern*, 22 Mo. 5

8. *Williams v. Reedy*, 72 39 N. W. 779.

9. *Bettis v. Goodwill*, 32 (N. Y.) 137.

10. *Gowdy v. Farrow*, 36 Post v. New York Cent. R. Co. Pr. (N. Y.) 552.

11. See *Wordin v. Bemis* 216. See also the title "Tend

12. See the statutes in t jurisdictions.

It has been held that for assault and battery (*Cligram*, 17 Kan. 586), and for trespass upon the plain and injury to his cattle (*Car Steggers*, 15 Ohio St. 511) a

any and every action, regardless of the nature and cause thereof.¹²

Actions Ex Delicto and Unliquidated Demands.—These statutes in some states apply to tort actions as well as to actions on contract;¹⁴ and to actions for unliquidated¹⁵ or disputed demands.¹⁶

Special Proceedings.—In some states special proceedings are not embraced by the statute.¹⁷

Proceedings in Justices' and Municipal Courts.—The statutes in some states apply to justices' courts, as well as to courts of general jurisdiction.¹⁸

for the recovery of money within the meaning of those statutes.

But the statute is not applicable to a proceeding to determine the value of land appropriated to public use, to the end that compensation may be rendered therefor. *Town of Cherokee v. Town Lot Co.*, 52 Iowa 279.

Under the Iowa Code, §3404, limiting the right to actions for the recovery of money, it was held that an offer to confess judgment may be filed after an appeal is taken from the award of commissioners assessing damages. *Harrison v. Iowa Midland R. Co.*, 36 Iowa 323.

Wisconsin Gen. Law, 1858, ch. 97, only applied to actions on contract. *McHugh v. Timlin*, 20 Wis. 513.

Maine Rev. St. 1858, ch. 82, §21, allowing an offer of default to be made in any "personal action," extends to an action of trespass *quare clausum fregit*. *Boyd v. Cronan*, 71 Me. 286.

Moreover, this section applies only to actions founded on judgment or contract, and hence does not embrace a writ of entry. *Carlson v. Walton*, 51 Me. 382.

13. *Richey v. Cooper*, 45 N. H. 414.

The offer of judgment under §385 of the New York Code was not confined to actions upon contract. *Bridenbecker v. Mason*, 16 How. Pr. (N. Y.) 203.

14. Conn.—*Wordin v. Bemis*, 33 Conn. 216. Kan.—*Clippinger v. Ingram*, 17 Kan. 586. Mo.—*Rosenberger v. Harper*, 83 Mo. App. 169.

By §523 of the Civil Code of Kansas, a defendant in an action for damages arising in tort may, in his answer, offer to confess judgment for a specified sum; and if judgment be not recovered for a larger sum, a judgment for costs of the action which accrued after the filing of the answer should be rendered against the plaintiff, and all costs made before filing of the answer

should be made against defendant. *Kaw Val. Fair Assn. v. Miller*, 42 Kan. 20, 21 Pac. 794.

In California, the defendant in an action for tort may make an offer of judgment. *Basler v. Sacramento Gas, etc. Co.*, 158 Cal. 514, 111 Pac. 530 (citing *Douthitt v. Finch*, 84 Cal. 214, 24 Pac. 929); *Redington v. Pacific Postal Tel. Co.*, 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132.

15. *Maxwell v. Missouri, etc. R. Co.*, 91 Mo. App. 582, citing *Lieurance v. McComas*, 59 Mo. App. 118.

16. *Hill v. Northrop*, 9 How. Pr. (N. Y.) 525.

17. *Chicago, etc. R. Co. v. Townedia*, 45 Kan. 771, 26 Pac. 427, holding that §528 of the Civil code does not embrace condemnation proceedings, because it refers to "actions brought for the recovery of money." But it was further held that after a landowner appeals from the award of commissioners, the proceeding becomes a civil action.

Proceedings To Settle Decedents' Estate.—*Hanna v. Dunham*, 10 Ind. App. 611, 38 N. E. 343; *Emmons v. Gordon*, 125 Mo. 636, 28 S. W. 863.

18. *Williams v. Ready*, 72 Wis. 408, 39 N. W. 779.

In Minnesota the right is created in actions brought in a justice's court by Gen. St., 1894, §4976, and to actions pending in the district court by §5405. Neither of those sections is applicable or of any force in actions brought in municipal courts established in accordance with the terms of Laws 1895, ch. 229. *J. Thompson & Sons Mfg. Co. v. Fereh*, 78 Minn. 520, 81 N. W. 520.

In Nebraska, in an action before a justice of the peace, if the defendant before trial offers in writing to allow judgment to be taken against him for a specified sum, and the plaintiff

COSTS

(II.) **Equity Cases.**—Offers of judgment are permitted in equity cases the same as in common law actions.¹⁹ But this does not deprive a court of equity of its well settled right to exercise its discretion as to costs.²⁰

Foreclosure Proceedings.—Although the plaintiff is obliged to the court to obtain the full relief sought, as in actions on mortgages and other liens, this fact does not deprive the plaintiff of the right to make an offer.²¹

(III.) **Actions by State or County.**—In actions by or on behalf of a state or county against individuals, the right to offer judgment is limited.²²

(IV.) **Proceedings in the Appellate Court.**—In New York an appeal is taken from the decision of a justice to the county clerk. The respondent may serve upon the appellant and justice a writ to allow judgment to be taken in the appellate court for a sum.²³ If the same be not accepted, the party on whom judgment is served will be liable for costs to his adversary, unless the

declines to accept the offer, and fails to recover a sum equal to the offer he cannot recover costs made after the offer, but the same must be adjudged against him. *Flower v. Nichols*, 55 Neb. 314, 75 N. W. 864; *Elsanger v. Grovjohn*, 29 Neb. 139, 45 N. W. 273.

19. *Gaines v. Heaton*, 100 Ill. App. 26, affirmed, 198 Ill. 479, 64 N. E. 1081; *Bathgate v. Haskins*, 63 N. Y. 261; *Kennedy v. McKone*, 10 App. Div. 88, 41 N. Y. Supp. 782; *Kiernan v. Agricultural Ins. Co.*, 3 App. Div. 26, 37 N. Y. Supp. 1070.

20. But if the action is an equity action, in which the costs are in the discretion of the trial court, and it has been determined that the complaint should be dismissed without costs, the statutes do not apply, although the plaintiff does not obtain as favorable a judgment as offered. The case in which it was held that the section applied to equity actions were said to be cases in which costs had been allowed by the trial court. *Connolly v. Hyams*, 58 N. Y. Supp. 932.

21. *Bathgate v. Haskins*, 63 N. Y. 261; *Penfield v. James*, 56 N. Y. 659; *Astor v. Palache*, 49 How. Pr. (N. Y.) 231; *Bettis v. Goodwill*, 32 How. Pr. (N. Y.) 137; *Pfister v. Stumm*, 7 Misc. 526, 27 N. Y. Supp. 1000.

Offers of judgment are allowable in proceedings to foreclose mechanic's liens. *Kennedy v. McKone*, 10 App. Div. 88, 41 N. Y. Supp. 782.

But the statute in Connecticut does

not apply to suits to foreclose mortgages. *People's Sav. Bank v. 27 Conn. 142.*

22. **Cutting Timber on Public Lands.**—In an action to recover damages for wrongfully cutting timber on public lands, an offer to purchase the land is available to the defendant to prevent further costs in the action where the "jury find such damages by mistake, and the sum of the costs for which judgment is offered was not less than the aggregate amount of the damages therein mentioned. *Smith v. 73 Wis. 375, 41 N. W. 532.*

Action Against Delinquent Taxpayers.—Since §997 of the California Civ. Proc. only provides for judgment to allow judgment "for the amount therein specified, such an offer may be made in an action to recover delinquent taxes. *County of Los Angeles v. Central Pac. R. Co.*, 61 Cal. 2d 100.

23. Code Civ. Proc. §307. The code now is [as amended in 1907] that a party can secure his costs, by an offer provided for in the section. *Kuskie v. Hendrickson*, 128 N. Y. 28, 28 N. E. 650.

Service must be made upon the defendant and upon the justice. *Smith v. 30 How. Pr. (N. Y.) 187.*

Must be served on an attorney and not an attorney in fact. *Lear v. Reynolds*, 76 App. D. N. Y. Supp. 457.

is more favorable to him than the offer. The only real effect of that offer is to entitle the party making it to costs, if the recovery is less favorable to his adversary than the offer. When the offer is not accepted, and is not as favorable to the adverse party as the result of the trial, the offer has no effect upon the question of costs.²⁴

f. Right To Make Offer as Dependent on Number of Defendants. The privilege of offering judgment is not confined to actions against a sole defendant, but extends to actions against several.²⁵

g. The Offer.—(1) *General Considerations.*—This offer is in the nature of a pleading,²⁶ and therefore must be construed most strongly against the party making it.²⁷

Distinctions.—An offer of judgment is clearly distinguishable from an offer to pay money into court.²⁸

Number of Offers Allowable.—Where an offer of judgment is not accepted by the plaintiff, the defendant may serve a second offer for a different amount.²⁹

Tendering the Offer.—*Through Whom.*—The offer need not be made in person, but may be made through an agent or attorney.³⁰

Manner of Tendering.—While it is the usual practice to make the offer by a separate writing, it may be made in the defendant's answer.³¹ But in other jurisdictions, it is held that the offer cannot be made in the answer, because such averment tenders no proper issue calling for proof on the trial.³²

24. *McKuskie v. Hendrickson*, 128 N. Y. 555, 28 N. E. 650, *reversing* 34 N. Y. St. 901; *Birdsall v. Keyes*, 66 Hun 233, 21 N. Y. Supp. 87; *Adolph v. De Ceu*, 45 Hun (N. Y.) 130.

25. *Bridenbecker v. Mason*, 16 How. Pr. (N. Y.) 203.

26. *Post v. New York Cent. R. Co.*, 12 How. Pr. (N. Y.) 552; *Hammond v. Northern P. R. Co.*, 23 Ore. 157, 31 Pac. 299.

An offer to allow judgment is but a substitute for the former *cognovit*, by which a defendant who had no defense gave the plaintiff a written confession of the action. *Boyd v. Ward Furniture, etc. Co.*, 38 Mo. App. 210, 214; *Kantrowitz v. Kulla*, 13 Civ. Proc. (N. Y.) 74, *citing* *Grah. Pr.* (2d ed.) 781.

27. *Bettis v. Goodwill*, 32 How. Pr. (N. Y.) 137.

28. *Kennedy v. McKone*, 10 App. Div. 88, 41 N. Y. Supp. 782.

29. *Hibbard v. Randolph*, 72 Hun 626, 25 N. Y. Supp. 854.

But even though a second offer is made by the defendant, yet if the first offer is not withdrawn and the plaintiff does not recover more than was first

offered, he must pay all the costs of the defendant incurred after the first offer. *Chicago, etc. Co. v. Townsden*, 45 Kan. 771, 26 Pac. 427.

30. *Randall v. Wait*, 48 Pa. 127, suit in a justice's court.

A judgment on the offer of the defendant personally, without notice to the attorney, is irregular. *Webb v. Dill*, 18 Abb. Pr. (N. Y.) 264.

31. *Kaw Val. Fair Assn. v. Miller*, 42 Kan. 20, 21 Pac. 794. N. C.—*Russ v. Brown*, 113 N. C. 227, 18 S. E. 107; *Stephens v. Koonce*, 103 N. C. 266, 9 S. E. 315. Ore.—*Hammond v. Northern Pac. R. Co.*, 23 Ore. 147, 31 Pac. 299. Wis.—*Williams v. Ready*, 72 Wis. 408, 39 N. W. 779; *Erd v. Chicago, etc. R. Co.*, 41 Wis. 65.

New Matter in Answer.—If the defendant sets up new matter in his answer and the plaintiff's reply puts it in issue, and the defendant is granted affirmative relief, it is error to enter judgment against the defendant for the plaintiff's costs and disbursements. *Harbo v. Board of Com'rs etc.*, 63 Minn. 238, 65 N. W. 457.

32. *City of Davenport v. Chicago, etc. R. Co.*, 38 Iowa 633; *Tipton v.*

(II.) **Form and Requisites.**³³ — The consent that judgment be entered is the equivalent of an offer of judgment.³⁴

Formal Requisites. — The offer must contain the caption required by the statute,³⁵ reciting there the title of the cause.³⁶ It must also be in writing³⁷ and be signed by or on behalf of the defendant to be bound

Tipton's Admr., 49 Ohio St. 364; Armstrong v. Spear, 18 Ohio St. 373.

The "offer to compromise" provided for in §493 of the Ohio Code, and the offer "to confess judgment" provided for in §498, cannot properly be made in the answer in the action, but to be effectual must be made as follows: The offer to compromise in a separate writing, and the offer to confess judgment in open court, in the presence of the plaintiff, or in the pursuance of the notice to him. *Armstrong v. Spears*, 18 Ohio St. 373.

33. Under the statutes in force in the respective states, the following forms were held sufficient:

"The plaintiffs are hereby notified that the defendants offer to confess judgment in favor of the plaintiffs for the sum of three hundred and fifty dollars, and costs of suit to this date.

"Goode & Bowman,

"Defendants' Attorneys."

Adams v. Phifer, 25 Ohio St. 301.

"Sir, take notice that the defendant hereby offers to allow the plaintiff in this action to take judgment against him for the amount claimed in the summons and complaint, less the amount of the two notes of Joseph Westfall, set up in the third and fourth defences in the answer, and for costs and disbursements.

Yours, etc.,

"Cornwell, Welling & Arnold,

"Defendants' Attorneys."

"To S. Baldwin, Esq.,

Plaintiff's Attorney."

Burnett v. Westfall, 15 How. Pr. (N. Y.) 420.

An offer of judgment in the following terms: "Now comes the defendant and offers the plaintiff judgment in the sum of four hundred and seven and 72/100 dollars, principal and interest due to date and costs," etc. may be construed as an offer of \$407.72 as damages including interest as well as principal, if not costs. *Upton v. Foster*, 148 Mass. 592, 20 N. E. 198, where it was said that the statute intended that the offer should be precise and not

one that might be open to future controversy.

It is a compliance with the statute in Maine if the offer is in these words: "and now on this third day of the term the defendant by his attorney comes and offers to be defaulted for the sum of seventy-five dollars damage in said action." *Gowdy v. Farrow*, 39 Me. 474.

34. *White v. Bogart*, 73 N. Y. 256.

35. *Benson v. Chicago, etc. R. Co.*, 113 Iowa 173, 84 N. W. 1028, holding that if the statute calls the proceeding an "offer to confess judgment," it is fatal to designate it an "offer of compromise." Compare *Adams v. Phifer*, 25 Ohio St. 301.

36. *Burnett v. Westfall*, 15 How. Pr. (N. Y.) 420.

37. **Ia.**—Code §3820. **Kan.**—Gen. St. 1899, §751. **Me.**—*Hunt v. Elliott*, 20 Me. 312. **Mo.**—*Enos v. St. Louis, etc. R. Co.*, 41 Mo. App. 269. **N. Y.**—Code Civ. Proc., §738. **Wis.**—Rev. St., 1898, §2789; Rev. St., 1899, §751.

Rule in Justice's Court.—An offer tendered in an oral answer before a justice, which however when entered by the justice in his docket is in substance necessarily reduced to writing in solemn form, is a compliance with a statute requiring an "offer in writing." *Williams v. Ready*, 72 Wis. 408, 39 N. W. 779. See *Carpenter v. Kent*, 11 Ohio St. 554.

Under the Iowa code an offer to confess judgment may be made orally in open court. *Barlow v. Buckingham*, 38 Iowa 169, 26 N. W. 58.

Reduction to Writing After Made. See *Masterson v. Homberg*, 29 Kan. 106.

Presumption as to Writing.— "Wherein an action for money before a justice of the peace, it is shown by the docket of the justice that, prior to the day of trial, the defendant offered to confess judgment in favor of the plaintiff for a certain sum, which plaintiff refused to accept, there is no presumption that the offer was not in writing, and in such case the de-

by it and against whom judgment is to be taken.³⁸ Sometimes it is required that the offer be sworn to.³⁹

Acknowledgment.—If the offer is subscribed by the defendant, this is sufficient; it need not be acknowledged.⁴⁰

Designation of Parties.—The offer must mention the party to whom it is made.⁴¹

General Requisites.—The offer of the defendant must be to allow judgment to be taken against him for a certain specified sum,⁴² so that if accepted judgment for the amount may be entered at once.⁴³ In other

cision of the district court on a motion to tax costs to plaintiff for the reason that the judgment did not exceed the offer will not be molested." *Underhill v. Shea*, 21 Neb. 154, 31 N. W. 510, per Reese, J.

38. *Ossenkop v. Akesson*, 15 Neb. 622, 19 N. W. 709.

Manner of Signing.—It can only be signed in one of three ways: 1st. By the defendants in person, each signing his own proper name; 2d, by an agent especially authorized to sign the same for them and in their name; or 3d, by an attorney of the court whose authority to represent the parties will be presumed. *Bridenbecker v. Mason*, 16 How Pr. (N. Y.) 203. And see *Sterns v. Bentley*, 3 How. Pr. (N. Y.) 331, as to signing by attorney.

In New York an attorney signing must annex his affidavit thereto, stating his authority. One partner may authorize his co-partner to give this authority. *Bulger v. Rosa*, 47 Hun (N. Y.) 435.

In an action before a justice of the peace it is not absolutely essential that the offer be authenticated by the signature of the defendant. *Masterson v. Homberg*, 29 Kan. 106.

39. "The provision of §740 of the (New York) Code of Civ. Proc., providing that an affidavit shall accompany an offer of judgment subscribed by an attorney only applies to an offer made as prescribed in the sections of the Code of Civil Procedure" and not to an offer made under §3070 allowing an offer to be served after an appeal. *Cutting v. Jessmer*, 101 App. Div. 283, 91 N. Y. Supp. 653.

Proof of Genuineness.—If the offer is subscribed by the party himself, no affidavit of his authority is required, nor is any formal acknowledgment of execution necessary. *Marks v. Epstein*, 13 Civ. Proc. (N. Y.) 293.

40. *Pfister v. Stumm*, 7 Misc. 526, 27 N. Y. Supp. 1000, *disapproving* *Rumsey* Pr. p. 629.

41. The name of an assignor of a note, made defendant to answer as to the assignment, need not be noticed in an offer by the maker of the note to confess judgment for a given sum, as the offer is, of itself, an admission of the assignment and a waiver of any further proceedings. *Harris v. Dailey*, 16 Ind. 183.

42. *Gans v. Woolfolk*, 2 Ment. 453 (holding that an admission in the defendant's answer that he owed the amount, stated in the complaint was not a compliance with the statute); *Hammond v. Northern Pac. R. Co.*, 23 Ore. 157, 31 Pac. 299.

The offer must be to allow judgment to be rendered against him for the sum named and costs. An offer in writing to pay a sum of money and costs if the plaintiff will dismiss his action is not a compliance with the statute. *Quinton v. Van Tuyl*, 30 Iowa 554.

A mere willingness on the defendant's part to confess judgment for a certain amount, nor an expectation that the judgment will be rendered against him for that amount, is not a sufficient offer. There must be an offer to confess judgment for a certain amount. *Ayer v. Jones*, 85 Ark. 28, 106 S. W. 1171; *Armstrong v. Spears*, 18 Ohio St. 373.

43. Ia.—*De Long v. Wilson*, 80 Iowa 216, 45 N. W. 764. N. Y.—*Marble v. Lewis*, 36 How. Pr. 337; *Bridenbecker v. Mason*, 16 How. Pr. 203. N. C.—*Williamson v. Locks Creek Canal Co.*, 84 N. C. 629.

An offer is sufficient though it is not for a specified sum, as for example, an offer tendering a balance which can be easily ascertained by the clerk. *Burnett v. Westfall*, 15 How Pr. (N. Y.) 420.

words, the offer must be a practical one, one of which the plaintiff may avail himself, at once and absolutely, without asking the aid or permission of the court, and without danger to his interests.⁴⁴ Moreover, the offer must be clear, unambiguous,⁴⁵ and unconditional, leaving no facts to be ascertained and determined before entering judgment on it.⁴⁶

If the offer does not comply with the statute in all substantial respects it is a nullity, and may be treated as such by the plaintiff. It will have no effect on the question of costs.⁴⁷

Necessity for Tendering Costs.—A general requirement is that the defendant in his offer of judgment must also offer to pay the plaintiff's costs up to the time of making the offer, otherwise it is insufficient.⁴⁸ But he is not permitted to offer judgment for a certain

Where an offer is made of a certain sum "with interest," not specifying the amount of interest or fixing any date for its computation, no significance can be given to the words "with interest." *Smith v. Bowes*, 11 Daly (N. Y.) 320.

44. *Griffiths v. DeForest*, 16 Abb. Pr. (N. Y.) 292, holding that the offer would be insufficient if it involved the necessity of severing the action.

In an action brought to foreclose a mechanic's lien, an offer in these words: the defendant hereby offers "to allow judgment in this action establishing the amount of the plaintiff's lien at the sum of \$300 and costs," is sufficient in substance under the New York code to entitle the defendant to costs, although the plaintiff has to go to court for the relief sought. *Pfister v. Stumm*, 7 Misc. 526, 27 N. Y. Supp. 1000, following *Lumbard v. Syracuse*, etc. R. Co., 62 N. Y. 290.

45. *Upton v. Foster*, 148 Mass. 592, 20 N. E. 198; *Post v. New York Cent. R. Co.*, 12 How. Pr. (N. Y.) 552.

Under the New Hampshire statute, when the defendant confesses the plaintiff's action, or part thereof, he is not required to specify the particular items in the plaintiff's specification which he admits. *Richey v. Cooper*, 45 N. H. 414.

46. *Pineckney v. Childs*, 7 Bosw. (N. Y.) 660.

The following words in an offer, "said amount to be a full settlement of the above cause," does not constitute a condition on which the offer is made. *De Long v. Wilson*, 80 Iowa 216, 45 N. W. 764.

The offer should not contain explanatory, apologetic or extenuating matters in no way going to the defense of the action. *Basler v. Sacramento Gas, etc. Co.*, 158 Cal. 514, 111 Pac. 530.

A written offer of judgment in an action for personal assault, aided by the process of attachment, is not insufficient for failing to mention the attachment. *Rosenberger v. Harper*, 83 Mo. App. 169.

47. *Ia.*—*McClatchey v. Finley*, 62 Iowa 200, 17 N. W. 469. *Kan.*—*Saum v. LaShell*, 45 Kan. 205, 25 Pac. 561. *N. Y.*—*Riggs v. Waydell*, 78 N. Y. 586; *McFarren v. St. John*, 14 Hun 387.

48. *Harter v. Comstock*, 11 Ind. 525. *Ia.*—*De Long v. Wilson*, 80 Iowa 216, 45 N. W. 764. *Compare* *Manning v. Irish*, 47 Iowa 650. *Mont.*—*Pape v. Chauvin-Fant Furniture Co.*, 25 Mont. 417, 65 Pac. 424. *Wis.*—*Warden v. Sweeney*, 86 Wis. 161, 56 N. W. 647.

"Costs to Date."—An offer of judgment for a certain sum with costs "to date" is invalid, because the plaintiff, if he had accepted it, could have taxed no costs accruing subsequently to the date of the offer. *Leslie v. Walrath*, 45 Hun (N. Y.) 18, distinguished in *Hammond v. Northern P. R. Co.*, 23 Ore. 157, 31 Pac. 299.

An offer to confess judgment for a definite sum with "accrued costs" (*Ind.*—*Holland v. Pugh*, 16 Ind. 21. *Minn.*—*Petrosky v. Flanagan*, 38 Minn. 26, 35 N. W. 665. *Ore.*—*Hammond v. Northern R. Co.*, 23 Ore. 157, 31 Pac. 299), or "all costs to this date" (*Keller v. Allee*, 87 Ind. 252), or "with costs accrued to the present

specified amount of costs; the offer is generally for the costs of the action.⁴⁹ In a few jurisdictions, however, it is not necessary that the defendant shall tender or include costs in his offer of judgment. It is enough that the offer contains a sum for which judgment is to be entered.⁵⁰

(III.) *Scope and Extent of Offer.* — The defendant's offer of judgment may be for the full sum demanded by the plaintiff, and he is not limited to cases in which he would only confess a part of the plaintiff's claim.⁵¹

The offer likewise must be as broad as the acceptance is required to be, for since acceptance must be in full of all demands it follows that the offer must be equally broad.⁵²

Completeness. — The tender must be of a judgment against all the defendants, and must be made in behalf of all of them.⁵³ If the offer is "so ambiguous, uncertain or indefinite, as to leave it doubtful whether it includes an offer of all the relief the party receiving it is justly entitled to," it is of no avail and the plaintiff is entitled to his costs, notwithstanding the offer.⁵⁴

(IV.) *Parties to Offer.* — *Joint and Several Parties.* — One joint debtor or partner cannot make an offer in behalf of his joint debtor or co-

time in the above entitled cause" (Rose v. Grinstead, 53 Ind. 202) are all sufficient under the statute.

Costs of Entering Judgment. — An offer to be valid must be so framed that the party served with it is entitled to enter judgment upon it, and to tax the costs of entry upon the party making it. If it subjects the plaintiff to the costs of entering judgment upon it and of issuing the execution and entering satisfaction, it is invalid. Leslie v. Walrath, 45 Hun. (N. Y.) 18.

49. Coates v. Goddard, 2 Jones & S. (N. Y.) 118, 129.

50. Hammond v. Northern P. R. Co., 23 Ore. 157, 31 Pac. 299.

In New York this was formerly the rule. Megrath v. Van Wyck, 3 Sandr. (N. Y.) 750. But the rule in that state now is that the offer must by its terms allow the judgment to be taken with costs, otherwise it is a nullity. Ranney v. Russell, 3 Duer (N. Y.) 689; Leslie v. Walrath, 45 Hun (N. Y.) 18; Deitz Co. v. Miller, etc. Co., 88 N. Y. Supp. 322.

An offer of judgment has no effect whatever, unless it includes costs. Loring v. Morrison, 48 N. Y. Supp. 975, citing Leslie v. Walrath, 45 Hun (N. Y.) 18.

The word "costs" in an offer includes disbursements. Leslie v. Walrath, 45 Hun (N. Y.) 18.

51. Ross v. Bridge, 24 How. Pr. (N. Y.) 163. This case is cited with approval in Boyd v. Ward Furniture, etc. Co., 38 Mo. App. 210, 214. But in some states the offer is expressly limited to a part of the amount claimed. Pet-singer v. Beaver, 44 Ark. 562; Carpenter v. Kent, 11 Ohio St. 554; Rev. St. (Ohio) §498.

52. City of Davenport v. Chicago, etc. R. Co., 38 Iowa 633.

53. Wyatt v. Wilson, 152 N. C. 267, 67 S. E. 501.

An offer on behalf of a partnership must embrace all the members of the firm, whether they were named in the summons and pleadings or not, because the recovery is against the firm, and then a judgment against one partner is not as favorable as a judgment against all. Bannerman v. Quackenbush, 7 Civ. Proc. (N. Y.) 428, 17 Abb. N. C. 103.

54. Bettis v. Goodwill, 32 How. Pr. (N. Y.) 137. In an action to recover possession of personal property an offer of judgment, unless it offer to allow judgment determining title, is of no avail. Oleson v. Newell, 12 Minn. 186.

partner;⁵⁵ unless his co-defendant is in default or the offer is made by authority on behalf of all.⁵⁶ Therefore it is safer for all who have been served with process to join in making the offer, especially if the plaintiff is not entitled to a default judgment against those not uniting in the offer.⁵⁷

But an offer may be made by one or more defendants if the suit is so situated with respect to the other defendants that the plaintiff may at once enter judgment to the effect offered against all the parties jointly liable with those making the offer.⁵⁸ Otherwise the offer is unavailable.⁵⁹

It must be observed, however, that the one making the offer is liable thereon if a separate judgment can be taken against him.⁶⁰

Fiduciaries.—An executor has no authority to make the offer without leave of court.⁶¹

Attorneys.—If the offer is made by the defendant's attorney he must subscribe it and annex thereto an affidavit of his authority when

55. *Garrison v. Garrison*, 67 How. Pr. (N. Y.) 271; *Bannerman v. Quackenbush*, 17 Abb. N. C. (N. Y.) 103, 7 Civ. Proc. 428 (containing a history of the legislation).

Where process has been served on both defendants, joint debtors, the attorney of one cannot offer judgment against both. *Blodget v. Conklin*, 9 How. Pr. (N. Y.) 442. The offer must come from all the defendants, or their common attorney at law. *Williamson v. Lock's Creek Canal Co.*, 84 N. C. 629.

But in Ohio where one of several defendants in an action for money only offers to confess judgment for a certain sum, under §5140 Rev. St., and such offer is not accepted and the plaintiff fails to recover more than was offered, such defendant is entitled to recover judgment against plaintiff for his costs from the time of such offer. *New York, etc. R. Co. v. Clark*, 54 Ohio St. 509, 43 N. E. 1038.

56. *Bridenbecker v. Mason*, 16 How. Pr. (N. Y.) 203 (partners); *Olwell v. McLaughlin*, 10 N. Y. Leg. Obs. 316.

No offer by one copartner is effectual against the others without evidence that the other copartner approved or ratified it. *Bannerman v. Quackenbush*, 7 Civ. Proc. (N. Y.) 428, 17 Abb. N. C. 103; *Weed v. Bergstresser*, 2 Monthly Law Bull. 55.

57. *Bridenbecker v. Mason*, 16 How. Pr. (N. Y.) 203.

But where one or two defendants, sued on a partnership demand, offers

judgment after his co-defendant's time to answer had expired and he had not appeared, the plaintiff must pay the defendant's costs from the time of the offer if he recovers less than the offer on the trial. *La Forge v. Chilson*, 3 Sandf. (N. Y.) 752.

58. *Bridenbecker v. Mason*, 16 How. Pr. (N. Y.) 203; *LaForge v. Chilson*, 3 Sandf. (N. Y.) 752.

59. *Brusle v. Gilmer*, 16 Abb. Pr. (N. Y.) 292 note. In an action against several defendants, an offer to allow judgment in order to preclude the plaintiff from recovering costs if he fails to obtain a more favorable judgment than offered, must be expressly an offer on behalf of all defendants, or at least on behalf of all as to whom the cause is in a situation to perfect judgment. *Griffiths v. De Forest*, 16 Abb. Pr. (N. Y.) 292.

60. *Everson v. Gehrman*, 1 Abb. Pr. (N. Y.) 167; *Kantrowitz v. Kulla*, 13 Civ. Proc. (N. Y.) 74.

By New York Code Civ. Proc. §738, if there are two or more defendants and the action can be severed, may be made by one against whom a separate judgment may be taken. *Garrison v. Garrison*, 67 How. Pr. (N. Y.) 271. But this does not apply if defendant's liability is joint, as in the case of copartners sued on a co-partnership debt. *Bannerman v. Quackenbush*, 17 Abb. N. C. (N. Y.) 103, 7 Civ. Proc. 428.

61. *Hanna v. Dunham*, 10 Ind. App. 611, 38 N. E. 343.

he delivers it to the plaintiff or his attorney, or it may be disregarded.⁶²

(V.) **Time and Place of Making.**—**Time of Making.**—The statutes usually provide that the defendant's offer may be made and served at any time before the trial.⁶³ In others the action must be pending before the offer can be made.⁶⁴

Place of Making.—*In Open Court.*—It has been held that the offer must be made in open court, and that an offer not so made cannot be considered.⁶⁵

In Appellate Court.—An offer to confess judgment made in the

62. *Smith v. Kerr*, 49 Hun 29, 1 N. Y. Supp. 454; *Leslie v. Walrath*, 45 Hun (N. Y.) 18; *Riggs v. Waydell*, 17 Hun (N. Y.) 515, *affirmed*, 78 N. Y. 586; *McFarren v. St. John*, 14 Hun (N. Y.) 387.

But the attorney need not have in addition to authority to appear generally, sworn authority to make the offer. *Fowler v. Haynes*, 91 N. Y. 346.

Courts will take judicial notice of the signatures of their attorneys, but not of parties litigant who have not appeared in person. *Markes v. Epstein*, 13 Civ. Proc. (N. Y.) 293.

Amendment nunc pro tunc to supply affidavit. *Eagan v. Moore*, 11 Daly (N. Y.) 199.

63. Ind.—*Horner v. Pilkington*, 11 Ind. 440. Kan.—Gen. St., p. 799, §117. N. Y.—Code Civ. Proc. §738. Utah. Code Civ. Proc. §780.

This requires, however, the service of the offer at a period antecedent to the trial sufficient to allow plaintiff the statutory time in which to indicate his acceptance. *Mansfield v. Fleck*, 23 Minn. 61; *Astor v. Palache*, 49 How. Pr. (N. Y.) 231; *Herman v. Lyons*, 10 Hun (N. Y.) 111; *Sares v. Matthews*, 15 N. Y. Supp. 510.

Although both papers are served upon the same day, an offer of judgment may be deemed to have been served before or together, with an answer, according to the intention of the parties serving the same. *Kautz v. Vandemburgh*, 77 Hun 591, 28 N. Y. Supp. 1046.

An offer comes too late after a referee has allowed an amendment to the defendant's pleading, because the trial has then commenced. *Warner v. Babcock*, 9 App. Div. 398, 41 N. Y. Supp. 493.

An offer not made and served until the trial has commenced is a nullity, and may be disregarded. *Warner v.*

Babcock, 9 App. Div. 398, 41 N. Y. Supp. 493; *Walter v. Chilson*, 65 Hun 529, 20 N. Y. Supp. 527; *Sares v. Matthews*, 39 N. Y. St. 920, 15 N. Y. Supp. 510.

64. *Crane v. Hirshfelder*, 17 Cal. 582; *Horner v. Pilkington*, 11 Ind. 440.

In South Carolina, the offer must be made on return of process and before answering. *Williford v. Gadsden*, 27 S. C. 87, 2 S. E. 858.

65. *New Providence v. Halsey*, 117 U. S. 336, 6 Sup. Ct. 764, 29 L. ed. 904.

In *Horner v. Pilkington*, 11 Ind. 440, it was held that the offer may be made also by notice in writing. So also in New York. See cases cited in next preceding note 62.

In Ohio a distinction is made between an offer to confess judgment under §498, and an offer to allow judgment to be taken under §493, the first of which must be made in open court being in the nature of a confession of judgment, while the other is in the nature of an offer of judgment which need not be made in open court, and costs will nevertheless attach. *Adams v. Phifer*, 25 Ohio St. 301. *Armstrong v. Spears*, 18 Ohio St. 373. *Fike v. France*, 12 Ohio St. 624.

An offer filed in vacation is not a compliance with the statute. *Madden v. Brown*, 97 Mass. 148.

Notice of Offer.—The defendant must give the plaintiff notice of his intended offer, the time when he proposes to make it, and the amount thereof, or he must call the attention of the court to the offer when the plaintiff is present in court. U. S.—*New Providence v. Halsey*, *supra*. Ind.—*Horner v. Pilkington*, 11 Ind. 440. Kan.—*Van Beatham v. Board of Comrs.*, 49 Kan. 30, 30 Pac. 111. Mass.—*Madden v. Brown*, 97 Mass. 148. Pa.—*Driesbach v. Morris*, 94 Pa. 23.

trial court follows the case on the appeal, and hence need not be renewed in the appellate court.⁶⁶

(VI.) **Service.**—The statutes usually require a service of the offer upon the plaintiff or his attorney, unless the offer was made in open court, the plaintiff being present and having notice thereof.⁶⁷

On Whom Served.—Generally this offer may be served on either the plaintiff or his attorney.⁶⁸

66. *Underhill v. Shea*, 21 Neb. 154, 31 N. W. 510; *Kleffel v. Bullock*, 8 Neb. 336.

Appeals From a Justice's Court.—"An offer to confess judgment duly made in a cause pending before a justice of the peace need not be renewed in the appellate court" to entitle the defendant to the benefit of those statutes. *Flower v. Nichols*, 55 Neb. 314, 75 N. W. 864; *Williford v. Gadsden*, 27 S. C. 87, 2 S. E. 858.

Under the New York code an offer to allow judgment to be taken in the county court on appeal from the justice's court may be made as soon as the appeal is perfected and before the return is filed. *Cutting v. Jessmer*, 101 App. Div. 283, 91 N. Y. Supp. 658; holding that §3071 of the code of civil procedure, prescribing the time when issue is deemed to be joined in the appellate court, relates to the issue only and in no way affects the time when the action shall be deemed pending in the county court.

Appeal to Common Pleas.—"Where, in an action for the recovery of money, commenced in a justice's court, the defendant in that court offers to confess judgment for a given amount, with interest from the accruing of the debt, which is not accepted, and the case is appealed to the court of common pleas, the offer follows the case to that court." *Cohoon v. Kineon*, 46 Ohio St. 590, 22 N. E. 722. See in accord *Wallace v. Hays*, 20 Ind. 252.

The statute in Wisconsin providing for an offer of judgment in civil actions in a justice's court, applies to the recovery in the circuit court, when the cause is appealed thereto. *Erd v. Chicago*, etc. R. C., 41 Wis. 65.

67. *La.*—*Watts v. Lamberton*, 39 Iowa 272. *Kan.*—*Van Benthum v. Osage County*, 49 Kan. 30, 30 Pac. 111. *Mo.*—*Towner v. Remick*, 19 Mo. App. 205. *Neb.*—*Rose v. Peck*, 18 Neb. 529, 26 N. W. 363.

The service of the offer is a condition precedent to the defendant's right to have costs taxed against the plaintiff, and the fact that the plaintiff's attorney well knew of such offer is immaterial. *Enos v. St. Louis*, etc. R. Co., 41 Mo. App. 269. When the offer is made in the defendant's answer it need not be served on the plaintiff. *Kaw Val. Fair Assn. v. Miller*, 42 Kan. 20, 21 Pac. 794; *Hammond v. Northern P. R. Co.*, 23 Ore. 157, 31 Pac. 299.

In Minnesota, in an action brought in a justice's court, the statute is complied with by filing the offer in court, but if the offer is made in an action brought in the district court it must be served on the adverse party. *J. Thompson & Son Mfg. Co. v. Ferch*, 78 Minn. 520, 81 N. W. 520.

If the statute does not prescribe a different manner of serving the offer, it is sufficient if the offer is filed with the papers in the cause in open court, in the presence of the plaintiff's attorney, with his attention called to the fact, which he then and there refuses to accept, after having been previously notified that such an offer would be filed. *Keller v. Allee*, 87 Ind. 252.

Service of copy of an offer is a compliance with the statute. *Smith v. Kerr*, 49 Hun 29, 1 N. Y. Supp. 454, 17 N. Y. St. 351, 15 Civ. Proc. 126. But even if such service is insufficient, plaintiff waives the irregularity by not returning the copy served with the objection specifically pointed out. The defect, if it be one, constitutes a mere irregularity. *Markes v. Epstein*, 13 Civ. Proc. (N. Y.) 293.

68. *Holland v. Pugh*, 16 Ind. 21; Iowa Code, §3820.

In Missouri, under Session Acts, 1907, p. 121, this offer may "be served on either the plaintiff or his attorney of record, instead of on the plaintiff alone, as theretofore the law required." *Brown v. Cole*, 146 Mo. App. 705, 125 S. W. 537. See as to the former prac-

Service must be proved to the satisfaction of the court just as any other fact is proved.⁶⁹

(VII.) **Filing.**—In some jurisdictions, when the offer is accepted by the plaintiff, he files the offer and proof of acceptance, together with the pleadings, with the clerk.⁷⁰

The formal acceptance may be filed at any time, *nunc pro tunc*, by leave of the court, or may be waived by the party.⁷¹

(VIII.) **Proof of Offer.**—An order entered at a former term reciting that the defendant had offered to confess judgment for a certain sum, should be set aside in the absence of fraud or mistake alleged and clearly shown.⁷²

(IX.) **Amendment.**—**Right To Amend.**—The court may allow an offer of judgment to be amended *nunc pro tunc*, in a matter of form, the plaintiff not having been misled.⁷³

Effect of Alterations or Amendments After the Offer.—If plaintiff materially amends his complaint after an offer of judgment the offer ceases to be binding or conclusive upon either party.⁷⁴ But if the amendment by the plaintiff is one of form only, and the cause of action and recovery sought remain the same, the offer will continue in force, notwithstanding the amendment.⁷⁵

tice, *Maxwell v. Missouri, etc.*, R. Co., 91 Mo. App. 582; *Enos v. St. Louis, etc.*, R. Co., 41 Mo. App. 269 (holding that where there is more than one plaintiff service must be on all).

In *Lieurance v. McComas*, 59 Mo. App. 118, where plaintiff refused to take the paper it was held a sufficient service to leave it on the sled by which he was standing.

69. *Enos v. St. Louis, etc.*, R. Co., 41 Mo. App. 269, holding oral evidence to be admissible to contradict an affidavit.

70. **Cal.**—Code Civ. Proc., §997. **N. Y.**—Code Civ. Proc., §738. **Ore.**—*Hammond v. Northern P. R. Co.*, 23 Ore. 157, 31 Pac. 299.

In *Post v. New York Cent. R. Co.*, 12 How. Pr. (N. Y.) 552, the court said that the purpose of this is not only as a constant admonishment to the plaintiff to stop the litigation, but for the further purpose of aiding the court or referee in taxing costs.

Failure to insert the offer in the judgment roll therein will not deprive the defendant of its benefit. *Bathgate v. Haskin*, 63 N. Y. 261.

Filing Copy.—It is not necessary under the New York code to have the original offer filed with the clerk before he can enter judgment; a copy is suffi-

cient. *Pfister v. Stumm*, 7 Misc. 526, 27 N. Y. Supp. 1000.

71. *White v. Bogart*, 73 N. Y. 256.

72. *Morris v. German American Ins. Co.*, 14 Ky. L. Rep. 859 (abstract).

73. *Eagan v. Moore*, 11 Daly (N. Y.) 199.

Conditions to Amendment.—But the court will condition allowance of the amendment upon a change in the offer to meet it, or else make the excess in amount of interest of no avail to defeat the offer. *Brooks v. Mortimer*, 10 App. Div. 518, 42 N. Y. Supp. 299.

74. *Brooks v. Mortimer*, 10 App. Div. 518, 42 N. Y. Supp. 299 (where the demand was increased by adding interest); *Thornall v. Crawford*, 34 Misc. 714, 70 N. Y. Supp. 61; *Woelfle v. Schmenger*, 12 Civ. Proc. (N. Y.) 312. These cases point out that the rule is different where the amendment is merely formal.

75. *Kilts v. Seeber*, 10 How. Pr. (N. Y.) 270.

A change in parties after the offer, especially when made by the plaintiff, there being no change in issues cannot affect the defendant's right to costs under the statute. *Shearer v. Hutchinson County*, 10 S. D. 9, 70 N. W. 1051, where the complaint was amended by striking out all but one plaintiff.

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(X.) Keeping Tender Good. — Under these statutes the tender to the plaintiff or a deposit in court, and this tender kept good.⁷⁶ But an offer to confess judgment "after act is sufficient to relieve the defendant from costs and interest thereafter without paying the money to the clerk of the time the offer is made."⁷⁷

h. Acceptance or Refusal of Offer. — An acceptance coupled with the condition that the judgment shall include an acceptance of the offer according to its legal effect, binds the plaintiff to judgment for the amount offered and precludes further litigation.⁷⁸

Notice of Acceptance. — If the plaintiff desires to accept judgment, he is required in some states to give notice thereof within a time specified.⁷⁹ The offer has no effect when the time prescribed in which the plaintiff may give such acceptance or rejection of the offer, and hence if the time expires before the time expires without any action by the plaintiff

76. *Ayers v. Jones*, 85 Ark. 28, 106 S. W. 1117 (holding that an appeal from the judgment they affect to confess is an abandonment); *Saum v. LaShell*, 45 Kan. 205, 25 Pac. 561; *King v. Harrison*, 32 Kan. 215, 4 Pac. 93.

If the defendant pays into court the correct amount due, this will stop the accumulation of costs. *Harrodsburg Water Co. v. Harrodsburg*, 28 Ky. L. Rep. 625, 89 S. W. 729.

Under New York municipal court act, §148, a tender made after suit brought, "that does not include interest and costs up to the time of the tender is invalid." *Public Bank v. Birnbaum*, 117 N. Y. Supp. 237, citing, *James Reilly's Sons Co. v. Aaron*, 86 N. Y. Supp. 732.

77. *Security State Bank v. Waterloo Lodge*, 85 Neb. 255, 122 N. W. 992.

78. *Palmer v. Styles*, 78 Neb. 362, 110 N. W. 1004. See *Beecher v. Kendall*, 14 Hun (N. Y.) 327, for sufficient acceptance of offer in justice's court.

Conditional Acceptance. — If a "condition is coupled with an acceptance of the offer, and is rejected by the defendant, his rejection thereof amounts to a withdrawal of his offer, and leaves the parties standing, with respect to costs, as though the offer had not been made." *Palmer v. Stiles*, 78 Neb. 362, 110 N. W. 1004; *Orth v. Zion's Co-op. Merc. Assn.*, 5 Utah 419, 16 Pac. 590.

Collateral Attack. — An offer of judgment is accepted in fact by the entry of judgment, and a formal ac-

ceptance in writing is not affecting the validity of the judgment, nor for which it can be collaterally attacked. *White v. Y.* 256.

79. Code (Iowa), §38; *Lowry*, 78 Wis. 329, 47 N. W. 100.

Five days is very generally required. Iowa Code, §3; *jurisdictions ten days*, day of service, is allowed *Fleck*, 23 Minn. 61; *Sares*, 15 N. Y. Supp. 510; *N. Y. Proc.*, §738.

If the offer is served plaintiff has twenty days. *v. Glass*, 60 Hun 546, 15 N. Y. 261.

In Maine, if the defendant does not accept the offer within the time for acceptance, as under the statutes in that state the plaintiff may accept at any time before the offer is revoked. *Phinney*, 48 Me. 300, citing *Pearson*, 47 Me. 352.

Effect of Failure To Accept. — If the plaintiff does not accept the offer within ten days after service of the offer is served, as required by the Wis. Rev. St., but within six months, the defendant's offer is deemed rejected. *Swartz*, 126 Wis. 176, 105 N. W. 100.

In ascertaining this point of service of the offer must be ascertained, and the trial must be held at a single point of time in

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ceptance also relates back to and takes effect as of the day the offer was made.⁸⁶

In Case of Failure or Refusal To Accept Offer.—If the plaintiff to accept the defendant's offer of judgment, it will be withdrawn,⁸⁷ and the plaintiff is to receive no benefit therefrom; it can be used against the defendant for any purpose.⁸⁸

Effect as an Estoppel or Evidence.—The offer upon which the plaintiff shall not be treated as an admission of the fact or amount to which the plaintiff was entitled,⁸⁹ nor given in evidence on the trial for any purpose,⁹¹ and it cannot even be commented on before the jury.⁹²

j. Favorableness of Recovery.—The offer of judgment avails the defendant unless he can establish that the plaintiff recovered a less favorable judgment than that offered,⁹³

first day of that term. *Madden v. Brown*, 97 Mass. 148.

86. *Douglass v. Macdurm*, 2 How. Pr. N. S. (N. Y.) 289.

87. *Collins v. Lowry*, 78 Wis. 329, 47 N. W. 612; *Auley v. Osterman*, 65 Wis. 118, 25 N. W. 657, 26 N. W. 568.

88. *Conn.*—*Wordin v. Bemis*, 33 Conn. 216. *Mo.*—*Rosenberger v. Harper*, 83 Mo. App. 169. *Neb.*—*Code of Civ. Proc.*, §565.

Under New York Code Civ. Proc., §3228, subd. 5, precluding a recovery of costs by the plaintiff in an action brought in the supreme court, if the recovery is less than \$500 and the action might have been brought in the counties of New York or Kings, it is held that if the defendant offers judgment and the plaintiff fails to accept it, he must pay costs to the defendant. *Patterson v. Woodbury Dermatological Inst.*, 102 N. Y. Supp. 790.

89. *Wentworth v. Lord*, 39 Me. 71.

If the plaintiff refuses to accept an offer of judgment made by the defendant in his answer, they cannot invoke such tender and offer of judgment as an estoppel on the defendant to deny his title. *Auley v. Osterman*, 65 Wis. 118, 25 N. W. 657, 26 N. W. 568.

An offer entered on the docket, but not accepted, is no waiver of the objection that the process is not sealed. *Tibbetts v. Shaw*, 19 Me. 204.

Because the offer to confess judgment which was declined is more advantageous to the plaintiff than the judgment he finally recovered, does not entitle him to his costs after the offer. *Schnute-Holtman Co. v. Sweeney*, 136 Ky. 773, 125 S. W. 180.

90. *Ia.*—*Code*, §3818. *Code*, §528. *Me.*—*Wentworth*, 39 Me. 71; *Jackson v. L.*

Ma. 37. *Ohio.*—*Rev. St.*, *Auley v. Osterman*, 65 N. W. 657, 26 N. W. 568.

91. *Ia.*—*Code*, §3818. *Code*, §528. *Me.*—*Gowdy*, 1

Ma. 474; *Wentworth v. L.* 71. *Mass.*—*Greve v. Wood* 173 Mass. 45, 52 N. E.

Waldbridge v. Barrett, 11 76 N. W. 973. *N. Y.*—*York Cent. R. Co.*, 12 H. *Ohio.*—*Rev. St.*, §498 *W.* Jones, 110 Wis. 52, 85 N.

An answer of an execution motion and order requiring final settlement, admitting liability to the estate, is not a compromise within the meaning of the prohibition. *Emmons v. L.* *Mo.* 636, 28 S. W. 863.

92. *Rev. St. (Mo.)*, §

But though such unaccepted offer is mentioned by counsel before the jury, yet if the defendant does not move for a discharge, and the jury be discharged, the fact that the jury be discharged without objection is not a reversible error. If a reversible act has been done in the jury's presence, he was to have waived his right to a new trial after verdict demand a new trial on the ground of such misconduct. *Bolch*, 68 Iowa 526, 27

93. *Ia.*—*Swails v. Cis* 693, 17 N. W. 39. *Kan.*—*Johnson*, 32 Kan. 215, 4 Pa. *Griffiths v. DeForest*, 16 *Schneider v. Jacobi*, 1 Du *ings v. Mills*, 2 Bosw. 481. *M'Kone*, 10 App. Div.

the recovery is less favorable than an offer of judgment tendered by the defendant and rejected, the defendant is entitled to his costs accruing subsequent to the offer.⁹⁴

Determining Favorableness of Recovery.—Although the verdict may be less favorable than the offer, yet if the judgment is more favorable the plaintiff will be entitled to costs, because the judgment and not the verdict determines the right to costs under these statutes.⁹⁵ The mere failure of the plaintiff to recover a money judgment in excess of the judgment offered will not disentitle him to his costs on the ground that he has not recovered "a more favorable judgment" than offered. The amount of the judgment is not the only test.⁹⁶

Supp. 782; *Kantz v. Vandenburg*, 77 Hun 591, 28 N. Y. Supp. 1046.

94. **U. S.**—*Florence Oil, etc., Co. v. Farrar*, 119 Fed. 150, 55 C. C. A. 656, construing the Colorado statute. **Kan.** *Logan v. Hartwell*, 5 Kan. 649. **Ore.** *Hammond v. Northern Pac. R. Co.*, 23 Ore. 157, 31 Pac. 299.

In other words, "the criterion by which this question is to be determined is, whether the plaintiffs have obtained 'a more favorable judgment.' . . . If they have, they are entitled to costs after the offer, as well as before. If not, the defendant is entitled to costs against them." *Ruggles v. Fogg*, 7 How. Pr. (N. Y.) 324.

95. *Wallace v. American Linen Thread Co.*, 16 Hun (N. Y.) 404.

These statutes usually refer to the final recovery. Thus, if the amount offered is less than the recovery before the trial court, but is equal to the sum recovered on appeal, then the plaintiff is liable for all costs incurred after the offer to confess is made. *Watts v. Lamberton*, 39 Iowa 272.

If a valuable lien is adjudged in his favor this may be more favorable than a mere money judgment. *Williams v. Chicago, etc., R. Co.*, 153 Mo. 487, 54 S. W. 689.

If the court finds for the plaintiff on one issue and against her on another, then the judgment is not a "more favorable" one within the meaning of the statutes. *Anderson v. New Canaan*, 66 Conn. 54, 33 Atl. 393.

96. *Williams v. Chicago, etc., R. Co.*, 153 Mo. 487, 54 S. W. 689; *Howard v. Farley*, 29 How. Pr. (N. Y.) 4.

The plaintiff's recovery where the judgment is exclusively for money to be more favorable than the defendant's offer, must be in excess thereof,

exclusive of interest. *Schulte v. Lestershire Boot, etc., Co.*, 88 Hun 226, 34 N. Y. Supp. 663.

The recovery of a judgment for a sum less than or equal in amount to that offered is not a "more favorable" judgment. *Fielding v. Mills*, 2 Bosw. (N. Y.) 489; *Hammond v. Northern P. R. Co.*, 23 Ore. 157, 31 Pac. 299.

In Pennsylvania, on appeal from a justice, judgment will be entered without costs, where the verdict is for the same sum as that for which judgment had been tendered before the justice. *Randall v. Wait*, 48 Pa. 127.

Foreclosure Proceedings.—In New York, an offer of a money judgment in an action to foreclose a mechanic's lien cannot be construed as authorizing a judgment for the establishment of the lien at the sum offered. Hence, a judgment giving the plaintiff a lien even for a less sum than offered directing a sale of the premises and providing for a deficiency judgment is more favorable than the offer. *McNally v. Rowan*, 101 App. Div. 342, 92 N. Y. Supp. 250, affirmed, 181 N. Y. 556, 74 N. E. 1120, showing that the rule in *Lumbard v. Syracuse, etc., R. Co.*, 62 N. Y. 290, is no longer the law in New York.

In *Kennedy v. M'Kone*, 10 App. Div. 88, 41 N. Y. Supp. 782, a proceeding to foreclose a mechanic's lien, in which the defendant offered to allow judgment to be taken against him establishing the lien at \$1000, the court said: "A judgment establishing their lien to the amount of \$600 with a deficiency judgment in personam might be more favorable than a judgment establishing their lien at \$1000, but without a deficiency judgment." See, also, *Bathgate v. Haskin*, 63 N. Y. 261.

If the judgment offered would not protect the plaintiff's interests as well as the judgment recovered, then it will not be regarded as "favorable" as the judgment recovered.⁹⁷

The offer itself is not necessary to the determination of this question.⁹⁸

Joint Judgments.—A judgment against all joint debtors must be deemed more favorable than a judgment for the same amount against a part of them only.⁹⁹

Computation of Interest.—*As Part of Offer.*—Where the damages are liquidated, an offer is more favorable to the plaintiff than the verdict recovered, if, adding interest to the offer, the sum offered exceeds the recovery.¹ But when unliquidated, interest cannot be added to the sum offered for the purpose of determining whether the judgment obtained is more favorable than the offer.² In other words, if it is necessary to compute interest in with the sum offered to bring it above the recovery, the plaintiff will be denied the right to recover his costs.³

As Part of Recovery.—"The plaintiff is not entitled to add the accumulated interest from the time that the offer might have been

97. *Singleton v. Home Ins. Co.*, 121 N. Y. 644, 24 N. E. 1021.

In an action on a money bond (secured by mortgage) for the penalty, by reason of default in the payment of a half year's interest—the principal not yet due—the defendant offered to allow the plaintiff to take judgment for the condition of the bond with interest due, besides the costs of the action, which offer was not accepted by the plaintiff, and on the trial judgment was recovered for the amount of the interest only, the court denying the plaintiff judgment for the penalty. It was held that the plaintiff obtained a more favorable judgment than the defendant's offer, for by accepting the defendant's offer he would have been bound to discharge the bond and mortgage not yet due, and reinvest his money at a probable loss of interest and expense. *Howard v. Farley*, 29 How. Pr. (N. Y.) 4.

98. Under Rev. St. (Wis.), 1898, §2789, there may be a finding that there was an offer of judgment which was more favorable to the plaintiff than that of final judgment, although the offer is not introduced in evidence, where there is evidence that the offer of judgment was actually served. *Bourda v. Jones*, 110 Wis. 52, 85 N. W. 671.

99. *Griffiths v. De Forest*, 18 Abb. Pr. (N. Y.) 292.

Unless an offer of judgment by one joint debtor is an offer of a joint judgment, it is not as favorable as the recovery, though it is less than the offer. *Bannerman v. Quackenbush*, 7 Civ. Proc. (N. Y.) 428, 17 Abb. N. C. 103.

1. *Pike v. Johnson*, 47 N. Y. 1; *Budd v. Jackson*, 26 How. Pr. (N. Y.) 393; *Hirschspring v. Boe*, 20 Abb. N. C. (N. Y.) 402; *Smith v. Bowers*, 3 Civ. Proc. (N. Y.) 72.

And in determining whether the offer be more favorable, the defendant is entitled to have interest upon the amount offered added from the time of offer to date of judgment. *Bathgate v. Haskin*, 63 N. Y. 261. See, *Hirschspring v. Boe*, 20 Abb. N. C. (N. Y.) 402.

2. *Wordin v. Bemis*, 33 Conn. 216; *Johnston v. Catlin*, 57 N. Y. 652; *Pike v. Johnson*, 47 N. Y. 1; *Thornell v. Crawford*, 34 Misc. 714, 70 N. Y. Supp. 61 (action to recover value of services rendered).

"Interest may be deemed incident to the offer only when incident to the claim in suit, and the fact that interest upon the unliquidated claim is demanded in the complaint does not affect the question." *Thornall v. Crawford*, 34 Misc. 714, 70 N. Y. Supp. 61.

3. *Upton v. Foster*, 148 Mass. 592, 20 N. E. 198; *Johnston v. Catlin*, 57 N. Y. 652; *Pike v. Johnson*, 47 N. Y. 1.

accepted to the time of the recovery for the purpose of claiming that the recovery is more favorable than the offer."⁴

Computation of Attorney's Fees.—Costs of attorney's services rendered the plaintiff prior to the offer of judgment may be considered in determining the amount of recovery, though it is not shown what such services are worth.⁵

Consideration of Counterclaims and Set-Offs Interposed.—If the defendant, after his offer of judgment is rejected, puts in an answer which not only controverts the plaintiff's cause of action, but interposes a set-off or counterclaim, and the plaintiff recovers a judgment extinguishing the counterclaim, in such case he recovers a more favorable judgment than that offered and is entitled to full costs, though less in amount than the offer.⁶ The reason is obvious for if the offer had been accepted it would have extinguished a claim not then interposed in the action,⁷ for the effect of an offer of judgment must be determined by the state of the pleadings when it is served.⁸ But if

4. *Schulte v. Lestershire Boot, etc., Co.*, 88 Hun 226, 34 N. Y. Supp. 663.

5. *Atchison, etc., R. Co. v. Ireland*, 19 Kan. 405.

6. *Tompkins v. Ives*, 36 N. Y. 75; *Fielding v. Mills*, 2 Bosw. (N. Y.) 489; *Kautz v. Vandenburg*, 28 N. Y. Supp. 1046; *Tipton v. Tipton's Admr.*, 49 Ohio St. 364, 30 N. E. 827.

Where plaintiff sues defendant on a contract, and defendant offers judgment for a certain sum which is refused, and he then files a counterclaim setting up a demand distinct and independent of the contract sued on, if the plaintiff's judgment extinguishes the defendant's counterclaim, it is more favorable to him than the offer. *Smith v. Sheldon*, 87 N. Y. Supp. 1099.

The acceptance of an offer "will not extinguish a counterclaim in an answer subsequently served, although such acceptance was made after service of such answer." *Kautz v. Vandenburg*, 77 Hun 591, 28 N. Y. Supp. 1046, citing, *Tompkins v. Ives*, 3 Abb. Pr. N. S. (N. Y.) 267; *Fielding v. Mills*, 2 Bosw. (N. Y.) 489.

Counterclaim Set Up in Amended Answer.—In *Turner v. Honsinger*, 31 How. Pr. (N. Y.) 66, defendant in his answer admitted liability which amounted on the day the answer was served to \$93.99, and denied all the other allegations in the complaint. Immediately subsequent to the service of the answer defendant served an offer of judgment for an amount slightly in excess of what he admitted by the answer to

be due. The offer not being accepted the cause was notice for trial and referred, and during the progress of the trial an amended answer was filed containing two counterclaims, one of \$405.37 and the other for \$361.00 with interest. Defendant failed to recover any part of the first counterclaim but did recover the whole of the second. "The referee reported due the plaintiff \$87.73, March 22, 1866, which is the balance of 93.99 and interest after deducting the amount of the second counterclaim." On these facts the court allowed full costs to the plaintiff on the ground that he had recovered "a more favorable judgment" than the defendant offered.

In Maine, if the case is referred by the court to a referee after the offer, and he finds that the claim is reduced by set-off below the amount offered, the plaintiff is entitled to full costs to the day of the offer, and the defendant to full costs after the date of such offer. *Higgins v. Rines*, 72 Me. 440.

7. *Ruggles v. Fogg*, 7 How. Pr. (N. Y.) 324. And see, *Scoville v. Kent*, 8 Abb. Pr. N. S. (N. Y.) 17.

8. *Tompkins v. Ives*, 36 N. Y. 75, reported more fully in 3 Abb. Pr. N. S. (N. Y.) 267; *Kautz v. Vandenburg*, 77 Hun 591, 28 N. Y. Supp. 1046; *Smith v. Sheldon*, 87 N. Y. Supp. 1099; *Thornall v. Crawford*, 34 Misc. 714, 70 N. Y. Supp. 761; *Woelfle v. Schmenger*, 12 Civ. Proc. (N. Y.) 312.

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an offer of judgment is made after the counterclaim is set sufficiently appraises the plaintiff of the nature of the case, then the fact that a judgment is recovered which extending counterclaim will not avail the plaintiff, if his recovery is less than the offer, and he must pay the defendant's costs at the time of the offer.⁹

Reduction of Claim After Offer.—The plaintiff is not liable for these statutes if the defendant after making the offer of judgment buys up a portion of the plaintiff's demand to reduce it.

Reduction of Recovery on Appeal.—Although the judgment is more favorable, yet if it is reduced on appeal below the offer, the effect is the same as though the judgment had been originally entered for the reduced sum.¹¹

k. Rendition and Entry of Judgment.—An offer that stops the litigation and judgment should be immediately entered by the clerk in accordance therewith.¹² No direction of the

9. *Bathgate v. Haskin*, 63 N. Y. 261, *distinguishing*, *Tompkins v. Ives*, 3 Abb. Pr. N. S. (N. Y.) 267; *Schneider v. Jacobi*, 1 Duer (N. Y.) 694.

Where the defendant confesses the plaintiff's action and that the plaintiff is entitled to recover a certain amount of debt or damages, and then pleads an offset to the residue of the plaintiff's claim, if the plaintiff recovers more upon his specification than offered, but not so much together with the amount allowed the defendant on his set-off, the defendant is entitled to his costs from the time of the offer or confession. *Richey v. Cooper*, 45 N. H. 414.

10. *Colored v. Conger*, 10 Okla. 458, 62 Pac. 276, holding, however, that where the demand sued on is the primary debt of another, and the plaintiff sues as assignee of the account without having become the owner of the entire account, and the person primarily liable pays off part of the account to the person originally entitled to it, and before the plaintiff had made payment to such person, such plaintiff is in no position to claim any exemption from the rule prescribed for taxing costs.

11. *Lunbard v. Syracuse, etc., R. Co.*, 62 N. Y. 290; *Williford v. Gadsden*, 27 S. C. 87, 2 S. E. 858.

Where in an action to recover money the defendant served an offer of judgment, which was not accepted, and the plaintiff recovered for a larger amount than offered, but on appeal the judgment

was modified so as to be more favorable than the offer, it is held that the defendant is entitled to his costs subsequent to the offer. *Sturford*, 58 N. Y. 103.

Reduction of judgment below allowance of counterclaim. *Bathgate v. Haskin*, 63 N. Y. 261.

12. *Gen. St. (Kan.)*, p. 126; *Smith v. Thenalt*, 126 Wis. 582, N. W. 662.

Nebraska Code Civ. Proc., § 12, provides that, in an action brought by a justice of the peace, if the defendant, at any time before trial, makes an offer of judgment to be taken for a specified sum, and the plaintiff rejects such offer and fails to recover a sum equal to the offer, he must pay the costs subsequently accrued. The offer may be made in writing, and when accepted as made, the plaintiff is bound to judgment therefor without further litigation. *Stiles*, 78 Neb. 362, 110 N. W. 103.

The true meaning of the Nebraska code authorizing the clerk to enter judgment upon an offer on the defendant's part to suffer judgment for a specified sum, etc., is that he may enter judgment only where the offer is not accepted after action is brought by the plaintiff. If the complaint and while the action is pending, and, accordingly, where a plaintiff makes the clerk the complaint, offer of judgment and notice of acceptance, at the same time, and the clerk enters judgment, *Crane v. Hirshfelder*, 17 Cal.

necessary to authorize the clerk to enter judgment,¹³ nor is it necessary to await the return day of the writ, but judgment may be entered immediately upon the actual return thereof.¹⁴

L. Respective Rights and Liabilities of Parties. — (1) **Where Offer Is Rejected.** — Before the plaintiff can be made liable for costs there must be a final adjudication in the action in which the offer was made, that the plaintiff is not entitled to recover the amount offered.¹⁵

Measure of Liability. — It is the purpose of these statutes to require the plaintiff not only to bear his own costs, but also the defendant's costs accruing after the offer.¹⁶ In other words if the plaintiff rejects the offer and recovers a less favorable judgment than offered, the

No proof of service of the summons is required as a condition to entry of judgment. *Lindsley v. Van Cortlandt*, 67 Hun 145, 22 N. Y. Supp. 222.

Record of Judgment. — In some jurisdictions it is provided that this judgment, after rendition, shall be entered on the record, and thereafter is the best evidence of the fact; and evidence to contradict the record may properly be excluded. *Hunt v. Elliott*, 20 Me. 312.

Effect of Judgment. — Since the offer is made to save litigation, a judgment entered upon the offer is a bar to a new action for any part of the claim embraced in the complaint, and which might have been litigated in the action. *Davies v. Mayor, etc.*, 93 N. Y. 250.

To set aside this judgment on the ground of fraud as to creditors, the proof thereof must be clear and convincing. *Lindsley v. Van Cortlandt*, 67 Hun 145, 22 N. Y. Supp. 222; *Stein v. Levy*, 55 Hun 381, 8 N. Y. Supp. 505.

The creditor's remedies under the New York practice are given in *Trier v. Herman*, 115 N. Y. 163, 21 N. E. 1034.

13. *Hill v. Northrop*, 9 How. Pr. (N. Y.) 525.

Application for Judgment. — Under §420 of the New York code, where the action is on contract, and the amount due is capable of computation and may be easily ascertained in that way, and the defendant serves an offer to allow judgment for a specific sum, with interest and costs, no application to the court is necessary for judgment, but upon filing the summons, complaint and offer, "the clerk must enter judgment accordingly."

Douglass v. Macdurm, 2 How. Pr. N. S. (N. Y.) 289.

14. *Boyd v. Ward Furniture, etc., Co.*, 38 Mo. App. 210; *Fowler v. Haynes*, 91 N. Y. 346.

15. Where C. brought an action in trespass before a justice of the peace against M., and recovered a judgment for \$37.50, and thereafter M. brings an action in trespass against C. before a justice of the peace and recovers a judgment for fifteen dollars, and both actions are duly appealed to the district court, and by consent are there consolidated and tried as one action, and a verdict rendered in favor of M. for less than five dollars, *held*, that the judgment would carry the entire costs of the consolidated action, and of the case of M. against C., notwithstanding the fact, that C. had in the action brought by M. and before the trial in the justice's court offered in writing to consent to a judgment in favor of M. in the action for five dollars. *Cockerell v. Moll*, 18 Kan. 154.

16. *Wachsmith v. Orient Ins. Co.*, 49 Neb. 590, 68 N. W. 935, holding that the proper order where there is only one defendant to tax all costs created after the offer against the plaintiff.

What Are Defendant's Costs. — §385 of the New York code, in requiring the plaintiff, in the cases provided for, to pay defendant's costs, means only such costs as are legally allowed either by statute, or, in case of discretion, by the court, and is not intended to limit, or in any case to interfere with the discretionary power over costs which is conferred on the courts, many of the various steps or proceedings that may be taken in the progress of the suit. *Kennedy v. M'Kone*, 10 App. Div. 88, 41 N. Y. Supp. 782.

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defendant is allowed costs from the time of the offer,¹⁷ to the date when the offer is made.¹⁸

These statutes do not affect the plaintiff's pre-existing costs which have accrued up to the time of making the offer, but apply only to costs accruing after the time of the offer. A plaintiff may recover costs accruing in his favor before judgment by the defendant, though he may recover a less judgment than was offered.¹⁹ Costs that accrued up to and

17. **Ark.**—*Petsinger v. Beaver*, 44 Ark. 562. **Ind.**—*Adams v. Pittsburg*, etc., R. Co., 165 Ind. 648, 74 N. E. 991; *Keller v. Allee*, 87 Ind. 252; *Wallace v. Hays*, 20 Ind. 252. **Ia.**—*Manning v. Irish*, 47 Iowa 650; *Harrison v. Iowa Midland R. Co.*, 36 Iowa 323. **Kan.**—*Chicago, etc., R. Co. v. Townsend*, 45 Kan. 771, 26 Pac. 427; *Elder v. Elder*, 43 Kan. 514, 23 Pac. 600; *Wichita R. Co. v. Beebe*, 38 Kan. 427, 17 Pac. 154. **Me.**—*Higgins v. Rines*, 72 Me. 440; *Hartshorn v. Phinney*, 48 Me. 300. **Mass.**—*Madden v. Brown*, 97 Mass. 148. **Mich.**—*Baars v. Twp. of Laketon*, 163 Mich. 665, 129 N. W. 7. **Mo.**—*Rosenberger v. Harper*, 83 Mo. App. 169. **N. H.**—*Richey v. Cooper*, 45 N. H. 414. **N. Y.**—*Burnett v. Westfall*, 15 How. Pr. 420; *Keese v. Wyman*, 8 How. Pr. 88; *McLees v. Avery*, 4 How. Pr. 440; *LaForge v. Chilsen*, 3 Sandf. 752; *Schulte v. Lestershire Boot, etc., Co.*, 88 Hun 226, 34 N. Y. Supp. 663. **Ohio.**—*Cohoon v. Kineon*, 46 Ohio St. 590, 22 N. E. 722; *Carpenter v. Kent*, 11 Ohio St. 554. **Ore.**—*Hammond v. Northern Pac. R. Co.*, 23 Ore. 157, 31 Pac. 299. **S. C.**—*Williford v. Gadsden*, 27 S. C. 87, 2 S. E. 858. **Wis.**—*Chicago, etc., R. Co. v. Groh*, 85 Wis. 641, 55 N. W. 714 (action of ejectment); *Collins v. Lowry*, 78 Wis. 329, 47 N. W. 612; *Williams v. Ready*, 72 Wis. 408, 39 N. W. 779; *Auley v. Osterman*, 65 Wis. 118, 25 N. W. 657, 26 N. W. 568.

Where the defendant offers to confess judgment for more than was due the plaintiff, in satisfaction of his cause of action, and the offer is declined, the plaintiff is not entitled to recover his costs expended after that time. *Evans v. Chapel*, 13 Bush (Ky.) 121.

In allowing the defendant his costs and disbursements after the offer, costs of entering up a separate judgment for his costs will not be allowed. *Keese v. Wyman*, 8 How. Pr. (N. Y.) 88.

In Missouri, if the acceptor of an offer is refused, and on a trial the plaintiff recovered more than the amount for which the defendant offered him to take judgment, the costs accruing after the service of the offer are taxed against the plaintiff. *Cole*, 146 Mo. App. 705, 537; *Maxwell v. Missouri*, 91 Mo. App. 582; *Rosenberger*, 83 Mo. App. 169; *McComas*, 59 Mo. App. 1. *Ward Furniture, etc., Co.*, 210.

Construction of California. That part of §997 of the procedure of California, which provides that if a plaintiff fails to obtain a favorable judgment than that offered in an offer of compromise, he may recover costs, simply and directly, that even if, after the rejection of the offer, he should receive a judgment within the jurisdiction but less than the amount offered, he would be entitled to costs. *Murphy v. Cal.*, 110 Pac. 98.

18. *Lynk v. Weaver*, 182 N. E. 508. See, also, *Chicago, etc., R. Co.*, 131 N. W. 88, where it was necessary to decide the particular question.

An offer filed at the first term accepted at the second term, entitles the defendant to recover costs accruing after such offer, but the plaintiff may recover his costs to the date of the default. *Pingree v. S.*, 544.

19. **Cal.**—*Douthitt v. F.*, 214, 24 Pac. 929. **Me.**—*Palmer*, 50 Me. 125. **Mass.**—*Brown*, 97 Mass. 148. **Mich.**—*Twp. of Laketon*, 163 Mich. 665, 129 N. W. 7. **N. Y.**—*Lynk v. Wyman*, 8 How. Pr. 88; *McLees v. Avery*, 4 How. Pr. 440. **Wis.**—

the day upon which the offer to confess judgment was made, may be taxed against the defendant, because they follow the judgment as an incident.²⁰

(II.) **Where the Offer Is Accepted.**—The plaintiff is entitled to the costs of carrying the offer into effect.²¹ And if after the offer is accepted and judgment entered thereon, the defendant reserves the right to a subsequent hearing as to damages and costs, the plaintiff may recover costs until final judgment.²²

(III.) **Apportionment of Costs.**—Where an offer is made to confess judgment after the action is begun, but the sum recovered is considerably more than the amount of the offer, there is no reason for dividing the costs.²³

(IV.) **Costs Accruing Ante Litem Motam.**—In some states the statutes only apply after the action is begun. Costs accruing before the filing of the defendant's answer should be paid by him.²⁴

(V.) **Bill of Costs.**—Since the defendant's offer is to pay the accrued costs, the acceptor or plaintiff is entitled to file a bill of costs,

Cream City Brick Co., 110 Wis. 618, 86 N. W. 169; *Montgomery v. American Cent. Ins. Co.*, 108 Wis. 146, 84 N. W. 175; *Chicago, etc., R. Co. v. Groh*, 85 Wis. 641, 55 N. W. 714.

In *North Carolina*, the defendant is liable only for the costs of the action up to the filing of the answer and of judgment. *Russ v. Brown*, 113 N. C. 227, 18 S. E. 107.

The cost of entering the judgment is a portion of the costs "to date," within the meaning of those terms in an order. *Lynk v. Weaver*, 128 N. Y. 171, 28 N. E. 508.

20. *Ind.*—*Rose v. Grinstead*, 53 Ind. 202. *Ia.*—*Manning v. Irish*, 47 Iowa 650. *Me.*—*Higgins v. Rines*, 72 Me. 440.

Disbursements on entering up judgment will not be allowed the plaintiff. *Keese v. Wyman*, 8 How. Pr. (N. Y.) 88.

21. Upon acceptance of the offer as provided by statute, the plaintiff's right to enter judgment carries with it the costs lawfully taxable to carry the offer into effect. *Petrosky v. Flanagan*, 38 Minn. 26, 35 N. W. 665.

If an offer is served by mail upon the plaintiff, he has twenty days for its consideration, and, having elected to accept it within that period, is not entitled to tax in his bill of costs an item "after notice of trial," the same having accrued subsequent to the offer. *Van Allen v. Glass*, 60 Hun 546, 15 N. Y. Supp. 261.

Costs of Serving Notice of Trial. But if after the offer is made, both parties serve notice of trial, the plaintiff who has since accepted the offer, cannot charge for this service, because the plaintiff is bound to accept the offer as of the day when it is made, and acceptance by him is inconsistent with the idea of a trial. *Douglas v. Macdurmuid*, 2 How. Pr. N. S. (N. Y.) 289.

22. *Pingree v. Snell*, 46 Me. 544.

23. *Matheney v. Eldorado*, 82 Kan. 720, 109 Pac. 166.

24. *Kaw Val. Fair Assn. v. Miller*, 42 Kan. 20, 21 Pac. 794.

Extra Allowance of Costs.—The court may grant an extra allowance of costs under the New York code, notwithstanding the offer and acceptance. *Hirshspring v. Boe*, 20 Abb. N. C. (N. Y.) 402; *Coates v. Goddard*, 2 Jones & S. (N. Y.) 118; note on additional allowances, 8 Civ. Proc. (N. Y.) 232.

An offer to allow judgment in a mortgage foreclosure suit will prevent an extra allowance under the New York Code. *Astor v. Palache*, 49 How. Pr. (N. Y.) 231.

A defendant who does not recover a judgment in the case is not entitled to recover the extra allowance of costs under the New York Code, in addition to the costs accruing subsequent to his offer. *McLees v. Avery*, 4 How. Pr. (N. Y.) 440.

or an amended bill in proper form if the first does not conform to legal requirements.²⁵

Manner of Taxation.—An offer, though not accepted, must necessarily be considered in determining the questions of costs.²⁶

Judgment or Order of Court.—Where the plaintiff becomes liable under these statutes there must be a judgment or order entered that he pay the defendant's costs subsequent to the offer.²⁷

Relief From Improper Taxation.—An order taxing costs under these statutes is appealable by either party.²⁸

(VI.) Enforcement and Collection.—These costs are to be collected by motion²⁹ or execution,³⁰ or they may, on a proper application, be set off against the plaintiff's judgment,³¹ and judgment may be rendered and execution issued for the balance.³²

5. How Far Amount of Recovery Controls.—a. *In General.* In the absence of a statute to the contrary the prevailing party in an action is entitled to a judgment for his costs, however small the recovery.³³

b. *Plaintiff's Right to Costs.*—Under the language of some statutes the plaintiff's recovery must exceed the sum named, and if he

25. *Smith v. Nelson*, 23 Utah 512, 65 Pac. 485.

26. *Bourda v. Jones*, 110 Wis. 52, 85 N. W. 671, holding that the referee need not allow all that is specified in the offer.

27. *Megrath v. Van Wyck*, 3 Sandf. (N. Y.) 750, holding, however, that such order is not properly any part of the judgment to be entered in the action.

28. *Sturgis v. Spofford*, 58 N. Y. 103; *Megrath v. Van Wyck*, 3 Sandf. (N. Y.) 750.

If an improper judgment is entered in the court below it may be modified on appeal, without appeal costs to either party. *Spears v. Sorge*, 106 N. Y. Supp. 141; *Southard v. Becker*, 15 Misc. 436, 37 N. Y. Supp. 927.

29. *M'Lees v. Avery*, 4 How. Pr. (N. Y.) 440, holding that they probably could be on proper application set off against the plaintiff's judgment.

30. *Megrath v. Van Wyck*, 3 Sandf. (N. Y.) 750.

31. *Wentworth v. Lord*, 39 Me. 71; *Burnett v. Westfall*, 15 How. Pr. (N. Y.) 420; *M'Lees v. Avery*, 4 How. Pr. (N. Y.) 440.

When the plaintiff becomes liable to the defendant under this statute, the court should deduct the defendant's

costs after offer from the plaintiff's judgment, and enter a single judgment. *Southard v. Becker*, 15 Misc. 436, 37 N. Y. Supp. 927; *Spears v. Sorge*, 106 N. Y. Supp. 141 (holding it improper to render two judgments, one in favor of the plaintiff for his costs to the date of the offer, and one in favor of the defendant for his costs after the offer).

Under an early statute in Pennsylvania if a defendant before appeal from a justice offered judgment and it was rejected, and on the stand in court or before arbitrators, he recovered a less amount, the defendant's bill of costs could be deducted from the amount of the judgment. *Gardner v. Davis*, 15 Pa. 41.

Right of Assignee.—The assignee of a claim takes it subject to the defendant's right "to offset the costs to which he might be entitled against the plaintiff's judgment in whosoever hands it might be." Otherwise, these provisions providing for an offer of judgment would be practically insufficient and nugatory. *Hibbard v. Randolph*, 72 Hun 626, 25 N. Y. Supp. 854.

32. Rev. St. (Minn.), 1835, ch. 165, §6.

33. *Brandies v. Stewart*, 1 Met. (Ky.) 395; *Gist v. Webb*, 1 Coldw. (Tenn.) 518.

recovers just the amount and no more, he will not be entitled to his costs.³⁴

Inclusion of Interest.—In those jurisdictions which deprive the plaintiff of his costs unless he recovers a certain amount, interest, especially as damages, may sometimes be regarded as part of the recovery for the purpose of fixing the right to costs,³⁵ but not interest on the verdict, because the verdict settles the amount of debt or damages for which the suit was instituted.³⁶

Inclusion of Costs.—Nor can costs be regarded as part of the plaintiff's recovery in order to bring the amount within the statutory requirement to entitle the plaintiff to costs.³⁷

Separate or Distinct Causes of Action.—If two or more causes of action are set forth separately in the complaint, and the plaintiff recovers the required amount on one and the other is found for the defendant, the plaintiff is, nevertheless, entitled to his costs.³⁸

Aggregate Amount of Demand.—If the aggregate of all the damages found is the damage of the plaintiff, and if this sum is not below the required amount, the plaintiff is entitled to costs; nor does the apportionment of damages among several defendants affect this right.³⁹ Where several defendants are sued jointly, and the recovery against each is below the required amount, the defendants are nevertheless liable for costs, if the aggregate amount is above the statutory minimum.⁴⁰ But where a joint action is brought against numerous defendants, and the action is not one in which the defendants could properly be joined, if a several verdict is found, the several judgments against each cannot be aggregated for the purpose of obtaining costs.⁴¹

As Affected By Tribunal.—In some jurisdictions no costs or disbursements are allowed the plaintiff in actions commenced in courts of gen-

34. *Joannes v. Pangborn*, 6 Allen (Mass.) 243.

35. *Mass.*—*Douglass v. Nichols*, 133 Mass. 470. *N. Y.*—*Loring v. Morrison*, 48 N. Y. Supp. 975. *Pa.*—*Kneckt v. Freyman*, 86 Pa. 333.

36. *Joannes v. Pangborn*, 6 Allen (Mass.) 243, *following*, *Andrews v. Austin*, 2 Pick. (Mass.) 528. But these cases are distinguished and explained in *Me.*—*Hervey v. Bangs*, 53 Me. 514. *Mass.*—*Douglass v. Nichols*, 133 Mass. 470. *N. Y.*—*Troy City Bank v. Grant*, 1 How. Pr. 135.

37. *Van Horne v. Petree*, Col. & C. Cas. (N. Y.) 390; *Slaman v. Bailey*, Col. & C. Cas. (N. Y.) 391.

38. *LaRosa v. Wilner*, 54 Misc. 574, 104 N. Y. Supp. 952.

A plaintiff is entitled to full costs who recovers as damages on different counts in his declaration a sum ex-

ceeding in the aggregate the required amount, although he recovers no more than that sum on any one count. *Hillman v. Whitney*, 2 Allen (Mass.) 268.

39. *Boon v. Horn*, 3 Strobb. (S. C.) 159.

40. *Huff v. Jewett*, 20 Misc. 35, 44 N. Y. Supp. 311, *construing* Code Civ. Proc. (N. Y.) 455.

Where a joint suit is brought against three railroads, treating the injury complained of as one wrong to the plaintiff, and three separate judgments are rendered against the three defendants respectively, each for less than the required amount, but in the aggregate in excess of that amount, it was held that the plaintiff is entitled to recover costs. *Johnson v. Mississippi*, etc. R. Co., 31 Fed. 551.

41. *Richards v. Scott*, 7 Idaho 726, 65 Pac. 433.

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eral or superior jurisdiction though he succeed in the recovery is below a certain amount, which amount statute, and could have been had in a court of inferior ju

42. U. S.—Cooper v. Coats, 1 Dall. 248, 1 L. ed. 122, stating the rule in Pennsylvania. **Ind.**—Taylor v. Blount, 7 Blackf. 38, actions of trover. **Ky.**—Fortune v. Howard, 4 J. J. Marsh. 171 (action on covenants); Huling v. Rife, 3 J. J. Marsh. 587. **Mass.**—Douglass v. Nichols, 133 Mass. 470; Fisk v. Gray, 100 Mass. 191. **Mich.**—Read v. Homer, 90 Mich. 152, 51 N. W. 207; Strong v. Daniels, 3 Mich. 466; Buck v. Miller, 1 Mich. N. P. 171. **Minn.**—Cressey v. Gierman, 7 Minn. 398. **Mo.**—Albers v. Eilers, 18 Mo. 279, action on a mechanic's lien. **Neb.**—City of Hastings v. Mills, 50 Neb. 842, 70 N. W. 381; Pickens v. Polk, 42 Neb. 267, 60 N. W. 566; Goodman v. Pence, 21 Neb. 459, 32 N. W. 219; Moore v. Darrow, 11 Neb. 462, 9 N. W. 637; Beach v. Cramer, 5 Neb. 98; Geere v. Sweet, 2 Neb. 76. **Nev.**—Klein v. Allenbach, 6 Nev. 159, holding that this statute in Nevada is confined to cases in the district court. **N. J.**—Hughes v. Hughes, 3 N. J. L. 432; Carman v. Smock, 2 N. J. L. 112. **N. Y.**—Code Civ. Proc., subd. 4, §3228; Lynk v. Weaver, 128 N. Y. 171, 28 N. E. 508; Gaetjens v. City of New York, 130 N. Y. Supp. 405. **Ohio.**—Linduff v. Steubenville, etc., R. Co., 14 Ohio St. 336; Brunaugh v. Worley, 6 Ohio St. 597; Van Buskirk v. Dunlap, 2 West L. 126, 2 Ohio Dec. (Reprint) 233. **Ore.**—Rayburn v. Hurd, 19 Ore. 59, 23 Pac. 669. **S. C.**—Douglas v. Mothershead, 1 Brev. 42. **S. D.**—Pyle v. Hand County, 1 S. D. 385, 47 N. W. 401. **Tex.**—Watts v. Harding, 5 Tex. 386. **Wash.**—Bagley v. Carpenter, 2 Wash. Ter. 19, 3 Pac. 193. **Wis.**—Olson v. United States Sugar Co., 140 Wis. 309, 122 N. W. 776; Trimborn v. Reimer, 112 Wis. 437, 88 N. W. 222; Emrick v. Krause, 52 Wis. 358, 9 N. W. 16 (holding that the term costs in the statute includes disbursements); Dunning v. Faulkner, 10 Wis. 394; Krenger v. Zirbel, 2 Wis. 233.

In Maine, in an action on a replevin bond, in which the penalty is more than \$20.00, if the damages assessed be less than that sum, the plaintiff will have full costs, although the action was not commenced before a jus-

tice of the peace. Lew. 49 Me. 322.

In New Hampshire, if brought in the court of which a justice of the peace has jurisdiction to try, and it appears that the plaintiff had no reasonable prospect of recovering more than a certain amount, the court may limit the sum to such sum as they think proper, and usually in practice the sum is to the amount of the costs recoverable before a justice. Clarke, 26 N. H. 366.

But it must clearly appear that the plaintiff's action had no reasonable prospect of recovering more than a certain amount, and accordingly, costs will not be awarded if the plaintiff has consented to satisfaction of his demand for less than \$13.33, paid into court as a common rule. (Bryant v. H. 157; Stevens v. Gibbs 106), nor because the juror in their report find a less sum than \$13.33. (Gale v. Emery, Ames v. Cady, 6 N. H. 5 Fuller, 5 N. H. 247).

In Pennsylvania, if an affidavit is filed that the plaintiff truly believes the sum exceeds \$100, he is not entitled to costs if he recovers less than \$100. v. Freyman, 86 Pa. 333; Hirshfield, 9 Pa. Co. Ct.

In New Jersey, if the plaintiff institutes a suit in the superior court and does not recover more than the exclusive of costs, then he is entitled to his costs. Brown v. Goodman, 42 N. J. L. 57; libel); Stille v. Jenkins, 302.

Under an early statute in New York, if the plaintiff was fifty pounds. White v. N. J. L. 415; Barrachiff v. N. J. L. 193; Phillips v. N. J. L. 137.

In Idaho, under the Rev. Stat. 4904, where the plaintiff succeeds in recovering less than the amount of his costs, he cannot recover his costs.

In others, he can only recover a reduced amount of costs, this mat-

Scott, 7 Idaho 726, 65 Pac. 433. But this section applies to actions originally brought in the district court, and not to actions brought in the probate or justice's court and taken by appeal to a higher court. Roseborough v. Whittington, 15 Idaho 100, 96 Pac. 437, following, Lovel v. Joyce, 9 Idaho 386, 74 Pac. 1073.

The requirement in Mississippi of a certificate from the trial judge to entitle the plaintiff to costs if he sues in a circuit court and recovers less than \$150, has reference only to actions *ex contractu*. Kansas City, etc., R. Co. v. Mabry, 67 Miss. 131, 7 So. 224.

In Missouri, if the plaintiff in certain actions, such as actions on contracts, recovers an amount, which, exclusive of interest, and aside from reduction by setoff, is below the jurisdiction of the court, the costs are to be adjudged against him. Rev. St. (Mo.), §2926; Hannan v. Shotwell, 55 Mo. 429.

Action Under Civil Damage Acts. In an action for damages on a saloon keeper's bond, a plaintiff is not entitled to recover his costs, if the verdict in his favor is less than \$200. Deck v. Kautz (Neb.), 133 N. W. 870, following Rosenbaum v. Dunston, 16 Neb. 111, 19 N. W. 610.

Recovery of Less Than \$100.—Under the Michigan statute giving costs to the defendant when the plaintiff in an action for damages recovers less than \$100 damages, it is error to award costs to the plaintiff when his recovery is less than that amount. Read v. Horner, 90 Mich. 152, 51 N. W. 207; Telford v. Church, 66 Mich. 431, 33 N. W. 913; Stortz v. Circuit Judge, 38 Mich. 243; Inkster v. Carver, 16 Mich. 484; Strong v. Daniels, 3 Mich. 466.

This applies to a suit under the civil damage act. Dikeman v. Harrison, 38 Mich. 617.

Act To Relieve Supreme Court of New York.—Subd. 5 of §3228, of the Code of Civ. Proc. (N. Y.), declares that in all actions brought in the supreme court triable in the county of New York which could have been brought, except for the amount claimed therein, in the city court of New York City or the county court of King's county, and in which the defendant

shall have been personally served with process within the city of New York, the plaintiff shall recover no costs or disbursements unless he recovers \$500 or more. The purpose of this statute is to discourage the bringing of actions in the supreme court where the amount recovered is less than \$500, and the plaintiff is deprived of costs if there is any way of getting service on the defendant as required, ignorance of counsel to the contrary notwithstanding. De Leon v. Brooklyn Heights R. Co., 125 App. Div. 752, 110 N. Y. Supp. 571; Patterson v. Woodbury Dermatological Inst., 117 App. Div. 600, 102 N. Y. Supp. 790. Accordingly, it is held that the words "triable in the county of New York," as used in this statute, refer to the conditions as they existed when the issues were tried, because the purpose of this statute was to relieve the congested calendars of the supreme court in New York by compelling, as far as practicable, actions to be brought in the city court of New York if within its jurisdiction. Seymour v. Wheeler, 137 App. Div. 52, 122 N. Y. Supp. 183. This statute does not mean that a plaintiff in King's county is called upon to bring his action in the city court of New York, if the action may properly be brought in King's county. Each county stands separate in the application of the statute. Adler v. Brooklyn Heights R. Co., 130 App. Div. 886, 114 N. Y. Supp. 719; Burgdorf v. Brooklyn, etc., R. Co., 130 App. Div. 253, 114 N. Y. Supp. 718; Maisch v. City of New York, 127 App. Div. 424, 111 N. Y. Supp. 645; Waldstreich v. Solomon, 127 App. Div. 364, 111 N. Y. Supp. 500, Hooker, J., *dissenting*. But the failure of the plaintiff to recover costs under this statute does not necessarily entitle the defendant to recover them (Streat v. Wolf, 132 App. Div. 872, 117 N. Y. Supp. 449), unless the defendant makes an offer of judgment and the plaintiff fails to accept it. Patterson v. Woodbury Dermatological Inst., 102 N. Y. Supp. 790.

A voluntary general appearance is equivalent to personal service of the summons upon the defendant, within the meaning of this statute. Swartz v. New York City R. Co., 119 App. Div. 889, 105 N. Y. Supp. 352; Hubbard v. Heinze, 130 N. Y. Supp. 542;

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ter being controlled by the statutes of the various jurisdictions.

The purpose of these statutes is to prevent the bringing in superior courts, which should or might be instituted in inferior courts, and thereby harrassing and oppressing defendants with bills of costs.⁴⁴

In Case of Concurrent Jurisdiction.—Where it appears that the commencement of the action in a justice of the peace has jurisdiction, whether concurrent or exclusive, and the plaintiff brings an action in any other court, and recovers an amount within the jurisdiction of the justice he cannot recover his costs, although in both courts are the same.⁴⁵

Amount Actually in Controversy.—Under statutes denying costs to a plaintiff, where he institutes his action in a court of superior jurisdiction and fails to recover a certain sum, it is well settled that the amount recovered determines the right to costs, and not the amount claimed.

Brumberg v. Lipman, 110 N. Y. Supp. 979.

This subdivision has no application whatever to the costs given a prevailing party upon appeal. *LaRosa v. Wilner*, 54 Misc. 574, 104 N. Y. Supp. 952.

43. *Spaulding v. Yeaton*, 82 Me. 92, 19 Atl. 156; *Inhab. of Houlton v. Martin*, 50 Me. 336 (giving the plaintiff one-fourth of a cent costs); *Lewis v. Warren*, 49 Me. 322; *Mass. St.* 1786, ch. 52, §3; *Mass. St.* (1807), ch. 123, §2; *Blanchard v. Fitchburg R. Co.*, 8 Cush. (Mass.) 280.

By statute in Maine, quarter costs only can be taxed when it appears on the rendition of judgment, that the action should have been originally brought before a justice of the peace. *Ladd v. Jacobs*, 64 Me. 347; *Inhab. of Houlton v. Martin*, 50 Me. 336; *Lawrence v. Ford*, 44 Me. 427; *Ridlon v. Emery*, 6 Me. 261.

Massachusetts.—See, also, *Shurtleff v. Hutchins*, 10 Met. 248; *Leland v. Bussey*, 7 Pick. 13.

In Georgia, when any action *ex contractu* shall be brought to the superior court, and the verdict of the jury, unreduced by matter of set-off or payment pending the action, shall be for a sum under fifty dollars, the defendant shall not be charged with more costs than would have necessarily accrued if such case had been before a justice; and the remainder of the court charges shall be paid by the plaintiff and may be retained out of the sum recovered by the plaintiff, and if that

is insufficient, judgment shall be entered by the court against the plaintiff for the balance. *Ga.* §5388; *Graham v. Baxley*, 43 S. E. 405; *Smith v. Shaver*, 459; *Mackey v. Blake*, 15

Under New York Code §3223, subd. 5, which provides that a plaintiff, in an action brought in city court, where, but for the claim, the action could have been brought in the municipal court, have no costs "unless he claims more than \$250 or more," it is the amount claimed, not the amount claimed, which determines the question. A pending suit is not a "recovery." *Kahn v. Kahn*, 98 N. Y. Supp. 100.

44. *Cal.*—*Murphy v. Campbell*, App. 781, 110 Pac. 956. *I. v. Bacon*, 78 Atl. 294. *Ga.* *Keith*, 19 Ga. 549. *Miss.*—*etc.*, *R. Co. v. Mabry*, 67 So. 224. *Nev.*—*Klein v. Nev.* 159. *N. H.*—*Church v. N. H.* 366; *Gale v. Emery*, 83. **Utah.**—*Hepworth v. Utah* 439, 11 Pac. 566. *born v. Reimer*, 112 Wis. W. 222.

45. *Conn.*—*Williams v. Conn.* 434, 68 Atl. 1009. *v. Sweet*, 2 Neb. 76. *Ohio v. Worley*, 6 Ohio St. 597. *v. Horn*, 3 Strobb. 159.

Contra, Ala.—*Clark v. J. Ala.* 365, 42 So. 833. *Mo. v. Ross*, 47 Me. 456. *Mo. Sloan*, 3 Mo. 328.

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poses a plea of set-off or counterclaim and his recovery is not up to the amount required of the plaintiff to be entered costs.⁵² The defendant will not be deprived of his costs and expenses, because the amount claimed by plaintiff is beyond the jurisdiction of a justice, and hence might have been dismissed.

This judgment in favor of defendant for costs must stand on the same judgment roll with the judgment for the plaintiff.⁵⁴

d. *Costs to Neither Party.*—In other jurisdictions, if the prevailing party recovers less than the amount fixed by the statute, the party recovers costs from the other, each being required to pay its own costs.⁵⁵

the defendant. *Lennon v. Charig*, 54 Misc. 298, 105 N. Y. Supp. 1039. That plaintiff may have costs it is not necessary that the action should have been commenced in the justice's court, and have been there discontinued for want of jurisdiction. *Glackin v. Zeller*, 52 Barb. (N. Y.) 147.

But where the action is originally brought in the supreme court, and the plaintiff's recovery is of a sum less than fifty dollars, it is incumbent on him to show that the action is one of which by the provisions of subd. 4, §2863, of the code a justice of the peace has no jurisdiction. This must be shown by proof that the sum total of the accounts proved exceeds \$400. *Youker v. Johnson*, 62 App. Div. 584, 71 N. Y. Supp. 178. And see *Tompkins v. Greene*, 21 Hun (N. Y.) 257.

If in an action to recover for the wrongful conversion of personal property alleged to be worth \$500, evidence is given tending to show that it was worth more than \$400, but the verdict is for \$35 only, the defendant is entitled to recover costs. *Powers v. Gross*, 6 Hun (N. Y.) 234, *affirmed*, 66 N. Y. 646.

In *Indiana*, under Rev. St., 1881, §5091, in actions for money demands on contracts, commenced in the circuit or superior courts, if the plaintiff recovers less than \$50 exclusive of costs, he shall pay costs, unless the judgment has been reduced below \$50 by set-off or counterclaim pleaded and proved by the defendant. *Berry v. Meron*, 120 Ind. 161, 22 N. E. 127.

In *Wisconsin*, if the plaintiff recovers less than \$100 in an action commenced in the circuit court on contract, the defendant is entitled to costs. *Field*

v. City of Elroy, 99 Wis. W. 68.

52. Cal.—*Davis v. F* Cal. 48, 57 Pac. 684. *M v. Mungus*, 28 Mont. 357, N. Y.—*Smith v. Bryant*, 61 N. Y. Supp. 943; *Ury* N. Y. Supp. 791. N. D.—*pel*, 4 N. D. 251, 60 N. Y.

In *California*, the defendant's costs as a matter of course files a counterclaim although less than \$300 on this be an action wherein plaintiff have been entitled to costs covered more than that of *Hurgren*, 125 Cal. 48, 57 *following Dows v. Glaspel*, 4 N. W. 60.

53. *Laney v. Ingalls*, 58 N. W. 572.

54. *Crim v. Cronkhite*, (N. Y.) 250.

55. U. S.—*Hamilton v. Fed.* 429. Neb.—*Morch v. Neb.* 502, 72 N. W. 953; *Shible*, 42 Neb. 850, 61 N. Y. *ler v. Roby*, 9 Neb. 471, Ohio.—*Linduff v. Steubenv* 14 Ohio St. 336, *explaining Hart*, 1 Ohio 154.

Cal. Code Civ. Proc., §102 provides that no costs can be an action for the recovery of damages when the plaintiff recovers less than three hundred dollars to both parties to the action bids the recovery of costs of them. *Anthony v. Gra* 235, 35 Pac. 859; *Frese v. Ins. Co.*, 11 Cal. App. 31 265.

In *Wyoming*, it is only judgment is less than \$10

e. *Rule in Federal Courts.*—Under the federal statutes the rule at law and equity is that if the sum for which the judgment is to be entered, is less than five hundred dollars, the plaintiff is not only not entitled to costs, but may be taxed with the costs.⁵⁶

f. *Amount of Recovery on Appeal.*—In many jurisdictions a failure to recover on appeal more than was allowed below, will render the appellant liable for the costs.⁵⁷

party is required to pay his own costs. Where plaintiff recovers \$100 or more, after the allowance of a counterclaim, he is entitled, of course, to recover costs. *Holgate v. Downer*, 8 Wyo. 334, 57 Pac. 918.

Offer of Judgment.—Neither party recovers costs, where the plaintiff's recovery under an offer and acceptance of judgment is less than the required amount. *Murphy v. Casey*, 13 Cal. App. 781, 110 Pac. 956; *McKuskie v. Hendrickson*, 128 N. Y. 555, 28 N. E. 650; *Moffett v. Deom*, 8 Civ. Proc. (N. Y.) 85.

It was held in *Lee v. Stern*, 22 Mo. 575, construing the statute in Missouri, that the defendant is not entitled to a judgment for costs, on the ground that the sum for which judgment is allowed to be taken is below the jurisdiction of the court.

Transfer of Cause.—If an action for \$100 damages, commenced in the district court, is upon defendant's motion duly transferred to the city court of New York, it is error to tax a bill of costs against the plaintiff, because he failed to recover a judgment of \$50 or over. Under such circumstances neither party is entitled to costs. *Levene v. Hahner*, 32 Misc. 634, 66 N. Y. Supp. 480. This order was reversed in *Levene v. Hahner*, 34 Misc. 154, 68 N. Y. Supp. 853. But in *Levene v. Hahner*, 70 N. Y. Supp. 913, the above rule was laid down and both the above cases reversed.

Counterclaim.—In like manner, where in an action upon a contract the plaintiff recovers less than \$50 but extinguishes a counterclaim set up in the answer, which exceeds that amount, neither party is entitled to costs. *Kalt v. Lignot*, 3 Abb. Pr. (N. Y.) 190.

56. *Williams v. Nottowa*, 104 U. S. 209, 26 L. ed. 219; *Gordon v. Lougest*, 16 Pet. (U. S.) 97, 10 L. ed. 900; *Green v. Liter*, 8 Cranch (U. S.) 229, 3 L. ed. 545; *Van Sielen v. Bartol*, 96 Fed.

796; *Curranee v. McQueen*, 2 Paine 109, 6 Fed. Cas. No. 3,488; *Leeds v. Cameron*, 3 Sumn. 488, 15 Fed. Cas. No. 8,206.

This statute (Rev. St., §968) does not leave even a court of equity any discretion in disallowing the plaintiff's costs. *Gibson v. Memphis, etc., R. Co.*, 31 Fed. 553.

But the plaintiff will not be required to pay the defendant's costs where the amount recovered by the plaintiff is less than \$500, except by way of penalty for bringing in a federal court a suit that should have been tried in a state court. *Van Sielen v. Bartol*, 96 Fed. 796; *Hamilton v. Baldwin*, 41 Fed. 429; *Hunter v. Marlboro*, 12 Fed. Cas. No. 6,908; *Greene v. Bateman*, 10 Fed. Cas. No. 5,762; *Cottle v. Payne*, 6 Fed. Cas. No. 3,268.

Unless it appears that the damages were laid in the declaration at more than \$2000 merely to give colorable jurisdiction to the circuit court, or that the suit did not really and substantially involve a dispute or controversy properly within the court's jurisdiction, a motion to impose costs on the plaintiff will be denied. *McCarthy v. American Thread Co.*, 143 Fed. 678.

This statute only applies where jurisdiction depends on the amount in controversy, and, hence, does not apply to a suit by the receiver of a national bank to recover its assets. *Murray v. Chambers*, 151 Fed. 142.

Under the federal practice, it is the judgment which the plaintiff is entitled to have entered that determines his right to costs. Accordingly, if his judgment is reduced to less than \$500 by the finding on a counterclaim, each party must pay his own costs, although the jury assessed the plaintiff's damages on his cause of action at a sum exceeding \$500. *Hamilton v. Baldwin*, 41 Fed. 429.

57. **Ark.**—*Jones v. Spencer*, 36 Ark. 82. **Ind.**—*Spence v. Board of Comrs.*,

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g. Actions Embraced by the Statutes.—The action on these statutes is usually an action on contract for the money or damages, and not a tort action.⁵⁸ But it is so expressly provided that if the recovery in actions for certain torts is below a certain amount, the plaintiff shall not costs.⁵⁹

117 Ind. 573, 18 N. E. 513. **Mass.** *Brigham v. Dole*, 2 Allen 49. **Tex.** *Rogers v. Fox* (Tex. Civ. App.), 16 S. W. 781.

Under a Nebraska statute, taken from Ohio, if the plaintiff in an action commenced in a county court or before a justice of the peace, who appeals from the judgment, whether for or against him, and does not recover in the appellate court more than \$20, exclusive of interest since the rendition of the judgment appealed from, cannot recover his costs, but shall be adjudged to pay all costs in the appellate court, including a \$5 fee to the defendant's attorney. *Weast v. Shephard*, 10 Neb. 508, 7 N. W. 284.

58. **Ind.**—*Craumer v. McEnderffer*, 2 Ind. App. 569, 28 N. E. 561, action for unlawful conversion. **Ky.**—*Fortune v. Howard*, 4 J. J. Marsh. 171. **N. Y.**—*Majory v. Schubert*, 81 N. Y. Supp. 703; *Walp v. Boyd*, 2 N. Y. Supp. 735. **Ore.**—*Rayburn v. Hurd*, 19 Ore. 59, 23 Pac. 369.

Action for Breach of Warranty. *Huling v. Rife*, 3 J. J. Marsh. (Ky.) 587.

In California, where the action is for damages, and the plaintiff recovers less than \$300, he is not entitled to recover his costs. *Pratt v. Welcome*, 6 Cal. App. 475, 92 Pac. 500; *Boland v. Ashhurst Oil Land, etc., Co.*, 145 Cal. 405, 78 Pac. 871; *Kishlar v. Southern Pac. R. Co.*, 134 Cal. 336, 66 Pac. 848; *Frese v. Mutual Life Ins. Co.*, 11 Cal. App. 387, 105 Pac. 265.

This section applies to the offer and acceptance of compromise judgment under which the plaintiff takes judgment for \$200. *Murphy v. Casey*, 13 Cal. App. 781, 110 Pac. 956.

In South Dakota, actions for the recovery of money are actions in which the plaintiff recovers costs, as a matter of course, if he recovers \$50 or more, and in which he must pay them if he recovers less, unless the case falls within subd. 3 of §5191 of the compiled

laws, in which case he incurs costs, without regard to recovered. *Pyle v. Han*, S. D. 385, 47 N. W. 401.

In Indiana, in actions for demands on contracts commenced in circuit or superior courts, if the plaintiff recovers less than \$50, he shall pay costs unless the judgment is reduced by setoff or claim pleaded by the defendant. The purpose of this section is to confine actions to be brought before justices of the peace. *Moore v. Ind.* 409; *Cotton v. Routh*, 680, 49 N. E. 1086.

But this section does not apply to actions to enforce mechanic's liens on real estate (*Scott v. Gold*, Ind. 268, 24 N. E. 333), nor to actions founded in tort (Graves, 103 Ind. 560, 3 N. E. 263).

In Wisconsin, the plaintiff is entitled to full costs although the action is within the jurisdiction of the justice of the peace, if it is on contract for more than \$50. *Dept. of Oshkosh v. Tuttle*, 552, 7 N. W. 549.

But in actions on tort the plaintiff is not entitled to costs unless he recovers at least \$50. If the recovery is less than \$50 the defendant is entitled to his costs. *Rev. St. (Wis.)* §2918; *Bruley v. Garvin*, 181 N. W. 1033; *Bugbee v. Wis.* 326, 68 N. W. 958 (affirmed); *Collins v. Lowry*, 74 N. W. 612.

An action for damages for breach of warranty in which no fraud is alleged is an action *ex contractu*, not *ex delicto*, and if the recovery is such an action in which the plaintiff claims over \$200 damages, he is entitled to costs, unless he recovers less than \$50, he may recover costs at the discretion of the court. *Hale*, 47 Wis. 424, 2 N. W. 59.

59. **Miss.**—Code, 1906, §1000. *City of Hastings v. Mills*,

Actions on Public Contracts.—In some jurisdictions, in actions on public contracts against a county, the plaintiff must pay costs, if he fails to recover a greater amount than was allowed him on presenting his claim to the proper authorities, although such failure is due to a successful counterclaim interposed by the county.⁶⁰

Actions To Recover Specific Personal Property.—In some jurisdictions, in an action to recover a chattel, if the value of the chattel recovered by the plaintiff, together with the damages, if any, awarded to him, is less than fifty dollars, the amount of his costs cannot exceed the amount of the value and the damages.⁶¹ But if the plaintiff recovers property exceeding fifty dollars in value, he is entitled to costs, notwithstanding the defendant also recovers property exceeding that value.⁶²

h. Reduced Costs as Affected by Recovery.—In some jurisdictions, especially in tort actions, when the recovery does not exceed an amount fixed by the statute, the plaintiff's costs and disbursements are to be limited to the amount of damages recovered. These statutes often enumerate the torts embraced in the rule and except others,⁶³ and in

70 N. W. 381, action against city for falling into unguarded excavation. *Wis.* *Corcoran v. Webster*, 50 *Wis.* 125, 6 N. W. 513.

In actions for libel and slander in many states, the plaintiff will be given no costs when his recovery is below a certain amount. *Code (Miss.)*, 1906, §955; *Hart v. Goodman*, 42 N. J. L. 573; *Dougherty v. Miller*, *Wright (Ohio)* 36.

60. *Ferrier v. Knox Co. (Tex. Civ. App.)*, 33 S. W. 896.

61. *N. Y.*—*Code Civ. Proc.*, §3223, subd. 2; *Wilkins v. Williams*, 15 *Civ. Proc.* 163, 3 N. Y. Supp. 897; *Herman v. Girvin*, 8 App. Div. 418, 40 N. Y. Supp. 845. *Ore.*—*Civ. Code*, subd. 5, §549; *Rayburn v. Hurd*, 19 *Ore.* 59, 23 *Pac.* 669. *Wis.*—*Fitzer v. McCannon*, 14 *Wis.* 63.

Under this section the fixing of the value of the property or of the damages is essential before a plaintiff is entitled to any costs. *Herman v. Girvin*, 8 App. Div. 418, 40 N. Y. Supp. 845; *Lockwood v. Waldorf*, 91 *Hun* 281, 36 N. Y. Supp. 199; *Rapid Safety Filter Co. v. Wyckoff*, 20 *Misc.* 429, 45 N. Y. Supp. 1028; *Wolf v. Moses*, 57 N. Y. Supp. 696.

If the defendant in an action to recover a chattel under this statute makes an offer of judgment and in such offer, which the plaintiff accepts, he limits the damages to its detention, the costs are also restricted to such sum.

Hausauer v. Machawicz, 54 App. Div. 23, 66 N. Y. Supp. 340.

62. *Stoddard v. Clarke*, 9 *Abb. Pr. N. S. (N. Y.)* 310. See, *Wis. St.* 1898, §2918.

63. *Conn.*—*Williams v. Meed*, 80 *Conn.* 434, 68 *Atl.* 1009 (action for killing registered dog); *Bristol Mfg. Co. v. Barnes*, 54 *Conn.* 58 (in this state an exception is made where title to land or water rights is involved). *Ga.* *Conley v. Arnold*, 93 *Ga.* 823, 20 S. E. 762 (action for assault and battery); *Thurmond v. Horton*, 10 *Ga.* 500 (actions for slander); *Hardin v. Lumpkin*, 5 *Ga.* 452; *Stapp v. Partlow*, *Dud.* 176. *Ind.*—*Pursley v. Wilke*, 118 *Ind.* 139, 19 N. E. 478; *Mackison v. Clegg*, 95 *Ind.* 373; *Willman v. Clouser*, 16 *Ind.* 318; *Conner v. Winton*, 8 *Ind.* 315. *Mich.*—*Johnston v. Disbrow*, 47 *Mich.* 59, 10 N. W. 79 (action for criminal conversation); *Dinger v. Miller*, 39 *Mich.* 332 (slander); *Meyer v. Wood*, 38 *Mich.* 297 (false imprisonment). *Miss.*—*Code*, 1906, §955. The statute in this state is confined by construction to actions *ex delicto*. *Kansas*, etc., *R. Co. v. Mabry*, 67 *Miss.* 131, 7 *So.* 224; *Fletcher v. Benbrook*, 5 *Smed. & M.* 619. *N. H.*—*Dennison v. Perkins*, 3 N. H. 313. *N. Y.*—*Code Civ. Proc.*, §3223, subd. 3; *Rogers v. Arnold*, 12 *Wend.* 31; *Garrabrant v. Sullivan*, 13 *Civ. Proc.* 196; *Lynch v. Syracuse Rapid Transit Co.*, 66 *Misc.* 573, 124 N. Y. Supp. 169, *affirmed*, 139 App. Div. 925, 124 N. Y. Supp. 1120; *Warren v. Chase*, 8 *Misc.*

520, 28 N. Y. Supp. 765; *O'Connor v. Union Pac. R. Co.*, 33 Misc. 723, 68 N. Y. Supp. 1056; *Gorton v. U. S. Steamship Co.*, 37 N. Y. St. 556, 13 N. Y. Supp. 653 (holding that the statute does not include action for wrongful death). **N. C.**—*Coates v. Stephenson*, 52 N. C. 124. **Ore.**—*Rayburn v. Hurd*, 19 Ore. 59, 23 Pac. 669. **Pa.**—*Knappenberger v. Roth*, 153 Pa. 614, 26 Atl. 223; *Miller v. Good*, 25 Pa. Co. Ct. 79. **R. I.**—Gen. Laws, ch. 295, §8. **Tenn.**—*Fox v. Byrd*, 104 Tenn. 357, 58 S. W. 221; *Steffner v. Burton*, 87 Tenn. 135, 10 S. W. 358 (giving a history of the statutory changes in that state); *Rosenfeld v. Guggenheim*, 3 Shann. Cas. 46. **Vt.**—*Plumley v. Marsh*, 15 Vt. 306. **Va.**—*Bills v. Harris*, 2 Va. Cas. 26. **Wash.**—*Meade v. French*, 4 Wash. 11, 29 Pac. 833. **Wis.**—*Fitzer v. McCannon*, 14 Wis. 63; *Sherible v. Janish*, 13 Wis. 615. **Eng.**—22 and 23 Charles II, ch. 9.

“Costs” includes disbursements. *Emerick v. Krause*, 52 Wis. 358, 9 N. W. 16.

In **New York**, there has been considerable conflict in the decisions, but the rule is now settled that when the plaintiff in tort actions can recover no more costs than damages, disbursements are included, no matter what the disbursements may be. See, *Wheeler v. Westgate*, 4 How. Pr. (N. Y.) 269; *Warren v. Chase*, 8 Misc. 520, 28 N. Y. Supp. 765.

In **Alabama**, in all actions to recover damages for torts, the plaintiff may recover no more costs than damages, where such damages do not exceed twenty dollars, unless the presiding judge certifies that greater damages should have been awarded. In the absence of this certificate it is reversible error to award greater costs to the plaintiff. *Buford v. Christian*, 149 Ala. 343, 42 So. 997; *Rarden v. Maddox*, 141 Ala. 506, 39 So. 65; *Guttry v. Boshell*, 132 Ala. 596, 32 So. 304; *Tipkins v. Peters*, 103 Ala. 196, 15 So. 564; *Tecumsh Iron Co. v. Mangum*, 67 Ala. 246; *Galle v. Lynch*, 21 Ala. 579; *Reid v. Gordon*, 2 Stew. 469.

But this section does not apply to actions brought in the county court which is given concurrent jurisdiction with justice's court (*Clark v. Jernigan*, 149 Ala. 365, 42 So. 833), nor to suits originating in a justice's court. It applies only to suits brought in common

law courts of record (*Baker v. Keith*, 77 Ala. 544).

And an earlier statute, identical except as to amount with the above, was held not to apply to an action for wrongful attachment. *McAllister v. McDow*, 26 Ala. 453.

In **Connecticut**, in actions of trespass brought to the superior court, if the recovery is not more than \$35 damages the plaintiff can recover no more costs than damages unless title to land and right of way, or the right to the use of water, shall have been in question. *White v. Fuller*, 36 Conn. 149; *Arnold v. Kellogg*, 25 Conn. 249; *Mansfield v. Church*, 21 Conn. 73, 80; *Bishop v. Seeley*, 18 Conn. 389.

In **New Hampshire**, when the damages in an action of trespass to real estate commenced in the supreme court are less than \$13.33, the court will allow no more costs than damages. *Jones v. Lane*, 63 N. H. 331.

In **Vermont**, in actions of trespass not involving title or possession of real estate commenced before the county court, no more costs than damages can be recovered, unless the plaintiff recovers more than \$7. If the plaintiff's title is admitted by defendant it is not brought in question. *Brainerd v. Casey*, 37 Vt. 479.

The statute in **Tennessee** applies alike whether the injury did or did not cause death. *Jenkins v. Hawkins*, 98 Tenn. 545, 41 S. W. 1028. But the statute has no reference to actions of trespass *quare clausum fregit* (*Winters v. McGhee*, 3 Sneed 123); it only applies to actions founded upon assaults, assault and battery, malicious prosecution, false imprisonment, and slander, written, printed or oral (*Fox v. Boyd*, 104 Tenn. 357, 58 S. W. 221; *Rosenfeld v. Guggenheim*, 3 Shann. Cas. 46).

The **Indiana** statute does not apply to cases appealed from a justice of the peace, although the recovery on appeal is less than \$5, but in such cases costs follow the judgment. *Castle v. House*, 41 Ind. 333.

England.—The statute of 22 and 23 Charles II, limiting the costs to the amount of damages did not apply to suits for injuries to personal chattels. *Browning v. Spackman*, 7 Montreal L. Rep. 369. See *Manghan v. Reed*, 11 Ga. 137.

Pennsylvania adopted the above statute. *Knappenberger v. Roth*, 153 Pa.

attempting to extend the rule to other torts than those enumerated the rule of *ejusdem generis* will be applied.⁶⁴

In a few jurisdictions, actions involving the title or right to possession of real estate are excepted from the operation of these statutes.⁶⁵

If a declaration or complaint joins counts in tort with counts in contract, the court in the exercise of its discretion may treat the action as one in tort, and tax the costs accordingly.⁶⁶

614, 26 Atl. 223; *Winger v. Rife*, 101 Pa. 152. It provided that if less than 40 shillings is recovered in actions of trespass, there should be no more costs than damages. It did not include actions of trespass *quare clausum fregit*. *Painter v. Kistler*, 59 Pa. 331; *Hinds v. Knox*, 4 Serg. & R. (Pa.) 417.

Right of Defendant to Costs.—But because the plaintiff is deprived of his costs for failure to recover the amount required does not entitle the defendant to a judgment against the plaintiff for his costs, incurred in defending the action (Ala.—*Ivey v. McQueen*, 17 Ala. 408. Ga.—*Thurmond v. Horton*, 10 Ga. 500. N. C.—*Coates v. Stephenson*, 52 N. C. 124. Wash.—*Meade v. French*, 4 Wash. 11, 29 Pac. 833), but each party pays his own costs, although the statutes in the different jurisdictions provide that the prevailing party shall be entitled to his costs (*Willman v. Clouser*, 16 Ind. 318; citing *Sinclair v. Roush*, 14 Ind. 450).

But in a few states if the plaintiff's recovery in a tort action does not exceed a certain amount, he is liable for costs. Ind.—*Conner v. Winton*, 8 Ind. 315. Ia.—*Britton v. Wright*, 1 G. Gr. 426. Tenn.—*Fox v. Boyd*, 104 Tenn. 357, 58 S. W. 221; *Steffner v. Burton*, 87 Tenn. 135, 10 S. W. 358. Wis.—*Bugbee v. Lombard*, 94 Wis. 326, 68 N. W. 958; *Wausau Boom Co. v. Plumer*, 49 Wis. 112, 4 N. W. 1072.

In Wisconsin, if the plaintiff is entitled to any costs, the defendant cannot recover costs. *Sherible v. Janish*, 13 Wis. 615.

In Iowa, it was early held in an action of tort, commenced in the district court, if the plaintiff recovers less than \$50, he can recover no more costs than damages, and is liable for the balance of the costs accruing in the case. *Britton v. Wright*, 1 G. Gr. (Iowa) 426.

64. *McGhee v. Evans*, 1 Stew. (Ala.) 589; *Vassey v. Spake*, 83 S. C. 566, 65

S. E. 825 (holding the statute in this state to be confined to personal torts as distinguished from torts to property).

Thus, a statute limiting the costs to the damages in actions for libel, slander or trespass, or assault and battery, etc., does not extend to an action of trover (*Johnston v. Sims*, 4 Stew. & P. (Ala.) 330. *Contra*, *Bugbee v. Lombard*, 94 Wis. 326, 68 N. W. 958), or trespass to try title (*McGhee v. Evans*, 1 Stew. (Ala.) 589), or assumpsit on an open account (*Fletcher v. Benbrook*, 5 Smed. & M. (Miss.) 619).

Neither an action by a servant against his master for personal injuries due to defective appliances (*Ruger v. Fahys Watch Case Co.*, 20 Civ. Proc. 204, 13 N. Y. Supp. 788), nor an action against a carrier for breach of duty resulting in an assault upon the passenger are actions for assault and battery within the meaning of these statutes (*Mace v. Reed*, 89 Wis. 440, 62 N. W. 186).

In other words, these statutes apply to actions of torts in which the damages claimed are the sole object sought, as in actions for assault, slander, fraud, and the like, and not to actions of replevin in which the property replevied is really the subject matter of the suit and trial, the damages being merely incidental. *Gaston v. Canty*, 48 Conn. 139.

65. *Mansfield v. Church*, 21 Conn. 73.

In some jurisdictions the plaintiff is nevertheless entitled to costs, though he recovers in the tort action less than the required amount, if the title to real estate is directly put in issue and this appears from the record. Conn.—*Fowler v. Fowler*, 52 Conn. 254. Mass.—*Willard v. Baker*, 2 Gray 336. Wis.—*Maxim v. Wedge*, 69 Wis. 547, 35 N. W. 11; *Corcoran v. Webster*, 50 Wis. 125, 6 N. W. 513.

66. *Scharff v. Schultz*, 79 Conn. 304, 64 Atl. 737.

COSTS

The question of costs under these statutes is dependent upon the amount of damages but upon the whole amount of recovery.

i. *Limitations and Exceptions.*—(1.) Where the Inferior Court has Jurisdiction. — If for any reason the plaintiff's suit is not within the jurisdiction of the justice's or other inferior court, the plaintiff, if successful, recovers full costs less of the amount of his recovery.⁶⁸ As for example, in tort

67. *Moore v. Ross*, 1 Morris (Iowa) 401, including the value of the property replevied. See, in accord, *Gaston v. Cauty*, 48 Conn. 139.

68. *Del.*—*Tappan v. Bacon*, 78 Atl. 294. *Ky.*—*Huling v. Rife*, 3 J. J. Marsh. 587. *Me.*—*Gilman v. Portland*, 51 Me. 457. *Mich.*—*Krzeszke v. Kamin*, 163 Mich. 290, 128 N. W. 190 (action for malicious prosecution); *Mason v. City of Muskegon*, 109 Mich. 456, 67 N. W. 692 (action against city); *Reath v. Western Union Tel. Co.*, 89 Mich. 22, 50 N. W. 817; *Gurney v. Mayor, etc., of St. Clair*, 11 Mich. 202. *Minn.*—*Greenman v. Smith*, 20 Minn. 418. *Neb.*—*Carlson v. Beckman*, 35 Neb. 392, 53 N. W. 203, action for accounting growing out of fiduciary relations. *N. H.*—*Brown v. Mathes*, 5 N. H. 229; *Pritchard v. Atkinson*, 4 N. H. 291. *N. Y.*—*Crim v. Cronkhite*, 15 How. Pr. 250; *Underhill v. Rushmore*, 51 App. Div. 204, 64 N. Y. Supp. 1015. *Wis.*—*French v. Keator*, 51 Wis. 290, 8 N. W. 190; *Eaton v. Lyman*, 30 Wis. 41 (action on a covenant in a deed).

The New York code provides that costs are to be allowed, of course, to the plaintiff upon a recovery in actions in which a justice of the peace has no jurisdiction, regardless of the amount recovered. *Chapin v. Cole*, 38 How. Pr. (N. Y.) 481; *Boston Silk & W. Mills v. Eull*, 37 How. Pr. (N. Y.) 299, citing, *Stillwell v. Staples*, 5 Duer (N. Y.) 691. The amount of costs so recoverable is limited.

For the same reason, as the city court of New York had no jurisdiction on September 1, 1904, of actions against the city of New York, the provisions of §3228 of the Code of Civ. Proc. as amended by ch. 557, p. 1351, Laws 1904, would not operate to prevent a plaintiff, suing the city in the supreme court and recovering an amount less than \$500, from recovering his full bill of costs, as he cannot bring his action in the city court. *O'Connor v. City of*

New York, 51 Misc. 560, 101 N. Y. 295.

The municipal court of a city has no jurisdiction of an action for forcible entry and detainment, for, if the clerk can be compelled to execute the writ, the plaintiff, in such an action, though he recovers judgment for only \$50. *Mantig*, 65 Misc. 310, 121 N. Y. 295.

If the plaintiff in an action is compelled to sue in the circuit courts, he recovers his costs, of the amount recovered. *Boyd*, 77 Ind. 223.

In Pennsylvania, the justices have jurisdiction of causes arising *ex contractu*, and, he is only in actions on contracts where the plaintiff must execute an affidavit to save costs when he recovers less than \$100. *Green v. Patterson*, 3 Pa. 354.

A plaintiff in a suit against a municipal corporation in Michigan, if he recovers in the circuit court, in which the recovery is less than \$100, is not less entitled to costs, because justices of the peace have jurisdiction against municipal corporations. *May v. The Mayor*, 11 Mich. 291.

In Minnesota, the plaintiff is allowed statutory costs in an action brought in the district court, where a justice of the peace has no jurisdiction, where the damages recovered are less than \$100. *Kimball v. Southern Land Imp. Co.*, 37, 58 N. W. 868 (following, *Smith*, 20 Minn. 418); *Mellen*, 36 Minn. 122, 30 N. W. 122.

Scire Facias To Enforce a Judgment—proceeding by *scire facias* must be in the court where the judgment is recorded by statute in Mississippi in such case the plaintiff is entitled to his costs, although the amount recovered is within the jurisdiction of the justice. *Adler v. Eilers*, 18 Mo. 269. These are not within

and actions involving the title to land in which a justice usually has no jurisdiction.⁷⁰

(II.) **Where the Remedy in Inferior Court Is Less Effective.**—In like manner if the result of a suit before a justice would not be as effective as if brought in a court of general jurisdiction, the plaintiff will not be deprived of costs.⁷¹

(III.) **Classes of Actions Excepted.**—In some jurisdictions certain

ute, because ordinarily a justice has no jurisdiction in such cases. **Ga.**—*Lea v. Harris*, 88 Ga. 236, 14 S. E. 566; *Morgan v. Keith*, 19 Ga. 549. **Ind.**—*Hull v. Kirkpatrick*, 4 Ind. 637. **Pa.**—*Clark v. McKisson*, 6 Serg. & R. 87; *Hancock v. Barton*, 1 Serg. & R. 269; *Zell v. Arnold*, 2 Pen. & W. (Pa.) 292.

But demands based on nonfeasance, the non-performance of a duty through neglect, are within a justice's jurisdiction. **Conn.**—*v. Stumm*, 31 Pa. 14; *Seitzinger v. Sternberger*, 12 Pa. 379; *Livingston v. Cox*, 6 Pa. 360; *McCahan v. Hirst*, 7 Watts (Pa.) 175.

Breach of Promise.—In Michigan costs go to the defendant when a judgment for breach of promise in a suit in the circuit court does not exceed \$100, because justices of the peace have jurisdiction of such actions. *Stortz v. Circuit Judge*, 38 Mich. 243. But see *Huling v. Rife*, 3 J. J. Marsh. (Ky.) 587.

The provision in Georgia does not extend to cases sounding in damages; in such cases the defendant is chargeable with full costs, although the recovery be within the jurisdiction of a justice. *Morgan v. Keith*, 19 Ga. 549.

And the same rule applies where the action is not for a breach of contract, but for a tort, such tort being a violation of a specific duty flowing from relations between the parties created by contract. *Lea v. Harris*, 88 Ga. 236, 14 S. E. 566.

70. So the plaintiff, if successful, is entitled to his costs. **Mich.**—*Thorn v. Maurer*, 85 Mich. 569, 48 N. W. 640, citing, *Druse v. Wheeler*, 22 Mich. 439. **N. H.**—*Pritchard v. Atkinson*, 4 N. H. 291. **N. Y.**—*Lynk v. Weaver*, 123 N. Y. 171, 28 N. E. 508. **Ohio.**—*Norton v. Hart*, 1 Ohio 151. **Wis.**—*Maxim v. Wedge*, 69 Wis. 247, 35 N. W. 11, citing, *Lipsky v. Borgmann*, 52 Wis. 256, 9 N. W. 158. See, also, *Trustees v. Andrus*, 21 N. J. L. 325, involving the right to a church pew.

An action for overflowing plaintiff's land involves title to land *Dixon v. Scott*, 18 N. J. L. 430.

But if the title to land is not put in issue by the pleadings, or contested upon the trial, costs will not be allowed to the plaintiff where the verdict is less than the amount required by the statute, but in such case the defendant will recover costs. *Sands v. Manistee Circuit Judge*, 116 Mich. 9, 74 N. W. 173 (action for flooding lands), citing *Ostrom v. Potter*, 104 Mich. 115, 62 N. W. 170, and, *distinguishing*, *Thorn v. Maurer*, 85 Mich. 569, 48 N. W. 640; *Druse v. Wheeler*, 22 Mich. 439; *Corcoran v. Webster*, 50 Wis. 125, 6 N. W. 513.

In an action of trespass *quare clausum um fregit*, a recovery of a less sum than required by statute entitles the plaintiff to full costs, though there is no certificate by the judge as required in Pennsylvania that the freehold or title to land was chiefly in question. *Hinds v. Knox*, 4 Serg. & R. (Pa.) 417.

Effect of General Verdict.—Where a complaint contains several counts for different torts, and on the trial evidence is given on all the counts, and a general verdict is given for less than the required amount, in such case the defendant is entitled to costs. *Chapin v. Cole*, 38 How. Pr. (N. Y.) 481, citing, *Shorke v. Charles*, 18 Wend. (N. Y.) 616.

71. The language of the Rev. Code of Delaware of 1852, amended to 1893, p. 852, ch. 114, § 7, which provides that if the suit is upon a cause of action "cognizable before a justice of the peace" the plaintiff shall not recover costs, unless the recovery is for more than \$50, means a suit where the judgment would be as effective, or could be made as effective, as if it had been obtained upon the verdict of a jury. If a judgment before a justice would not constitute a lien it is not as effective. *Tappan v. Bacon* (Del.), 78 Atl. 294.

classes of actions are excepted from the rule that a recovery in a court of record below a certain amount will render the plaintiff liable for costs, if the suit was properly cognizable before a justice of the peace.⁷² As for example, suits against nonresidents,⁷³ suits involving the title to or possession of real estate,⁷⁴ and suits involving questions

72. **Ky.**—*Fortune v. Howard*, 4 J. J. Marsh. 171 (contracts to marry and penal obligations); *Wells v. Com.*, 8 B. Mon. 459 (action on official bond). **Mich.**—*Wardle v. Townsend*, 75 Mich. 385, 42 N. W. 950; *Bacon v. Clyne*, 70 Mich. 183, 38 N. W. 207 (actions by receiver to recover assessment). **N. Y.** *Silberstein v. Wicke*, 29 Abb. N. C. 291. **S. C.**—*Cloud v. Sledge*, Harp. 367, actions of trover and all actions to try title to property.

Arbitration proceedings are excepted in many states. *Loud v. Hobart*, 2 Cush. (Mass.) 325; *Moore v. Heald*, 7 Mass. 467; *Baker v. Blodgett*, 1 Vt. 141.

Actions on Accounts.—In Oregon, an action involving an open mutual account, if the sum total of the account exceeds \$150, is excepted. *Altree v. Gregson*, 40 Ore. 599, 67 Pac. 921; *Rayburn v. Hurd*, 19 Ore. 59, 23 Pac. 669; *Hayden v. Waymire*, 10 Ore. 367.

In Missouri, in all cases of trespass where any damage is found for the plaintiff, he recovers his costs. *Bragg v. Brooks*, 8 Mo. 40; *Grant v. Brinegar*, 6 Mo. 450.

An action for damages for wrongful conversion by the defendants, sounds in tort, and the defendants are properly taxed with costs, although the recovery is for only \$47.00. *Black v. Scott*, 104 Mo. App. 37, 78 S. W. 301.

Action for Wrongful Death.—In actions to recover damages for wrongful death, the plaintiff is entitled to full costs, although he only recovers nominal damages. *Silberstein v. Wicke*, 29 Abb. N. C. (N. Y.) 291.

A plaintiff prosecuting a suit in forma pauperis is excepted from these statutes and may recover his costs from the defendant regardless of the amount of recovery. *Weltman v. Posenecker*, 19 Misc. 592, 44 N. Y. Supp. 406.

73. **Somerset County Bank v. Beekman**, 50 N. J. L. 344, 13 Atl. 169.

The practice act in New Jersey (2 Gen. St., p. 2586, pl. 319) denies costs to a plaintiff who does not recover above \$200.00, exclusive of costs, except where title to land comes in ques-

tion, or "where the parties to a suit, in which the amount recovered exclusive of costs, exceeds \$100.00, do not reside in the same county." Held that the language quoted is not limited to cases where both parties reside in New Jersey, and will apply to a recovery by a foreign corporation. *Import Co. v. Paschall*, 60 N. J. L. 137, 37 Atl. 454.

74. **Conn.**—*Bristol Mfg. Co. v. Barnes*, 54 Conn. 53, 5 Atl. 593. **Ind.** *Burnett v. Coffin*, 4 Ind. 218. **Me.**—*Burnham v. Ross*, 47 Me. 456; *Morrison v. Kittridge*, 32 Me. 100; *Williams v. Veazie*, 8 Me. 106. **Mass.**—*Heims v. Ring*, 11 Allen 352; *Willard v. Baker*, 2 Gray 336 (action for carrying away building on plaintiff's land); *Ryder v. Hathaway*, 2 Metc. 96; *Butterfield v. Pearson*, 10 Mass. 410. **Minn.**—*Booth v. Sherwood*, 12 Minn. 426. **N. J.**—2 Gen. St., p. 2586, pl. 319; *Hunt v. Morris*, 12 N. J. L. 175. **N. Y.**—*Heath v. Barmour*, 35 How. Pr. 1; *Powell v. Rust*, 8 Barb. 567; *Dinehart v. Wells*, 2 Barb. 432; *Dexter v. Alfred*, 74 Hun 259, 26 N. Y. Supp. 592. **S. C.**—*McCullough v. McCullough*, 2 Nott & McC. 361. **Vt.**—*Long v. Ober*, 51 Vt. 73.

Actions involving a right of way or easement on land. **Mass.**—*Rathke v. Gardner*, 134 Mass. 14. **Mich.**—*Knorr v. Macomb Circuit Judge*, 78 Mich. 168, 43 N. W. 1099. **N. Y.**—*Tuncliff v. Lawyer*, 3 Cow. 382; *Dinehart v. Wells*, 2 Barb. 432.

Actions of trespass on real estate are expressly excepted from the statute in some states and come within the general rule that the prevailing party shall recover costs. **Mass.**—*Sawyer v. Ryan*, 13 Metc. 144. **N. Y.**—*Utter v. Gifford*, 25 How. Pr. 289. **Ohio.**—*Norton v. Hart*, 1 Ohio 154.

Actions quare clausum fregit (*Ind.* *Anderson v. Buchanan*, 8 Ind. 132. **Mass.**—*Sawyer v. Ryan*, 13 Metc. 144; *Dummer v. Foster*, 7 Mass. 476. **N. H.** *Bachelder v. Green*, 38 N. H. 265. **N. Y.** *Heath v. Barmour*, 53 Barb. 444; *Rogers v. McGregor*, 4 Cow. 531; *Radley v. Brice*, 6 Wend. 539. **Pa.**—*Weiser v.*

Schanble, 1 Leg. Rec. 291); actions for obstructing private ways or water courses (*Empson v. Seavey*, 8 Me. 138; *Plympton v. Baker*, 10 Pick. (Mass.) 473; *Crocker v. Black*, 16 Mass. 448); actions for interfering with the easement of abutting owners (*Bruen v. Manhattan R. Co.*, 14 N. Y. Supp. 285, affirming, 131 N. Y. 602, 30 N. E. 865; *Jones v. Met. El. R. Co.*, 14 N. Y. Supp. 632), and actions for waste (*Padelford v. Padelford*, 7 Pick. (Mass.) 152; *Snyder v. Beyer*, 3 E. D. Smith [N. Y.] 235) are actions involving title to real estate within the meaning of these statutes.

But an action of trespass *quare clausum fregit*, to which the defendant pleads *liberum tenementum*, is not an "action to establish or try title." (*Woodward v. Moore*, 9 Rich. L. [S. C.] 340; *Nevils v. Hartzog*, 4 Rich. L. [S. C.] 552); nor is an action for breach of covenant one involving title to land (*Chapman v. Griffin*, 1 Root [Conn.] 525; *Aaron v. Foster*, 11 Civ. Proc. [N. Y.] 325).

But actions which put in issue rights to real estate, though in form personal, are real actions within the meaning of that term in a statute giving plaintiff full costs in such case, regardless of amount of recovery. *Plympton v. Baker*, 10 Pick. (Mass.) 473.

In Massachusetts, if the plaintiff in an action of trespass to real estate, commenced originally in the superior court, recovers less than \$20.00 as damages, he will be entitled to no costs unless the judge shall certify that the title to real estate was in fact concerned. *Heims v. Ring*, 11 Allen (Mass.) 352.

Determining Whether Title Is in Issue.—Whether title of real estate is in question in an action of trespass is sometimes to be determined from the pleadings, and sometimes from the course of the trial. *Bachelder v. Green*, 38 N. H. 265. See *Sawyer v. Ryan*, 13 Metc. (Mass.) 144.

The right and title to real estate must, of course, be put in issue by the pleadings, and be necessarily involved, to entitle the plaintiff to costs. *Conn.* *Bishop v. Seeley*, 18 Conn. 389. *Minn.* *Booth v. Sherwood*, 12 Minn. 426. *N. Y.* *Pierret v. Moller*, 3 E. D. Smith 574; *Cleveland v. Wilder*, 78 Hun 591, 29 N. Y. Supp. 209; *Rumsey v. New York, etc., R. Co.*, 21 N. Y. Supp. 193. *S. C.*

McCullough v. McCullough, 2 Nott & McC. 361. *Wis.*—*Wauson Boom Co. v. Plumer*, 49 Wis. 112, 4 N. W. 1072.

In an action of trespass on lands, if the allegation of title is admitted, or not put in issue by the answer, the plaintiff cannot recover costs unless his recovery is up to the statutory requirement. *Shurtleff v. Hutchins*, 10 Metc. (Mass.) 248; *Lynk v. Weaver*, 128 N. Y. 171, 28 N. E. 508.

But it is not necessary in the code states that an answer setting up title should be controverted by a reply in order to put it in issue. *Farrell v. Hill*, 69 Hun 455, 23 N. Y. Supp. 402.

If the defendant in his pleadings interposes title to land as a defense to the action, this is sufficient to entitle the prevailing party to costs irrespective of the amount recovered. *Mansfield v. Church*, 21 Conn. 73; *Jackson v. Randall*, 11 Johns. (N. Y.) 405; *Eustace v. Tuthill*, 2 Johns. (N. Y.) 183.

If prescriptive right is interposed as a defense to an action for obstructing a highway, this entitles the plaintiff to full costs, regardless of amount of recovery. *Knorr v. Macomb Circuit Judge*, 78 Mich. 168, 43 N. W. 1099.

An issue on a license to do an act on real estate, which would otherwise be a trespass, does not present for trial, a claim of title to real property; accordingly the plaintiff in such case must pay the costs unless he recovers the amount required. *Otis v. Hall*, 3 Johns. (N. Y.) 450; *Ex parte Coburn*, 1 Cow. (N. Y.) 568; *People v. New York Common Pleas*, 18 Wend. 579; *Chandler v. Duane*, 10 Wend. 563; *Launitz v. Barnum*, 4 Sandf. (N. Y.) 637.

But the contrary has been held. *Cumming v. Prang*, 24 Mich. 514; *Powers v. Leach*, 22 Vt. 226.

If the plaintiff claims a title to real property, however, he is entitled to costs regardless of the amount of recovery, though the defendants plead license to do the act complained of, pleading license not being inconsistent with the denial of plaintiff's title. *Booth v. Sherwood*, 12 Minn. 426.

Must Be Directly Involved.—The title to land must be directly and not merely incidentally involved in the issues to be tried (*Bishop v. Seeley*, 18 Conn. 389; *Robbins v. Sawyer*, 3 Gray (Mass.) 375), and in some states this must appear from the record. *Fowler v. Fowler*, 52 Conn. 254.

of water rights in which actions the successful party becomes entitled to his costs regardless of the amount he may recover.⁷⁵

(IV.) *Effect of Plaintiff's Good-Faith.* — To the rule that a recovery below the required amount will render the plaintiff liable for the costs, there is the exception, recognized in some states, that if the court is of opinion from the evidence that the plaintiff, when he brought his suit, had recoverable grounds for expectation for believing himself entitled to a larger recovery, he may recover his costs.⁷⁶ For example, where the plaintiff brings an action in which he has no means of regulating his demand by any standard, and claims damages uncertain in amount, he may recover costs, though his recovery is less than the required amount.⁷⁷

(V.) *Effect of Plaintiff's Affidavit.* — An affidavit seasonably filed stating that the plaintiff believes that the debt due is over the amount cognizable by a justice will, in some states, save the costs to the plaintiff, although the recovery is below that amount.⁷⁸

75. *Fowler v. Fowler*, 52 Conn. 254; *White v. Fuller*, 36 Conn. 149.

76. *U. S.* — *Gibson v. Memphis, etc.*, R. Co., 31 Fed. 553. *Mass.* — *Bickford v. Page*, 2 Mass. 455. *Miss.* — *Shackelford v. Levy & Co.*, 63 Miss. 125. *Mo.* — *Hannan v. Shotwell*, 55 Mo. 429. *N. H.* — *Rochester v. Roberts*, 29 N. H. 360; *Church v. Clarke*, 26 N. H. 366; *Ames v. Cady*, 6 N. H. 59; *Herriek v. Fuller*, 5 N. H. 247.

In other words, the court in the exercise of its discretion will not tax costs against the prevailing plaintiff, except where he must have known that he was not entitled to recover the amount sued for. *U. S.* — *Gibson v. Memphis, etc.*, R. Co., 31 Fed. 553. *Conn.* — *Cotle v. Payne*, 3 Day 289. *Pa.* — *Roop v. Brubacker*, 1 Rawle 304.

But if the plaintiff's expectation of recovering more is founded on a mistake of the law, it will not protect him. *Toppam v. Atkinson*, 2 Mass. 365.

Evidence of Good Faith. — If the judgment of the court taxes the defendant with costs, this is conclusive evidence that the court was of opinion that the plaintiff had reasonable grounds to believe he was entitled to recover a larger sum. *Owers v. Ingram*, 74 Mo. 193, *citing*, *Hannan v. Shotwell*, 55 Mo. 429.

In South Carolina, a plaintiff who sues in a court of general jurisdiction is entitled to full costs, although the sum recovered is within the summary jurisdiction, unless it appear that he offered no proof at the trial of a cause of action beyond the summary jurisdic-

tion, or that the suit had been instituted wantonly, upon a fictitious demand with a view to increase the costs, and neither of these will be presumed against him in the absence of a report from the trial judge. *Furman v. Peay*, 2 Bailey (S. C.) 612.

77. *Pointer v. Kistler*, 59 Pa. 331; *Hinds v. Knox*, 4 Serg. & R. (Pa.) 417; *Grimes v. Gowen*, 1 McCord (S. C.) 93 (action for breach of warranty); *Scarborough v. Reynolds*, 13 Rich. (S. C.) 98.

78. *Cooper v. Coats*, 1 Dall. (U. S.) 308, 1 L. ed. 150 (giving the early rule in Pennsylvania); *White v. Lacy*, 3 N. J. L. 898; *Boudinot v. Lewis*, 3 N. J. L. 566.

But in the absence of this affidavit, judgment is properly entered without costs in Pennsylvania, where the recovery is less than \$100, and there is nothing to show that the demand was reduced by set-off. *McCafferty v. Crew*, 153 Pa. 311, 25 Atl. 833; *Glamorgan Iron Co. v. Rhule*, 53 Pa. 93; *Hale's Exrs. v. Ard's Exrs.*, 48 Pa. 22; *Rogers v. Ratcliffe*, 23 Pa. 184; *Louer v. Hummel*, 21 Pa. 450; *Green v. Patterson*, 3 Pa. Super. 354.

Whether the plaintiff's demand is within the jurisdiction given to justices by the Pennsylvania statute, and they are subject to the provision requiring an affidavit, is to be tested by the cause of action set forth in the statement, without regard to the form of action, selected by the plaintiff. *Green v. Patterson*, 3 Pa. Super. 354, *citing* *Saltzinger v. Steinberger*, 12 Pa. 379.

(VI.) **Rule Where Other Relief Is Sought.**—The statutes providing that if in certain classes of actions the recovery is below a certain amount, no costs can be recovered, have no application where other forms of relief are sought.⁷⁹ For example, if the statutes specify actions on contract or to recover money or damages, and the plaintiff seeks in addition equitable relief, the statutes do not govern in awarding costs, but the plaintiff may be awarded full costs, regardless of the amount of his recovery.⁸⁰

(VII.) **Reduction of Amount.**—**By Set-Off or Counterclaim.**—Another exception to the general rule existing in most jurisdictions⁸¹ is that if the recovery is reduced by set-off or counterclaim below the sum required by statute to entitle the plaintiff to costs, in such case the statute does not apply, and the plaintiff is entitled to full costs, regardless of the amount of recovery,⁸² or at any rate the defendant

But this statute does not apply to actions of trespass *quare clausum fregit*. *Moyer v. Illig*, 52 Pa. 444.

The fact, however, that the plaintiff joins with his money claim a demand on real contract will not entitle him to costs where he recovers less than \$100 and fails to make the required affidavit. *Minnich v. Lawall*, 6 Kulp (Pa.) 487.

In Delaware, if suit is commenced adversely in a superior court, when it could have been instituted in the justice's court, the plaintiff will not be entitled to costs, unless the report be for a sum exceeding \$50, or unless there is a sufficient affidavit by the plaintiff that he has a just cause of action. *Tappan v. Bacon* (Del.), 78 Atl. 294; *Adkins v. Campbell*, 6 Penne. (Del.) 96, 64 Atl. 628; *Chillas v. Brooks*, 5 Harr. (Del.) 60. And so though it is sent to a referee by consent. *Jones v. Murphy*, 3 Harr. (Del.) 334.

But this action has no reference to amicable actions. *Jones v. Murphy*, 3 Harr. (Del.) 334.

79. **Diversion of Water.**—In an action to try the right to the use of water and for damages for diverting it, although the amount recovered is less than \$200, costs will be awarded. *Marius v. Bicknell*, 10 Cal. 217. See *Brown v. Ashley*, 13 Nev. 251.

80. Cal.—*Esmond v. Chew*, 17 Cal. 336. Ind.—*Douglass v. Blankenship*, 50 Ind. 160. Mo.—*Stewart v. See*, 21 Mo. 513, *affirmed*, *Skinner v. See*, 21 Mo. 517.

If the action is matter for the recovery of money or damages, but es-

entially sounds in equity, the matter of awarding costs is largely in the discretion of the trial court, and the plaintiffs may be taxed with costs although the recovery is less than \$300. *Clark v. Brown*, 141 Cal. 93, 74 Pac. 548; *Bemmerly v. Smith*, 136 Cal. 5, 68 Pac. 97, *citing Anthony v. Grand*, 101 Cal. 235, 35 Pac. 859; *Abram v. Stuart*, 96 Cal. 235, 31 Pac. 44.

But if the prayer for equitable relief joined in a suit for damages, is denied, and only damages less than \$300 are recovered, such judgment will not carry costs. *Brown v. Delavau*, 63 Cal. 303; *Hines v. Johnson*, 61 Cal. 259.

81. In the absence of statute, the fact that the amount was reduced by set-off, does not entitle the plaintiff to costs if he recovers less than the statute requires. Me.—*Foster v. Ordway*, 26 Me. 322, *explaining, Hathorne v. Cate*, 5 Me. 59. Neb.—*Moore v. Darrow*, 11 Neb. 462, 9 N. W. 637. Ore.—*Rayburn v. Hurd*, 19 Ore. 59, 23 Pac. 669. Tex.—*Ferrier v. Knox Co.* (Tex. Civ. App.), 33 S. W. 896.

But the rule has been laid down that even in the absence of statute, where the plaintiff claims by his petition enough to give the superior court jurisdiction, and the jury find his claim to exceed that sum, but it is by counterclaim or set-off allowed by the jury reduced to an amount within the jurisdiction of the justice, the plaintiff is entitled to his costs. *Brunaugh v. Worley*, 6 Ohio St. 597, severely criticized in *Moore v. Darrow*, 11 Neb. 462, 9 N. W. 637; *Roberts v. Carland*, 1 Ore. 332.

82. Ind.—*Berry v. Town of Merom*,

120 Ind. 161, 22 N. E. 127; *Mills v. Rosenbaum*, 103 Ind. 152, 2 N. E. 313; *Browning v. Dixon*, 80 Ind. 150; *Higman v. Brown*, 3 Ind. 430. **Mass.**—*Williams v. Williams*, 133 Mass. 587; *Douglas v. Nichols*, 133 Mass. 470; *Loud v. Hobart*, 2 Cush. 325. **Mich.**—*Carter v. Snyder*, 27 Mich. 484; *Ladd v. Duncan*, 23 Mich. 285. **N. H.**—*Burbank v. Willoughby*, 5 N. H. 111. **N. Y.** *Sherry v. Cary*, 111 N. Y. 514, 19 N. E. 87, reversing 55 N. Y. Super. 253; *Griffen v. Brown*, 35 How. Pr. 372. **Ohio.**—*Snoddy v. Mason*, 8 Am. L. Rec. 415, 6 Ohio Dec. (Reprint) 838. **Pa.** *Glamorgan Iron Co. v. Rhule*, 54 Pa. 93; *Berry v. Mervine*, 4 Pa. 330; *Grabav v. Hirshfield*, 9 Pa. Co. Ct. 159; *Shurley v. Entricken*, 3 W. N. C. 51. **S. C.** *Duggan v. Roche*, 2 Hill 584. **Tex.** *Watts v. Harding*, 5 Tex. 386. **Wis.** *Van Patten v. Wilcox*, 32 Wis. 340; *Pyncheon v. Baxter*, 2 Pinn. 31. **Wyo.** *Holgate v. Downer*, 8 Wyo. 334, 57 Pac. 918.

Under these statutes it has been held that a reduction by an equitable defense (*Manning v. Eaton*, 7 Watts [Pa.] 346), but not by counter evidence (*Spring Val. Stat., etc., Co. v. Jackson*, 2 Sandf. [N. Y.] 622), will entitle the plaintiff to costs.

In Massachusetts, see *Barnard v. Curtis*, 8 Mass. 535.

In New York costs cannot be allowed plaintiff upon dismissal of counterclaim. The only provision allowing the plaintiff costs on recovering a judgment upon a defendant's counterclaim is contained in subd. 4 of §332 of the municipal court act (Laws, 1902, ch. 580), and costs are there authorized only when the plaintiff's claim is for less than \$50 in amount, and the plaintiff recovers judgment on the non-appearance of the defendant. *Ficke v. Hessberg*, 127 N. Y. Supp. 1008.

In Pennsylvania, if the plaintiff claims more than \$100 in a suit brought otherwise than before a justice, and does not make the affidavit required by statute that he believes the debt due is over that sum, he ought to rule the defendant to give notice of special matter, so as to bring his defense on the record, and show whether the defense was set-off or payment. Because if the claim was reduced by set-off, the plaintiff would be entitled to recover his costs, although he recovered less than \$100, but it is otherwise if the

reduction was under a plea of payment. *Braitley v. Miller*, 2 Dall. (U. S.) 74, 1 L. ed. 295; *Cooper v. Coats*, 1 Dall. (U. S.) 308, 1 L. ed. 150; *Glamorgan Iron Co. v. Rhule*, 53 Pa. 93; *Rees v. Waters*, 9 Watts 90; *Lawrence v. Hunter*, 9 Watts & S. 64; *Stroh v. Uhrich*, 1 Watts & S. 57; *Barry v. Mervine*, 4 Pa. 330.

And the presumption is that the reduction was by plea of payment. *Hale's Exrs. v. Ard's Exrs.*, 48 Pa. 22.

In Oregon.—In an action to recover damages for the breach of a contract, if the plaintiff recover less than \$50, he cannot recover costs in Oregon, although the defendants' answer may contain a counterclaim for more than \$150, which counterclaim is founded on an account. The plaintiff cannot recover costs in such case unless there be open mutual accounts involved, which, taken together on both sides, shall exceed \$150. *Rayburn v. Hurd*, 19 Ore. 59, 23 Pac. 669; *Mason v. Riner*, 18 Ore. 153, 22 Pac. 532.

Determination of Character of Plea.

In determining whether a plea constitutes a counterclaim within the meaning of that term as used in the text, the rule that a pleading is judged by what it is, not what it is called, is applied. If an answer is, in fact, a counterclaim, though not such in form, it is sufficient. *Mills v. Rosenbaum*, 103 Ind. 152, 2 N. E. 313; *Fuller v. Curtis*, 100 Ind. 237.

But paragraphs of an answer are not counterclaims or set-offs within the meaning of those statutes. *Berry v. Town of Merom*, 120 Ind. 161, 22 N. E. 127; *Moore v. Newland*, 90 Ind. 409. Nor is a plea setting up as a defense a settlement between the parties. *Carter v. Snyder*, 27 Mich. 484.

But in one jurisdiction it is held that if the plaintiff's demand is reduced by evidence of a special contract to pay the debt of a third person, he is nevertheless entitled to costs because this falls within the principles of the statute. *Manning v. Eaton*, 7 Watts (Pa.) 346.

In action to recover rent, an affidavit of defense by the tenant setting up that the premises were untenable, that the landlord promised to repair, and released him from the rent, etc., does not amount to a set-off within the meaning of this statute. *Grabav v. Hirshfield*, 9 Pa. Co. Ct. 159.

will not be entitled to costs against the plaintiff,⁸³ provided the jury shall certify in their verdict as is required in some jurisdictions, that the damages were reduced to such sum by means of the amount allowed by them on account of such set-off.⁸⁴ But if the counterclaim pleaded grew out of the same transaction alleged in the complaint, the defendant is entitled to costs, if the balance could have been sued for in a justice's court.⁸⁵ Of course, if the recovery is up to the statutory requirements after the allowance of the set-off or counterclaim, costs should always be awarded to the plaintiff.⁸⁶

By Payment.—It seems that in case of a reduction of the amount of demand by payments below the required amount, the plaintiff is not entitled to his costs, because this reduces the actual demands between the parties.⁸⁷

By Plea of Failure of Consideration.—If the recovery is reduced by a successful plea of failure of consideration, costs cannot be adjudged against the plaintiff.⁸⁸

Reconvention Under the Civil Law. In Louisiana, where the defendant's reconventional demand is offset by the main action, and a judgment is recovered by the plaintiff for a balance proved, the judgment includes costs. *Bloch v. Creditors*, 46 La. Ann. 1334, 16 So. 267.

Finding Against Counterclaim.—In *Butler v. Kneeland*, 23 Ohio St. 196, it was held in an action in the court of common pleas, for the recovery of money only, that where the facts alleged in a counterclaim set up by the defendant are denied by the plaintiff, and the jury, by a general verdict, finds "the issues joined" for the plaintiff and assess his damages at less than \$100, this is in effect a finding against the counterclaim, the plaintiffs are not entitled to recover costs, because they recovered less than \$100.

83. *Kalt v. Lignot*, 3 Abb. Pr. (N. Y.) 190.

84. *Hilton v. Walker*, 56 Me. 70; *Thompson v. Thompson*, 31 Me. 130.

In *Lawrence v. Ford*, 44 Me. 427, it was held that where the defendant filed an account in set-off, and thereafter offered to be defaulted for a sum less than \$20, the plaintiff, in order to recover full costs, should have it appear that his acceptance of the offer was by reason of a reduction, plus judgment, in consequence of the account filed in set-off.

85. *Gregory v. McArdle*, 1 How. Pr. N. S. (N. Y.) 187.

86. *Beaton v. Radford*, 40 Ohio St. 106; *Holgate v. Downer*, 8 Wyo. 334, 57 Pac. 918.

87. *Ind.*—*Wathen v. Fare*, 17 Ind. 320; *Poag v. LaDue*, 7 Ind. 675; *Carter v. Crume*, 7 Ind. 197. *Mass.*—*Loud v. Hobart*, 2 Cush. 325. *Mich.*—*Mandigo v. Mandigo*, 26 Mich. 349. *Mo.*—*Evans v. Hays*, 2 Mo. 97. *N. Y.*—*Burke v. Philipps*, 20 Misc. 413, 45 N. Y. Supp. 1024; *Crim v. Cronkhite*, 15 How. Pr. 250; *Van Antwerp v. Ingersoll*, 2 Caines 107; *Lewis v. New York Dry Goods Co.*, 1 N. Y. Leg. Obs. 200.

In Texas, see *Watts v. Harding*, 5 Tex. 386, citing, *Hall v. Hodges*, 2 Tex. 323; *Cochran v. Kellum*, 4 Tex. 120.

A plea of settlement was held to be in substance a plea of payment within Art. 1432 of the Revised Statutes of Texas, 1895, providing that where the plaintiff's demand is reduced by payment to an amount which would not have been within the jurisdiction of the court, the defendant shall recover his costs. *Reed v. Walker* (Tex. Civ. App.), 130 S. W. 607.

In North Carolina, in actions in form *ex contractu*, if the plaintiff shows no right to recover more than \$20, or if he show such right and the amount is reduced to \$20 or less, by payment or proof of payment, to an amount within the summary jurisdiction, he cannot recover; but where the damages are uncertain, as in action on warranty, or where they are reduced by any other defense than that of payment, in such case the plaintiff recovers costs. *Scarborough v. Reynolds*, 13 Rich. (S. C.) 98, reviewing many cases. *Levy v. Roberts*, 1 McCord (S. C.) 395.

88. *Pa.*—*Sadler v. Slobaugh*, 3 Serg. & R. 388. *S. C.*—*Mitchum v. Richard-*

By Remittitur. — If the recovery is reduced below the required amount by a *remittitur ad damnum*, the plaintiff, nevertheless will be entitled to no costs.⁸⁹

j. Evidence. — Presumptions. — If the plaintiff recovers less than the minimum amount of a justice's jurisdiction, and there is nothing to show that the demand was reduced by set-off, the presumption is that the amount was within the jurisdiction of a justice of the peace.⁹⁰

Record. — The amount that was actually recovered may be proven by the judgment roll, if it is properly made up.⁹¹

6. Effect of Plea Puis Darrein Continuance. — Where a plea *puis darrein continuance* is relied on, the rule is well settled that the defendant must pay the costs accruing up to the time he filed his plea,⁹² but where judgment is rendered for the defendant on the plea, he is entitled to the costs accruing after the filing of the plea.⁹³ And the

son, 3 Strobb. 254. **Tenn.** — Gist v. Webb, 1 Coldw. 518. **Tex.** — Bryan v. Allen (Tex. Civ. App.), 39 S. W. 963, writ of error denied by supreme court.

^{89.} Babbitt v. Shearer, 192 Mass. 600, 78 N. E. 796.

In Crockett v. Calvert, 8 Ind. 127, the suit was before a justice of the peace, resulting in a verdict for the plaintiff for \$100, on which judgment was entered. The plaintiff entered a remittitur of "\$25 of the above judgment." The defendant appealed to the circuit court, where judgment was rendered for \$80. It was held that this was such a reduction of the justice's judgment as entitled the defendant to costs.

^{90.} Maloney v. Murphy, 173 Pa. 335, 34 Atl. 20; Rogers v. Ratcliff, 23 Pa. 184.

^{91.} Thus, where in an action for the recovery of money, the plaintiff enters judgment against the defendant for the amount (over \$50), for which the defendant offered that plaintiff might take judgment, and the parties go to trial for the balance of the plaintiff's claim, and the verdict is for the plaintiff, but for a sum less than \$50, the plaintiff is, nevertheless, entitled to costs. The reason is that the judgment roll overrides the sum mentioned in the offer of judgment by the defendant. Hoe v. Sanborn, 24 How. Pr. (N. Y.) 26.

^{92.} **U. S.** — *Ex parte* Foster, 2 Story 131, 9 Fed. Cas. No. 4,960. **Ala.** — Dolberry v. Trice's Exrs., 49 Ala. 207; Hitt v. Lacy, 3 Ala. 104, 36 Am. Dec. 440. **Ark.** — Reid v. Hart, 45 Ark. 41. **Mass.** — Coffin v. Cottle, 9 Pick. 287. **Mo.**

Nettles v. Sweazea, 2 Mo. 100. **N. H.** — Kimball v. Wilson, 3 N. H. 96, 14 Am. Dec. 342. **N. Y.** — New York Dry Dock Co. v. McIntosh, 5 Hill 505; Shawe v. Wilmerdin, 2 Caines 380. **N. C.** — Wilson v. Pharr, 47 N. C. 451. **R. I.** — Warland v. Colwell, 10 R. I. 369. **S. C.** — State v. Moses, 20 S. C. 465. **Tenn.** — Campbell v. Reeves, 3 Sneed 52; Canon v. Blakemore, 10 Humph. 227. **Eng.** — Woollen v. Smith, 9 Ad. & El. 505, 36 E. C. L. 285; Jeffs v. Smith, 4 Taunt. 196.

When, in a real action for the recovery of land, the defendant files a plea puis darrein continuance and the plaintiff accepts such plea, the plaintiff is the prevailing party up to the time of filing the plea, and is entitled to costs up to that time. After that time the defendant is the prevailing party, and is thereafter entitled to costs. Poland v. Davis, 103 Me. 472, 70 Atl. 22.

In Tennessee, under the code, costs are awarded in view of all the issues. Susong v. Jack, 1 Heisk. (Tenn.) 415.

The reason of the rule is this: By the plea *puis darrein continuance* the defendant admits that the action is well founded at the first, and he ought not to have the costs which accrued while the plaintiff was in the right and he in the wrong. **U. S.** — Wisdom v. Williams, Hempst. 460, 30 Fed. Cas. No. 17,904. **N. Y.** — Smith v. Barse, 2 Hill 387. **Eng.** — Lyttleton v. Cross, 4 B. & C. 117, 10 E. C. L. 285.

^{93.} Sanche v. Webb, 110 Ala. 214, 20 So. 462; Draper v. Walker, 98 Ala. 310, 13 So. 595; Dolberry v. Trice, 49 Ala. 207.

rule is the same although the defense is pleaded in the answer under the code of procedure.⁹⁴

7. Costs in Particular Kinds of Actions and Proceedings.—*a. Scope of Section.*—Costs in particular kinds of proceedings will be found treated under the appropriate titles, because such question is usually inseparable from other preliminary considerations that can be adequately dealt with only in the particular topic. As, for example, "Ejectment;" "Mandamus;" "Quo Warranto," etc. Consult also the table of cross-references.

b. Actions or Special Proceedings.—In some jurisdictions, the right of the successful party to recover costs is confined to actions and cannot be extended to other kinds of proceedings.⁹⁵

c. In Friendly Suits.—In amicable, though contentious, suits in equity, costs will not ordinarily be allowed to either party,⁹⁶ but will be equally divided between them.⁹⁷

d. In Actions Respecting Title to Real Estate.—(1.) **Award of Costs to Successful Party.**⁹⁸—In a number of jurisdictions, the plaintiff is entitled to costs as a matter of course in actions to recover real property or in any actions involving the title to land, if final judgment is rendered in his favor.⁹⁹

The effect of this plea upon costs has been stated as follows: "In one sense such a plea may be said to divide the suit into two actions, in the first of which the plaintiff is the prevailing party and entitled to costs, and in the second of which the defendant is the prevailing party and entitled to costs." *Leavitt v. School Dist.*, 78 Me. 574, 7 Atl. 600.

91. *Pettit v. Western Coal, etc., Co.*, 123 Fed. 840.

95. *Willis v. Calhoun*, 145 Ky. 95, 140 S. W. 139, proceeding by motion for establishment of ferry. *Compare, Ackler v. Oldham*, 1 A. K. Marsh (Ky.) 471.

In condemnation proceedings, the rules as to costs are the same as in civil actions generally. *Andrus v. Bay Creek R. Co.*, 60 N. J. L. 10, 36 Atl. 826; *McCreedy v. Rio Grande Western R. Co.*, 30 Utah 1, 83 Pac. 331. See the title "Eminent Domain."

An ex parte application under §1391, New York Code Civ. Proc., for orders directing the issuance of executions against the wages of several defendant debtors, is not a motion within the meaning of §3236 of the New York code, and, hence, no costs may be granted. *Brodie v. O'Donnell*, 71 Misc. 530, 130 N. Y. Supp. 805, citing, *Edlefson v. Duryee*, 21 Hun 607,

96. *Ma.*—*Rotch v. Livingston*, 91 Me. 461, 40 Atl. 426. *Mich.*—*Smith v. First Nat. Bank*, 17 Mich. 479. *Vt.* *Morse v. Lyman*, 64 Vt. 167, 24 Atl. 763; *Randall v. Josselyn*, 59 Vt. 557, 10 Atl. 577; *State v. Adams*, 58 Vt. 694, 4 Atl. 228; *McConnell v. McConnell*, 11 Vt. 290.

Thus, a trustee may seek the advice of a court of equity with reference to questions arising in the administration of his trust and involving the determination of equitable principles without being taxable with costs. *Jones v. Stockett*, 2 Bland. (Md.) 409.

So, in a friendly proceeding to test the validity of a statute, costs should not be awarded. *Smith v. First Nat. Bank*, 17 Mich. 479.

97. *Dodge v. Wilbur*, 5 Sandf. (N. Y.) 397.

98. See *supra*, p. 873. See, also, the titles "Ejectment;" "Trespass To Try Title."

99. *Cal.*—Code Civ. Proc., §1022; *Gilson v. Hammang*, 145 Cal. 454, 78 Pac. 953; *Sierra Union, etc., Co. v. Wolff*, 144 Cal. 430, 77 Pac. 1038; *Schmidt v. Klotz*, 130 Cal. 223, 62 Pac. 470; *Kelly v. Cent. P. R. Co.*, 74 Cal. 565, 16 Pac. 390. *Mich.*—*How. Ann. St.*, §8964. *N. Y.*—Code Civ. Proc., §3228; *Van Wyck v. Baker*, 11 Hun

And in some jurisdictions the defendant, if successful, is entitled to costs, or, as it is sometimes expressed, whenever the plaintiff is not so entitled.¹ Under these statutes it has been held that a partial recovery is sufficient to entitle the plaintiff to his costs.²

(II.) **When Title in Issue.** — If ownership and right to the possession of real estate is claimed by the plaintiff and denied by the defendant, title to land is involved within the meaning of those statutes. Briefly it is sufficient if the title to land is put in issue by the pleadings.³

309 (action to set aside fraudulent conveyance). S. D.—Comp. Laws, 5121, the statute in this state is similar to the New York statute. Wis.—Wis. Stats., 1898, §2918, 2920.

And if the action involves the title or possession of real estate, it is immaterial what the form of action may be, or whether the relief sought is in whole or in part equitable. If the plaintiff recovers, even though only as to a portion of the title or possession involved, the right to costs follows, of course, under the terms of the statute. *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569.

Under the New York Code, if a claim of title to real property arose upon the pleadings, the plaintiff is entitled to costs whether there was any certificate by the referee that a claim of title came in question upon the trial, or not, final judgment having been rendered in his favor. *Bowen v. Holdredge*, 119 N. Y. Supp. 199.

The right to allow extra allowances of costs in partition suits is not limited, so far as the defendants are concerned, to those who have filed answers creating issues. *Warren v. Rupert*, 203 N. Y. 250, 96 N. E. 417.

Under the New York Code of Civ. Proc., providing for an additional allowance of costs where the action is brought to compel the determination of a claim to real property, claims to incorporeal as well as corporeal property are intended, such as an easement. *Furniss v. Fogarty*, 63 Misc. 385, 117 N. Y. Supp. 385.

In actions for trespass on land the plaintiff will be entitled to costs, under these statutes. *Hoyt v. Carlin*, 1 Mich. N. P. 44.

An easement is real estate; and its possession or title is involved in an action seeking damages for past trespasses and a restraint against future trespasses upon such easement, where

the defendant puts in issue the existence of the easement. Cal.—*Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569. Mass. *Rathke v. Gardner*, 134 Mass. 14. N. Y.—*Slingerland v. International Contracting Co.*, 43 App. Div. 215, 60 N. Y. Supp. 12, *affirmed*, 169 N. Y. 60, 61 N. E. 995.

The word "title" as used in these statutes means precisely what it means in reference to the common law action of ejectment. It is synonymous with the right of possession. *Ehle v. Quackenboss*, 6 Hill (N. Y.) 537; *Grosso v. City of Lead*, 9 S. D. 310, 68 N. W. 310.

1. *Alexander v. Hard*, 42 How. Pr. (N. Y.) 131; N. C. Code, §525.

If final judgment is rendered in favor of the defendant, upon the trial of an issue of fact, the defendant is entitled under the New York code to the certificate that title to the real property came in question on the trial and to his costs, although he gives no evidence on the trial, and the cause is dismissed on his motion. *Morse v. Salisbury*, 48 N. Y. 636; *Rathbone v. McConnell*, 21 N. Y. 466; *Taylor v. Wright*, 55 N. Y. Supp. 761; *Ehle v. Quackenboss*, 6 Hill (N. Y.) 537; *Saunders v. Goldthrite*, 41 Hun (N. Y.) 242; *Gates v. Canfield*, 28 Hun (N. Y.) 12.

If by reason of the plaintiff's default the action is dismissed at the hearing, the defendant is entitled to costs, without any certificate of the judge that the title to real property came in question. *Saunders v. Goldthrite*, 1 N. Y. St. 522, *following*, *Gates v. Canfield*, 28 Hun 12.

2. *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734; *Horton v. Horne*, 99 N. C. 219, 5 S. E. 927.

3. N. Y.—*Burnet v. Kelly*, 10 How. Pr. 406; *Boyle v. Lawton*, 3 How. Pr. (N. S.) 444; *Bowen v. Holdredge*, 119 N. Y. Supp. 199; *Quinn v. Winter*, 4 N. Y. Supp. 865; *Kelly v. New York*,

Or whenever, under the pleading, it becomes necessary for the plaintiff to prove, and he upon the trial gives evidence of, title, it may be said that such title is in question upon the trial.⁴ But ordinarily, unless the title to land is put in issue by the pleadings, it is not involved, and the defendant is entitled to costs, where the plaintiff's recovery does not exceed the amount fixed by statute.⁵

(III.) **Apportionment of Costs.**—If a cross action is filed and it cannot be ascertained from the record, what portion of the total costs were properly attributable to the trial of the original action, and what portion to the trial of the cross action, the costs may be divided between the parties.⁶

e. In Doubtful and Novel Cases.—In cases of doubtful or novel character, where the question is one of importance, justifying a full defense and a thorough investigation, the losing party, if he has acted in good faith, should not be taxed with any but his own costs.⁷

etc., R. Co., 19 Hun 363; Ehle v. Quackenboss, 6 Hill 537; Muller v. Bayard, 15 Abb. Pr. 449. **S. D.**—Grosso v. City of Lead, 9 S. D. 165, 68 N. W. 310. **Wis.**—Maxim v. Wedge, 69 Wis. 547, 35 N. W. 11; Ames v. Meehan, 63 Wis. 408, 23 N. W. 586; Lipsky v. Borgmann, 52 Wis. 256, 9 N. W. 158.

If, in an action to quiet title, the plaintiff is decreed to be the owner of the fee, the defendants having denied her alleged ownership, plaintiff is entitled to costs as a matter of right. *Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690 (following, *Gibson v. Hammang*, 145 Cal. 454, 78 Pac. 953; *Sierra Union, etc., Co. v. Wolff*, 144 Cal. 430, 77 Pac. 1038).

4. Taylor v. Wright, 55 N. Y. Supp. 761.

Under the Connecticut statute, the record itself must show the title directly in issue. *Fowler v. Fowler*, 52 Conn. 254.

5. It is not enough that the title to real estate is incidentally involved and may be affected by the judgment if an issue in respect thereto does not arise upon the pleadings. *Larkin v. McNamee*, 109 App. Div. 884, 93 N. Y. Supp. 827, affirmed, 80 N. E. 112 (action to declare invalid probate of will); *Langdon v. Guy*, 91 N. Y. 663; *Fisk v. Wabash, etc., R. Co.*, 114 Mich. 248, 72 N. W. 205.

In an action of replevin to recover hay alleged to be owned by the plaintiff, the mere fact that the complaint alleged that the hay was cut from real property does not necessarily show that

the title to land came in question. *Wolfe v. Furman*, 142 Wis. 94, 124 N. W. 1039.

6. Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569.

To entitle the plaintiff to recover under North Carolina statute, he must recover on all the issues. Otherwise the defendant is entitled. *Murray v. Spencer*, 92 N. C. 264; *Clarke v. Wagner*, 78 N. C. 367.

7. U. S.—*Grattan v. Appleton*, 3 Story 755, 10 Fed. Cas. No. 5,707. **Ala.**—*Maybury v. Grady*, 67 Ala. 147. **Mich.**—*Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *People v. Auditor General*, 38 Mich. 746. **N. Y.**—*Pattison v. Hull*, 9 Cow. 747; *People v. Town of Barton*, 44 Barb. 148, 29 How. Pr. 371. **Va.**—*Jones v. Mason*, 5 Rand. 577, 16 Am. Dec. 761.

Thus, costs have been denied upon the refusal of a writ of mandamus brought to determine a new question of great public importance. *People v. Auditor General*, 38 Mich. 746.

And even though the point involved is merely a doubtful and unsettled question of practice, costs may be denied. *Mich.*—*Culver v. McKeown*, 43 Mich. 322, 5 N. W. 422; *Ellis v. Fletcher*, 40 Mich. 321. **N. Y.**—*Porter v. Jones*, 7 How. Pr. 192. **Pa.**—*Coleman v. Brooke*, 39 Leg. Int. 158, 15 Phila. 202.

Thus, where the practice as to taxing costs is uncertain, no costs will be allowed either party on a motion to set aside a taxation without notice. *Akerly v. Vilas*, 23 Wis. 628.

In New York, the right of husband

This is true in equity as well as at law, it being the rule in those courts in such cases to deny costs to either party,⁸ or to apportion them between the parties.⁹

or wife to sue the other at law, and the right of the husband to recover from the wife's separate estate money advanced at her request for the benefit of such separate estate, being new and unsettled questions, have been held of sufficient importance to warrant the exercise of a discretion denying costs to both parties. *Alward v. Alward*, 15 Civ. Proc. 151, 2 N. Y. Supp. 42.

In New York, an extra allowance of costs is given in difficult and extraordinary cases. *Brackett v. Seovey*, 131 N. Y. Supp. 664; *Secor v. Ardsley Ice Co.*, 133 App. Div. 136, 117 N. Y. Supp. 414, *affirmed*, 95 N. E. 1139, provided the case contains the requisite certificate by the referee, etc., that the case is both difficult and extraordinary, and that the plaintiff is entitled to an additional allowance (*Central Trust Co. v. Manhattan Trust Co.*, 129 N. Y. Supp. 730).

Where the rights of the parties depend upon the location of indefinite boundary lines contained in patents and ancient deeds, the conclusion of the trial court that the action was a difficult and extraordinary one authorizing an additional allowance will not be disturbed on appeal. *Town of North Hempstead v. Oelsner*, 133 N. Y. Supp. 319, *citing*, *American Fruit Product Co. v. Ward*, 113 App. Div. 319, 99 N. Y. Supp. 717, *affirmed*, without opinion, 190 N. Y. 533, 83 N. E. 1122.

But if the case is not difficult and extraordinary the court has no power to make an extra allowance. *Campbell v. Emalie*, 188 N. Y. 509, 81 N. E. 458, *affirming*, 99 N. Y. Supp. 1136; *City of New York v. Seely-Taylor Co.*, 133 N. Y. Supp. 808; *Storrs v. Northern Pac. R. Co.*, 132 N. Y. Supp. 954; *Leask v. McCarty*, 132 N. Y. Supp. 92; *Secor v. Ardsley Ice Co.*, 117 N. Y. Supp. 414.

Thus, a simple action for damages for false representations (*Allen, Kingston Motor Car Co. v. Consol. Nat. Bank*, 129 N. Y. Supp. 1070), or cases involving merely the duties and liabilities of masters to their servants (*Standard Trust Co. v. New York Cent. R. Co.*, 178 N. Y. 407, 70 N. E. 925; *Collins v. Waterbury Co.*, 129 N. Y. Supp. 661) are not

ordinarily such difficult or extraordinary cases as justify the award of an extra allowance of costs under the New York code.

Nor is a mere action for breach of promise of marriage difficult or extraordinary within the meaning of this statute. *Horner v. Webendorfer*, 126 N. Y. Supp. 475.

Repeated trials does not make the case an extraordinary one. *Vaughn v. Glen Falls Portland Cement Co.*, 59 Misc. 230, 112 N. Y. Supp. 240.

An allowance does not depend upon whether difficult questions of law have been litigated, but upon the question whether the case is a difficult and extraordinary one. It may be difficult and extraordinary because of the questions of fact involved, as well as for any other reason. *American Fruit Product Co. v. Ward*, 113 App. Div. 319, 99 N. Y. Supp. 717.

These words "difficult and extraordinary" must be given their usual and accepted meaning. *Campbell v. Emalie*, 188 N. Y. 509, 81 N. E. 458, *affirming*, 99 N. Y. Supp. 1136; *Standard Trust Co. v. New York, etc., R. Co.*, 178 N. Y. 407, 70 N. E. 925.

No additional allowance can be granted in a controversy submitted to the court upon an agreed case, or settled without a trial. *Campbell v. Emalie*, 188 N. Y. 509, 81 N. E. 458, *affirming*, 99 N. Y. Supp. 1136; *Hanover Fire Ins. Co. v. Germania Fire Ins. Co.*, 138 N. Y. 252, 33 N. E. 1065; *People v. Fitchburg R. Co.*, 133 N. Y. 239, 30 N. E. 1011; *Conaughty v. Saratoga Co.*, 92 N. Y. 401; *Wright v. Fleischmann*, 99 App. Div. 547, 91 N. Y. Supp. 116.

When there is no dispute about the material facts, the question whether a case is difficult and extraordinary is a question of law and open to review in the court of appeals on an appeal from the judgment, since the extra allowance is included in the judgment and a part of it. *Campbell v. Emalie*, 188 N. Y. 509, 81 N. E. 458, *affirming*, 99 N. Y. Supp. 1136.

8. *Jones v. Mason*, 5 Rand. (Va.) 577.

9. *Denehey v. City of Harrisburg*, 2

8. Effect of Bringing Separate Actions.—Where separate actions which could not have been joined are brought on separate and independent claims, though they be of the same nature and calling for like judgment, the plaintiff, upon judgment in his favor, is entitled to his separate costs in each action.¹⁰ If the result is different in several suits between the same parties, the court, in its discretion, may order the costs in one case to be set off, either in whole or part, against the costs in the other.¹¹

In Case of Improper Severance.—If a cause of action is improperly severed and two suits brought, only single costs will be allowed.¹²

Pears. (Pa.) 330; *Coleman v. Brook*, 39 Leg. Int. (Pa.) 158, 15 Phila. 302.

10. **Ind.**—*Ft. Wayne, M. & C. R. Co. v. Clark*, 59 Ind. 191; *Wade v. Muselman*, 15 Ind. 77. **Me.**—*Eames v. Black*, 72 Me. 263; *Bickwell v. Trickey*, 34 Me. 273. **Mass.**—*Richardson v. Curtis*, 2 Gray 497; *Dorrell v. Johnson*, 17 Pick. 263. **Pa.**—*Kemp v. Kemp*, 1 Woodw. Dec. 189; *Ballinger v. Killam*, 10 W. N. C. 372. **Tenn.**—*State v. McDonald*, 9 Humph. 606. **Vt.**—*Hall v. Adams*, 2 Aikens 130. **Va.**—*Ayres v. Lewellin*, 3 Leigh. 609.

Where only a partial recovery was had in an action of replevin because the goods were not in the defendant's possession, the plaintiff was allowed his costs, both in the replevin action and in a subsequent action for the value of the remainder of the goods. *Reid, Murdoch & Co. v. Parks*, 122 Mich. 363, 81 N. W. 252, 6 Det. Leg. N. 781.

A creditor having several demands against the same parties, maturing at different dates is not compelled to wait until the last falls due and join all in one suit under 2 Ind. Rev. St. 196; *Ft. Wayne, M. & C. R. Co. v. Clark*, 59 Ind. 191.

Separate Actions on Tort.—In the case of separate actions founded upon a tort, there can be but one demand and satisfaction, and where judgment against the defendant in one action has been paid and satisfied before judgment recovered in the other, the plaintiff is not entitled to a judgment for nominal damages and costs in the actions against the other tort feors. *Mitchell v. Libbey*, 33 Me. 74; *Savage v. Stevens*, 128 Mass. 254.

But it is otherwise where judgment is recovered in both actions before the payment and satisfaction of either. *Savage v. Stevens*, 128 Mass. 254.

11. *Lowe v. Duncan*, 3 Strob. (S. C.) 195.

12. *Ackroyd v. Newton*, 24 Misc. 424, 53 N. Y. Supp. 682; *Avery v. Popper* (Tex. Civ. App.), 45 S. W. 351, modified 48 S. W. 572, 92 Tex. 337, 49 S. W. 219, 50 S. W. 122, 71 Am. St. Rep. 849.

Under the Montana Act, Code Civ. Proc., §1894, it is for the court to determine what costs are to be awarded the parties in the original suits previous to the consolidation. *Handley v. Sprinkle*, 31 Mont. 57, 77 Pac. 296.

In Washington, the consolidation merely for convenience of trial of causes in which the defendant was entitled to a separate judgment does not bar the defendant from recovering his statutory costs in each case upon judgment being rendered in his favor. *Gray's Harbor Boom Co. v. McAmant*, 21 Wash. 465, 58 Pac. 573.

Actions on Negotiable Notes.—In some jurisdictions it is held that the right of a holder of a note to bring separate actions against the makers and indorsers thereof is exercised at his peril as to costs (*Nugent v. Delhomme*, 2 Mart. (O. S.) (La.) 307), and that after the payment of the debt, interests and costs by the defendant in one action, the action and right to costs against the others is gone, since there can be but one satisfaction. *La. Nugent v. Delhomme*, 2 Mart. (O. S.) 307. **Me.**—*Foster v. Buffin*, 20 Me. 124; *Main Bank v. Osborne*, 13 Me. 49. **Mass.**—*Gilmore v. Carr*, 2 Mass. 171.

In other states, costs are allowed in both suits where the maker and guarantor or maker and indorsers are sued separately. **Md.**—*Bank of Columbia v. Ross*, 4 Har. & McH. 456. **Mass.**—*Whipple v. Newton*, 17 Pick. 168; *Por-*

In other words, where two or more actions are brought separately when under the laws of the state they should have been joined, the plaintiff can, generally speaking, recover his costs in but one action.¹³

In equity, if several bills be brought upon matters which under the rules of equity pleading, might have been well joined in one bill, the costs of one bill only will be allowed.¹⁴

Separate Suits on Matters Available by Set-Off or Counterclaim.—Where parties to a cause needlessly institute an independent suit upon matters which might properly have been raised and adjudicated by means of a set-off or counterclaim in the cause then pending, costs will not be allowed.¹⁵ And if a party go into equity to enjoin a judgment or to assert a right which might have been used as a set-off at law, but which was not so used, the court, while it will not refuse to entertain jurisdiction on the ground of an adequate remedy at law, will discourage such suits by denying costs to the plaintiff.¹⁶

Election Between Law and Equity.—And so if a defendant in an action at law successfully invoke the powers of a court of equity with reference to the matter in controversy at law, he will not be entitled to costs in the law action after the first term and before the suit in equity was begun.¹⁷

C. CHARGING COSTS ON FUND OR ESTATE IN SUIT.—1. The Gen-

ter *v. Ingraham*, 10 Mass. 88; *Simonds v. Center*, 6 Mass. 18. **N. Y.**—*Austin v. Bemiss*, 8 Johns. 356.

13. Cal.—*Longmaid v. Coulter*, 123 Cal. 208, 55 Pac. 791. **Ky.**—*Combs v. Breathitt County*, 20 Ky. L. Rep. 529, 46 S. W. 505. **La.**—*Bolton v. Harrod*, 10 Mart. 115. **Mass.**—*Stafford v. Gold*, 9 Pick. 533. **Mo.**—*Maberry v. Missouri Pac. R. Co.*, 83 Mo. 664. **N. Y.**—*Wilde v. Jenkins*, 4 Paige 481; *Quin v. Bowe*, 11 Abb. N. C. 115; *Munro v. Tousey*, 13 N. Y. Supp. 81, 36 N. Y. St. 520. **Pa.**—*Towanda Bank v. Ballard*, 7 Watts & S. 434.

A plaintiff bringing separate suits against the city for neglect to repair a sewer and against the city officers for improperly repairing it, is not within the California Code of Civ. Proc., §1023, prohibiting recovery of costs in more than one action when separate actions are brought against defendants who might have been sued jointly. *Butler v. Ashworth*, 110 Cal. 614, 43 Pac. 386.

The Maine statute, Rev. St., ch. 82, §107, relating to costs where actions which might have been joined are brought separately, applies only to parties of record. *Perry v. Kennebunkport*, 55 Me. 453.

14. Wilde v. Jenkins, 4 Paige (N.

Y.) 481; *Woodworth v. Brooklyn El. R. Co.*, 22 App. Div. 501, 48 N. Y. Supp. 80.

15. U. S.—*The Carlotta*, 5 Fed. Cas. No. 2,413a. **Mich.**—*Mimnaugh v. Partlin*, 67 Mich. 391, 34 N. W. 717. **Va.**—*Young v. McClung*, 9 Gratt. 336.

The Arkansas statute (*Kirby's Dig.*, §6104), denying costs to the plaintiff in a suit upon a claim which might have been used as a set-off, has no application to claims for unliquidated damages. *Milner v. Camden Lumb. Co.*, 74 Ark. 224, 85 S. W. 234.

Under the Indiana act (Code, §60; 2 Gav. & H. Rev. St. 92), the defendant interposing an answer in bar of costs upon the ground that the claim sued upon could have been used as a counter-claim in a previous action between the parties, must show that it arose out of or was connected with said cause of action. *White v. Miller*, 47 Ind. 385.

16. N. Y.—*Gridley v. Garrison*, 4 Paige 647; *Freeland v. Mannahan*, Hopk. Ch. 276. **Tenn.**—*Blevins v. Armstrong*, 3 Hayw. 135; *Teil v. Roberts*, 3 Hayw. 139. **Va.**—*Young v. McClung*, 9 Gratt. 336.

17. Enright v. Amsden, 70 Vt. 183, 40 Atl. 37.

eral Rule.—The general rule in a court of law is that costs are to be paid by the losing party and not out of the estate or fund in controversy.¹⁸

The right to charge a fund with costs and expenses depends on whether the litigation in which the costs and expenses were incurred was in promotion of the interests of those eventually found to be entitled to the fund.¹⁹ But even a court of equity has no power to

18. *Baker v. Bancroft*, 79 Ga. 672, 5 S. E. 46; *Francis v. Holbrook*, 68 Ga. 829.

If the court by its order finds that the fund in controversy is claimed in another suit by a person not a party to the cause, and remits the parties to that case to settle their rights to the fund, the costs of the case at bar should not be ordered paid from that fund. *Buser v. Burkhardt*, 20 Ohio C. C. 366.

In proceedings to claim a reward brought into court, the unsuccessful defendant who offered the reward is not entitled to have his costs paid out of such fund in court. *Kinn v. First Nat. Bank*, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.

19. Cal.—*Von Schmidt v. Huntington*, 1 Cal. 55. Colo.—*Currier v. Johnson*, 19 Colo. App. 453, 75 Pac. 1079. N. J.—*Coddington v. Idell*, 29 N. J. Eq. 504, partnership fund. N. Y. *Rennick v. Weeden*, 120 N. Y. Supp. 532. Pa.—*Schwartz v. Keystone Oil Co.*, 164 Pa. 415, 30 Atl. 297; *In re Tarr's Estate*, 10 Pa. Super. 554.

According to the ordinary equity practice, the costs of a party unnecessarily joined as defendant in a suit in equity are to be paid out of the fund if there is a fund recovered in the suit. And where there is no fund, the complainant is frequently compelled to pay the costs himself. *Stafford v. Mott*, 3 Paige Ch. (N. Y.) 100.

In attachment (*Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; *Smith v. Carter*, 30 Wis. 424), and foreclosure proceedings (*Bronston v. LaCrosse*, 2 Wall. (U. S.) 283, 17 L. ed. 725), not taxed and received from the defendants in those proceedings, the costs may be taxed against the *res*.

The costs and expenses of litigation respecting a particular fund in the hands of an executor, between the specific legatee, the residuary legatee and

the heir at law, and also the commissions of the executor for receiving and disbursing the money, are properly payable out of the fund, and not out of the estate generally. *Johnson v. Holifield*, 82 Ala. 123, 2 So. 753, *approved* in Louisville, etc. R. Co. v. Perkins (Ala.), 56 So. 105.

Actions To Construe Deeds and Wills. It is the practice in New York to direct the taxable costs in actions brought by trustees for the construction of a deed or will to be paid out of the estate. *Downing v. Marshall*, 37 N. Y. 387.

But the rule is not applicable in Minnesota under the strict language of the statute. *Atwater v. Russell*, 49 Minn. 22, 51 N. W. 624.

In an action to obtain construction of a will brought by an infant *cestui que trust* and his guardian, the court may direct the costs to be paid out of the income of the trust fund, when the action is unsuccessful. *Wead v. Cantwell*, 36 Hun (N. Y.) 528.

In Wisconsin the rule in will contests is that the costs of both parties in the appellate court will be paid out of the estate, if the contestant acted in good faith and on probable cause. *Mueller v. Zilles*, 132 Wis. 165, 111 N. W. 1128; *O'Shea v. O'Shea*, 103 Wis. 632, 84 N. W. 835; *In re Donges' Estate*, 103 Wis. 497, 79 N. W. 786; *Will of J. B. Smith*, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665; *In re Carroll's Will*, 50 Wis. 437, 7 N. W. 434; *Will of J. Meurer*, 44 Wis. 392; *Jackman's Will Case*, 26 Wis. 364.

The usual practice is for the estate to pay the costs of proving the will; not only the costs of the party seeking to establish the will but also those of the party contesting the same. *Jackman's Will Case*, 26 Wis. 364.

By statute in Massachusetts the court in probate cases (Pub. St. ch. 156, §35) and in all matters of insolvency may award costs to be paid out of

decree that the costs of an unsuccessful defendant be paid out of property which is in dispute, especially when that property is not a fund in court which is to be disposed of by the judgment.²⁰ The general fund cannot be taxed with costs of a proceeding instituted only in the interests of a few of the parties entitled to it;²¹ nor can an allowance be made out of a fund in favor of a litigant who was not a representative of the fund and whose interest therein is purely contingent.²²

2. Trust Fund or Estate.—The general rule is that if trustees bring suits against strangers, or strangers bring suits against the trustees, respecting the trust funds, cost will be awarded against the losing party as in other suits.²³ But the court has no authority, independent of a statute on the subject, to direct the payment of costs or counsel fees of the trustee out of the trust fund, except such taxable costs as the trustees would otherwise be compelled to pay personally.²⁴

Without plain legislative authority a trust fund should not in any case be depleted to pay the expenses of litigation in respect thereto of a person who has no interest therein.²⁵ And the costs of a defeated party in litigation respecting the fund will be charged on the fund only to the extent of his interest in the fund.²⁶ Third persons against

the estate in controversy, if justice and equity require it (Pub. St. ch. 157, §140).

20. *Mo.*—*Drake v. Crane*, 66 Mo. App. 495, liability of reserve fund. *N. H.*—*Town of Gilford v. Munsey*, 68 N. H. 609, 44 Atl. 536. *N. Y.*—*Mills v. Mills*, 50 App. Div. 221, 63 N. Y. Supp. 771, citing *Couch v. Millard*, 41 Hun 212.

But if the fund is in court and admits of that disposition, such expenses may be allowed out of the share of the parties litigant, and the fact that the litigant is a minor does not change the rule. *Mo.*—*Drake v. Crane*, 66 Mo. App. 495. *N. Y.*—*Union Ins. Co. v. Van Rensselaer*, 4 Paige 85. *Tenn.*—*Kerbaugh v. Vance*, 5 Lea 113. *Tex.*—*Holloway v. McIlhenny Co.*, 77 Tex. 657, 14 S. W. 240.

21. *Ex parte Gray*, 157 Ala. 358, 47 So. 286.

22. *Drake v. Crane*, 66 Mo. App. 495; *In re Holden*, 126 N. Y. 589, 27 N. E. 1063; *Gott v. Cook*, 7 Paige (N. Y.) 521; *Union Ins. Co. v. Van Rensselaer*, 4 Paige (N. Y.) 85.

23. *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. 507.

24. *Colo.*—*Currier v. Johnson*, 19 Colo. App. 453, 75 Pac. 1079. *N. Y.*—*Smith v. Lansing*, 24 Misc. 566, 53 N. Y. Supp. 633 (allowance to special

guardian). *Wis.*—*In re Cole's Estate*, 102 Wis. 1, 78 N. W. 402, 72 Am. St. Rep. 854.

The trust estate and not the trustee should bear the burden of litigation respecting it, if the trustee is not in fault. *Smith v. Boyd*, 61 N. J. Eq. 175, 47 Atl. 816; *Young v. Hughes*, 39 Ore. 586, 65 Pac. 987, 66 Pac. 272.

Suits for Instruction of the Court. "There can be no doubt as to the general rule in the courts of this state that costs will be awarded a complainant out of the estate on the dismissal of the bill when, as executor, he comes into a court of equity to settle the construction of the will, or for direction as to his duty in regard to the mode of carrying its provisions into effect. *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Van Houten v. Pennington*, 8 N. J. Eq. 745; *Cox v. Wills*, 49 N. J. Eq. 573, 25 Atl. 938. The same rule prevails in the English Court of Chancery. *Rashley v. Masters*, 1 Vos. 200; *Joleff v. East*, 3 Br. Ch. Rep. 25. See, also, *Dan. Ch. Pr.* 1426; 1 Redf. on Wills, 433." *Larkin v. Wikoff* (N. J.), 81 Atl. 365.

25. *In re McNaughton's Will*, 138 Wis. 179, 118 N. W. 997, 120 N. W. 288.

26. *In re McNaughton's Will*, 138

whom actions are brought for wrongs to the trust estate cannot charge their costs against the estate.²⁷

Suits Between Trustees and Cestui Que Trust.—In the case of suits between the *cestui que trust* and the trustees in relation to the trust fund, the general rule that guides rather than governs courts of equity is that trustees shall have their costs either out of the trust fund or from the *cestui que trust* personally, who may be found to be in fault; and this rule applies whether the trustees be plaintiffs or defendants.²⁸

Proceedings To Administer Trust Fund.—It is a well recognized rule of equity that when a trust fund is brought into court for administration and distribution, it must bear the expense incurred by those who instituted the proceedings for the benefit of the fund,²⁹ or those benefited by the suit may be compelled to contribute their share.³⁰

Wis. 179, 118 N. W. 997, 120 N. W. 288.

27. The costs of an action by an administrator against one who has appropriated his ward's funds and refused to pay them on demand, should be charged against the defendant personally and not against the fund recovered, except a fee of the solicitor for recovering the fund. *Harrison v. Pe-rea*, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. ed. 478.

Where an action for damages is brought by trustees on behalf of the trust estate and the *cestui que trust* are improperly made parties, their costs are to be paid out of the amount recovered and is not taxable against the defendant. *Roberts v. New York El. R. Co.*, 155 N. Y. 31, 49 N. E. 262.

28. 2 *Perry Trusts*, §893; *Gomez v. Gomez*, 33 App. Div. 379, 54 N. Y. Supp. 237; *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. 507.

But a trustee defendant, resisting the plaintiff's claim, and failing in his defense, will not be permitted to charge against the fund money expended in attorney's fees, unless it appears that such defense was reasonable and proper. *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. 507.

29. U. S.—*Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. ed. 696; *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. ed. 940; *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157 (holding such party not entitled to his private expenses, such as traveling and hotel bills). Ill.—*Abend v. Endowment Fund*, 174 Ill. 96, 50 N. E. 1052. Mass.—*Bryant v. Russell*, 23 Pick. 508. Tenn.—*Whitsett v. Build-*

ing, etc. Assn., 3 Tenn. Ch. 526. Eng. *Batten v. Dartmouth Harbor Comrs.*, 45 Ch. Div. 612.

“Where many persons have a common interest in a trust property or fund, and one of them for the benefit of all, and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed for his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts.” *Hobbs v. McLean*, 117 U. S. 567, 582, 6 Sup. Ct. 870, 29 L. ed. 940; *Davis v. Bay State League*, 158 Mass. 434, 33 N. E. 591.

Items Taxable.—The expense necessarily includes the fees of counsel, representing all persons having an interest in the fund brought into court by it, and who avail themselves of it, and of counsel employed by authority of the court to perform services beneficial to the fund. *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Petersburg Sav. & Ins. Co. v. Delatorre*, 70 Fed. 643, 17 C. C. A. 310; *Jacksonville, etc. R. Co. v. American Const. Co.*, 57 Fed. 66, 6 C. C. A. 249; *Bound v. South Carolina R. Co.*, 59 Fed. 509; *Fecheimer v. Baum*, 43 Fed. 719; *Hand v. Savannah, etc. R. Co.*, 21 S. C. 162.

30. *Central R. Co. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. ed. 915.

This rule has been applied not only in cases of express trusts under wills or other written instruments, but in a proceeding for the common benefit of many persons interested in the preser-

But this rule does not apply in favor of one who sets up an independent right to participate in the fund in litigation, and whose claim involves an antagonistic interest to the complainant in the suit, and those of same class or of like interest.³¹

3. In Particular Actions or Proceedings. — Receivership Proceedings. — The costs and expenses of the receivership are chargeable against the fund in the receiver's hands,³² if it is properly adjudged liable.³³

Interpleader. — The plaintiffs in a bill of interpleader are generally entitled to their costs out of the fund.³⁴

Actions Against Public Officers. — In an action against a public officer in his official capacity respecting a fund in his hands as such, he is not personally liable for the costs, but the judgment for costs must be collected out of the fund.³⁵

Actions Against Personal Representatives. — It is usual in suits against executors and administrators, for the settlement of estates and payment of legacies, to direct the costs to be paid out of the fund.³⁶

vation of the property. *Bowditch v. Soltyk*, 99 Mass. 136; *Frost v. Belmont*, 6 Allen (Mass.) 152; *Kinmouth v. Brigham*, 5 Allen (Mass.) 270; *Amory v. Lowell*, 1 Allen (Mass.) 504.

31. U. S.—*Farmers' Loan & Trust Co. v. Green*, 79 Fed. 222, 24 C. C. A. 506 (denying such party a right to counsel fees and expenses); *Petersburg Sav. & Ins. Co. v. Dellatorre*, 70 Fed. 643, 17 C. C. A. 310. **Ala.**—*Strong v. Taylor*, 82 Ala. 213, 2 So. 760; *Grumbell v. Cruse*, 70 Ala. 534. **Mich.** *Sokup v. Letellier*, 123 Mich. 640, 82 N. W. 523. **N. Y.**—*Ryckman v. Parkins*, 5 Paige 543.

One suing unsuccessfully to get possession of trust property from those entitled to it, has no right to demand reimbursement for his expenses out of the trust fund, or contribution from those whose property he is suing to get possession of. *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. ed. 940.

In an action brought by the attorney general against an insolvent life insurance company, resulting in a judgment of dissolution, and putting it into the hands of a receiver, intervening policy holders are not entitled to costs out of the fund. *Attorney General v. North American Life Ins. Co.*, 91 N. Y. 57.

32. U. S.—*Kell v. Trenchard*, 146 Fed. 245. **Ga.**—*Hanson v. Stephens*, 116 Ga. 722, 42 S. E. 1028. **Mass.**

Davis v. Bay State League, 158 Mass. 434, 33 N. E. 591.

But so much of the fund in the receiver's hands as is necessary to pay off the amount due on a prior mortgage is not subject to be diminished by the costs of receivership. *Bradford v. Cooledge*, 103 Ga. 753, 30 S. E. 579.

33. The clerk has no right to his costs out of the fund in a receiver's hands, until the fund has been adjudged liable on the termination of the suit. *Ballin v. Ferst*, 55 Ga. 546.

34. *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268, 5 L. ed. 614.

A fund which is the stake in controversy should bar the expenses of a suit to determine its ownership. *The Eastern Cherokees v. United States*, 45 Ct. Cl. 104.

35. *Hauenstein v. Lynham*, 131 U. S. cxc, 26 L. ed. 125; *Smith v. Carter*, 30 Wis. 424.

36. *Chicago, etc. R. Co. v. Harshman*, 21 Ind. App. 23, 51 N. E. 343. **N. C.**—*Benick v. Bowman*, 56 N. C. 314. **S. C.**—*Brickle v. Leach*, 55 S. C. 510, 33 S. E. 720.

The statutes providing that in actions by or against trustees costs are chargeable against the estate, does not apply to actions brought by the trustee wrongfully and without authority. *First Gen. Baptist Soc. v. Loomis*, 3 N. Y. Supp. 572.

4. Funds and Deposits in Courts.—The costs of bringing funds into court and of distributing them, must be borne by the fund.³⁷

Contest Over Deposits in Court.—In a contest over a fund deposited in court, the usual practice is not to allow the successful party his costs out of the fund, but such costs are chargeable against the party contesting his right to be paid out of such funds.³⁸

D. WAIVER OR LOSS OF RIGHT.—The right to claim costs may be released or waived just as other known rights, and this waiver may be express or implied.³⁹ For example, a party may be estopped by his conduct from claiming costs.⁴⁰

37. *Cammann v. Traphagan*, 1 N. J. Eq. 230; *Timmonds v. Wheeler*, 12 Ohio C. C. 19 (fee of special master).

Courts of equity, when funds realized from litigation are brought into court, will dispose of the funds as to costs in such manner as they deem equitable. *Timmonds v. Wheeler*, 12 Ohio C. C. 19, citing as sustaining this proposition, *Rooney v. Second Ave. R. Co.*, 18 N. Y. 368; *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435; *Bloomington v. Stein*, 42 Ohio St. 168; *Diehl v. Friester*, 37 Ohio St. 473; *Armstrong v. McAlpin*, 18 Ohio St. 184.

In Georgia a fund brought into court by execution is liable for all the expenses of bringing it in and the costs of distributing it, including reasonable counsel fees (*Colclough v. Mathis*, 79 Ga. 394, 4 S. E. 762; *Bullard v. Leaptrot*, 57 Ga. 522), but not with the costs incurred in obtaining the execution (*Buena Vista Bank v. Grier*, 114 Ga. 398, 40 S. E. 284).

The costs and expenses of bringing a receivership fund into the state court should be charged against the fund before requiring the delivery of the same to a trustee in bankruptcy. *Wilson v. Parr*, 115 Ga. 629, 42 S. E. 5.

38. *National Bank v. Whiting*, 103 U. S. 99, 26 L. ed. 443; *Kinn v. First Nat. Bank*, 118 Wis. 537, 95 N. W. 969.

But a circuit court may consider an application for an allowance of costs to counsel out of funds in court where the supreme court's mandate adjudges a party entitled to costs. *Mason v. Pewabic Min. Co.*, 153 U. S. 361, 14 Sup. Ct. 847, 38 L. ed. 745.

39. *N. J.*—*Crane v. Gurnee*, 75 N. J. Eq. 104, 71 Atl. 338. *N. Y.*—*Hinekley v. Boardman*, 3 Caines 134. *Vt.*—*Bal-*

knap v. Godfrey, 22 Vt. 288. See *infra* Taxation of Costs — 7

Release of Co-Defendants.—A release from liability for costs given by the plaintiff to one of several co-defendants does not affect the liability of the others. *Edmunds v. Smith*, 52 N. J. Eq. 212, 27 Atl. 827.

Effect of Death.—The rule at law and equity is that if a party dies before costs are decreed they are lost. But where the plaintiff dies after a decree for costs and before taxation, they may be recovered by his representatives, by a decree for revivor. *Travis v. Waters*, 1 Johns. Ch. (N. Y.) 85, following *Lloyd v. Powis*, 1 Dick. 16; *Hall v. Smith*, 1 Bro. Ch. 438; *Morgan v. Scudamore*, 3 Ves. Jr. 195, 30 Eng. Reprint 965; *Blower v. Morrets*, 3 Atk. 772, 26 Eng. Reprint 1242.

40. *Me.*—*Haskell v. Brewer*, 11 Me. 258. *Md.*—*Willson v. Williams*, 108 Md. 522, 70 Atl. 409. *Mass.*—*Davis v. Ferguson*, 148 Mass. 603, 20 N. E. 311, waiver of costs by taking out execution for damages only. *N. Y.* *Whitney v. Townsend*, 67 N. Y. 40.

Delay in Making Motion To Tax. In the absence of any statute or rule of court on the subject, the right of a party to have expenses he has incurred taxed as costs will be deemed to have been waived if not asserted until after a judgment has been rendered and satisfied, when no excuse is shown for the delay. *Missouri*, etc. *R. Co. v. Jenkins*, 79 Kan. 698, 101 Pac. 630.

A failure to claim such costs, or any item thereof, in the manner required by the statute, is deemed to be a waiver of such costs, and precludes a recovery thereof. *Galindo v. Roach*, 130 Cal. 389, 62 Pac. 597; *Hotchkiss*

E. TITLE AND OWNERSHIP OF COSTS.—1. Legal and Equitable Title.—The general rule is that the party in whose name costs are recovered is merely the legal and not the equitable owner thereof; the parties to whom they are payable are the real owners and may recover them, nor can this right be prejudiced by the party in whose favor the judgment was rendered.⁴¹

But in some jurisdictions it is held that costs belong to the party in whose favor the judgment has been rendered; he is supposed to have advanced or is liable for the costs, and those entitled to fees, etc., must look to him for payment.⁴² Under this rule parties entitled

v. Smith, 108 Cal. 285, 41 Pac. 304; *Chapin v. Broder*, 16 Cal. 403.

Failure To File Memorandum.—"The omission from section 1033 of the Code of Civil Procedure of the clause in section 510 of the practice act, which provided that a failure by the prevailing party to file his memorandum of costs within the time limited should be deemed a waiver of his costs, is not a material circumstance. The Code contemplates that such shall be the result, since the only costs which the clerk is authorized to insert are those claimed, and 'taxed or ascertained,' in the manner provided." *Riddell v. Harrell*, 71 Cal. 254, 261, 12 Pac. 67, 71, §1035, Code Civ. Proc. And see *Galindo v. Roach*, 130 Cal. 389, 62 Pac. 597, 598.

41. **U. S.**—*Hoysradt v. Delaware*, etc. R. Co., 182 Fed. 880. **Mo.**—*State v. Ashbrook*, 40 Mo. App. 64; *Garrett v. Cramer*, 14 Mo. App. 401. **Pa.** *Ellsbro v. Ellsbro*, 28 Pa. 172; *Musser v. Good*, 11 Serg. & E. 247; *Ramsey v. Alexander*, 5 Serg. & R. 344; *Moyer v. Ojoe*, 23 Pittsb. Leg. J. 17; *Beale v. Com.*, 7 Watts 183. **Tenn.**—*Smith v. Van Bebber*, 1 Swan 110.

The costs of a suit belong exclusively to the witnesses and officers of the court and not to the prevailing party. His name may be used for the purpose of collection, but he has no right to demand or receive the costs. *Carey v. Campbell*, 3 Sneed 62. And see *Scharlock v. Oland*, 1 Rich. L. (S. C.) 207.

Attorney's fees taxed as provided in a written contract are a part of the costs incidental to the action, and not a part of the amount in controversy, and belong to the officers and persons in whose favor they are taxed. *Van Buren County Sav. Bank v. Rockwell* (Iowa), 134 N. W. 424.

A judgment in favor of the officers

of the court for costs can not be offset by a claim against the successful party, and it does not matter that he is insolvent. *Ruddell v. Sparks*, 79 Tex. 308, 15 S. W. 239.

Under the federal practice, the fees of clerks, marshals, commissioners and proctors are their individual property (*The Baltimore*, 8 Wall. (U. S.) 392, 19 L. ed. 463; *United States v. Cigars*, 2 Fed. 494), regardless of what the practice is in the state courts in which the federal court sits (*Aiken v. Smith*, 57 Fed. 423), 6 C. C. A. 414).

42. **Ala.**—*Rosser v. Timberlake*, 78 Ala. 162, taxation of attorney's fees in an injunction suit. **Ind.**—*Hays v. Boyer*, 59 Ind. 341. **La.**—*Kerchan v. Delahoussaye*, 9 Rob. 77; *Williams v. Gallien*, 1 Rob. 94. **N. Y.**—*Sherwood v. Travelers' Ins. Co.*, 12 Daly 137. **S. C.**—*Sims v. Anderson*, 1 Hill L. 394.

A judgment in favor of a party for costs is as much his own property as a judgment for a debt sued for. *Goodwin v. Smith*, 68 Ind. 301 (citing *Hays v. Boyer*, 59 Ind. 341); *Miller v. State*, 61 Ind. 503. He is entitled to control the judgment and receive the money so recovered, and the officers of the court must look to him. *Armstrong v. Scotten*, 29 Ind. 495. And see *De La Garza v. Carolan*, 31 Tex. 387.

Executors.—Costs entered in favor of an executor in an action against him as such, belong to him individually. *Rupp v. Swartz*, 3 Lack. Jur. (Pa.) 125.

Rule as to Witnesses' Fees.—"It is well established that the costs taxed in favor of a successful party for the fees and mileage of witnesses are his own, and do not belong to the witnesses on whose account they were recovered. The reason is that the party is directly responsible to his witnesses for the fees due them, as they ac-

to costs may enforce their right as soon as the services are rendered, though usually their payment is not compelled until after final judgment.⁴³

2. As Between State and Its Officers.—The recovery of costs in an action instituted by a public official in his capacity as such, does not belong to him but to the state.⁴⁴

3. As Between Attorney and Client.—While an attorney has a lien on the costs for his services, the party himself owns the judgment for costs.⁴⁵

4. Accrual of Right.—In an action at law neither party has a legal right to costs against the other until a final judgment, or other final determination of the cause, because they are merely incident to the judgment.⁴⁶ Therefore in actions tried before a referee, the right

crue." *Hartley v. Hoppee*, 3 Pa. Dist. 770 (citing *Harvard Bldg. Assn. v. Philadelphia, etc. R. Co.*, 102 Pa. 220); *Howell v. Withers*, 1 Pa. Dist. 62.

The real party in interest who undertakes and carries on the defense is entitled to the costs, and not the nominal defendant. *Wheeler v. McFarland*, 2 Denio (N. Y.) 183; *McFarland v. Crary*, 8 Cow. (N. Y.) 253; *s. c.*, 6 Wend. 297.

43. *Armstrong v. Scotten*, 29 Ind. 495.

In an injunction proceeding, an attorney's fee, when taxed as costs, accrues, not on the dissolution of a preliminary injunction, but on the final determination of the cause. *Rosser v. Timberlake*, 78 Ala. 162.

44. *McGahey v. Virginia*, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. ed. 304.

A statute which merely exempts an officer from liability for costs cannot be construed to give him title or possession of the costs recovered in an action instituted by him. *Adams v. Evans*, 74 Miss. 886, 21 So. 921.

It is not essential to the exaction of fees "that they should inure to the personal benefit of the officer. The officers are but the agents of the state for transacting the public business, and it is in its nature wholly immaterial to those requiring their services whether the sum to be paid therefor goes to the officer or into the public treasury, provided no more is exacted than is just and reasonable for the facilities afforded and the services performed." *State v. Judges*, 21 Ohio St. 1.

45. *Me.*—*Clay v. Moulton*, 70 Me.

315. *Minn.*—*Davis v. Swedish American Bank*, 78 Minn. 408, 81 N. W. 210, 80 N. W. 953. *N. Y.*—*Phillips v. Stagg*, 2 Edw. Ch. 108; *Obermeyer v. Adisky*, 123 App. Div. 272, 107 N. Y. Supp. 949; *Taylor v. Long Island R. Co.*, 25 Misc. 11, 53 N. Y. Supp. 830; *disapproving Delaney v. Miller*, 84 Hun 244, 32 N. Y. Supp. 505; *in re Bailey*, 31 Hun 608.

Costs given upon overruling a motion properly belong to the prevailing party and not to his attorney. *Porter v. Vandercook*, 11 Wis. 70.

Double costs awarded to an officer under the New York statute in a suit against him for acts done in the discharge of the duties of his office, belong to the party and not to the attorney who conducted the defense. *McFarland v. Crary*, 6 Wend. (N. Y.) 297.

46. *Mass.*—*Ross v. Harper*, 99 Mass. 175. *Mo.*—*Conroy v. Frost*, 38 Mo. App. 351. *Pa.*—*Grim v. Weissenberg School Dist.*, 57 Pa. 433, 98 Am. Dec. 237; *Grace v. Altemus*, 15 Serg. & R. 133 (holding that a party has no vested right to costs at the commencement of an action). *Utah.*—*Hepworth v. Gardner*, 4 Utah 439, 11 Pac. 566.

Pecuniary interest in costs, the amount of which is fixed by law, is not synonymous with pecuniary interest in a case. *Wellmaker v. Terrell*, 3 Ga. App. 791, 60 S. E. 464.

"Items of cost, as they arose in an action, are in no legal sense the subject of litigation, and arise only incidentally in the progress of the cause." *Hockaday v. Lawrence* (N. C.), 72 S. E. 387.

to costs does not accrue on the signing and delivery of the referee's report to the successful party, because the report does not become a decision or judgment by the court until filed with the clerk and thus made a record of the court.⁴⁷ And if a settlement before judgment is without any provision for the payment of costs, the plaintiff loses them.⁴⁸ But as soon as taxed and incorporated in the final judgment they are due and payable.⁴⁹ And the mere fact that supervenient occurrences show that it was unnecessary to incur such expense does not deprive the prevailing party of his right thereto, if he acted in good faith.⁵⁰

Costs do not become a debt against a party to an action until judgment, unless he agrees to pay them. Warfield v. Watkins, 30 Barb. (N. Y.) 395.

But when a final judgment or decree is pronounced, costs become a debt due from the party against whom they are awarded to the party in whose favor they are awarded. Willson v. Williams, 108 Md. 522, 70 Atl. 409.

Judgment on Demurrer.—If some of the grounds for a demurrer remain undetermined, and therefore no final judgment can be entered, an entry of judgment for costs by the defendant is irregular. Robinson v. Hall, 35 Hun (N. Y.) 214.

Change of Rule By Statute.—So the legislature may, after contract made, and even pending suit on it, constitutionally pass laws which change the costs recoverable, or deprive the party of costs. Rader v. The Southeastern Road Dist., 36 N. J. L. 273.

In an action for costs it is not sufficient to aver that plaintiff "incurred costs" to the amount claimed. Louis v. Seaton, 7 Ky. L. Rep. 592.

Rule in North Carolina.—"The costs in the superior court, as a rule, abide the final result in that court, but there are exceptions, as, for instance, when a continuance is granted upon terms of the payment of the costs of a term or of the costs up to date. These are not recovered back in the final judgment, although the party obtaining the continuance may be finally successful in the action, else the terms imposed on him for some default would be illusory. Nor are the costs of an appeal, in which a new trial is ordered, to be recovered back, because the successful appellant loses in the final judgment." Dobson & Whitley

v. Southern R. Co., 133 N. C. 624, 45 S. E. 958.

47. Torrey v. Hadley, 14 How. Pr. (N. Y.) 357.

48. Warfield v. Watkins, 30 Barb. (N. Y.) 395.

49. La.—Lobdell v. Bushnell, 27 La. Ann. 394. Me.—Merrick v. Farwell, 33 Me. 253. N. Y.—Cathcart v. Cannon, 1 Johns. Cas. 220; Macauley v. Sternburgh, 3 Cow. 368; Bradstreet v. Phelps, 2 Cow. 453; Warfield v. Watkins, 30 Barb. 395. Ohio.—Naper v. Bowers, Wright 692. Pa.—Lyon v. McManus, 4 Bin. 167; Dehart v. Kerlin, 4 Pa. Co. Ct. 396. Tex.—International & G. N. R. Co. v. Turner (Tex. Civ. App.), 31 S. W. 518.

Under the federal statutes witness fees may not be withheld until final adjudication of the cause, though this be the practice in the state court. O'Neil v. Kansas City, etc. R. Co., 31 Fed. 663.

The clerk of a federal court is entitled to demand his fees in advance, because he must account for them to the government, whether collected or not, once they are earned. Bean v. Patterson, 110 U. S. 401, 4 Sup. Ct. 23, 28 L. ed. 190; Steever v. Rivkman, 109 U. S. 74, 3 Sup. Ct. 67, 27 L. ed. 861; Hoysradt v. Delaware, etc. R. Co., 182 Fed. 880; Cavender v. Cavender, 10 Fed. 828.

Abiding the Event.—All the costs of trial at circuit, of course, "abide the event," and the party who ultimately prevails will tax costs of all the trials, including disbursements for witness fees, etc., with his final bill of costs. But the "costs of appeal" are a different matter. Berthold v. Burton, 169 Fed. 495.

50. "If costs are incurred in good faith, they are none the less a proper

Courts of equity, however, having a large discretion in matters of costs, frequently give costs in intermediate stages of a cause, without waiting for the final decree.⁵¹

F. AWARD OR ALLOWANCE OF COSTS.—1. Discretion of Court. The rule is well settled that in the absence of statutory provisions or rules of practice to the contrary the award or taxation of costs rests in the sound discretion of the trial court.⁵² Therefore, the court may,

charge because the judge is afterwards found to be disqualified. The party who recovers is not to lose costs that he necessarily incurred because they were incurred under a void order." *Meyer v. City of San Diego*, 132 Cal. 35, 64 Pac. 124.

"Costs are often incurred in the trial of cases where the jury disagrees, or in which a new trial is granted, or the verdict set aside as being void for some reason; in all of which cases the prevailing party recovers his costs finally. Witnesses are often procured at heavy expense, and their testimony, for some reason, is not needed, or becomes immaterial, yet the party who is put to the expense, and incurs it in good faith, may recover it as part of his costs." *Meyer v. City of San Diego*, 132 Cal. 35, 64 Pac. 124.

51. *Avery v. Wilson*, 20 Fed. 856, citing *Adams Eq.* 389, 2 Danl. Ch. Pr. 1457.

Although a different rule prevails in equity, in cases at law such costs and expenses of litigation as may be incurred abide the result of the suit, and are chargeable against the party cast therein. In such cases the property of the defendant cannot in any event be appropriated to the payment of such costs or expenses until final judgment against him. *Ward v. Barnes*, 95 Ga. 103, 22 S. E. 133.

52. **U. S.**—*Tyler Min. Co. v. Sweeney*, 79 Fed. 277, 24 C. C. 578. **Ala.** *Connor v. Armstrong*, 91 Ala. 265, 9 So. 816. **Ark.**—*Meadows v. Rogers*, 17 Ark. 361. **Fla.**—*White v. Walker*, 5 Fla. 478. **Ind.**—*Ind. Rev. St.*, 1881, §§2603, 2604. **Neb.**—*Woodward v. Baird*, 43 Neb. 310, 61 N. W. 612. **N. Y.** *Dennison v. Dennison*, 9 How. Pr. 246; *People v. Harris*, 6 Abb. Pr. 30; *People v. Densmore*, 1 Barb. 557; *Brodie v. O'Donnell*, 71 Misc. 530, 130 N. Y. Supp. 805. **Tex.**—*Gulf, etc. R. Co. v. Henderson*, 83 Tex. 70, 18 S. W. 432; *Moore v. Woodson*, 44 Tex. Civ. App.

503, 99 S. W. 116; *Smith v. Owen*, 43 Tex. Civ. App. 411, 97 S. W. 521; *Texas, etc. R. Co. v. Davis* (Tex. Civ. App.), 66 S. W. 598, affirmed in 95 Tex. 688, no op.). **Wis.**—*Briere v. Taylor*, 126 Wis. 347, 105 N. W. 817.

But in California whether the matter of awarding costs in a given case rests in the discretion of the court, "must depend upon whether the legislature has omitted such discretion to the court." *Duley v. Peacock* (Cal. App.), 119 Pac. 1086.

The discretion conferred on the courts by Neb. Code Civ. Proc., §623 (Ann. Code, 1901), in taxing costs, is not arbitrary, but a legal one, to be exercised within the limits of legal and equitable principles. *In re Clapham's Estate*, 73 Neb. 492, 103 N. W. 61, following and approving *Wallace v. Sheldon*, 56 Neb. 55, 76 N. W. 418.

Where it is clear from the evidence that a suit was made necessary by knowingly wrongful acts of one of the parties, costs should be taxed against him in favor of the parties directly injured thereby; but where it appears that parties to the proceeding are benefited by the general result arising from an adjustment of all conflicting claims on the stream, the court may, in the exercise of its discretionary powers under the code in such matters, adjudge that each pay his own cost. *Hough v. Porter*, 51 Ore. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

In Missouri costs are left to the discretion of the courts to be equitably adjusted or proportioned in actions at law. *Hecht v. Morris*, 81 Mo. App. 370.

In special proceedings in New York costs may be allowed in the discretion of the court, but if allowed, they must be at the rates fixed by the statute in an action. *Paley v. Smith*, 132 N. Y. Supp. 152, citing *In re Protestant Episcopal Public School*, 86 N. Y.

in the exercise of this discretion, limit the costs of the prevailing party, or refuse to allow him any costs, in a case in which the statute has made no express provision.⁵³

And the discretion of a law court in taxing costs will not be reviewed on appeal, unless it plainly appears from the record that this discretion has been abused.⁵⁴

396; *Scribner v. Water Comrs.*, 58 App. Div. 554, 69 N. Y. Supp. 93.

Certiorari and Mandamus.—"While in some cases the courts have awarded costs in certiorari and mandamus proceedings to the prevailing party, the same as in all other cases, we think the better rule, in the absence of a special statute, is to award or withhold costs as best comports with a sound judicial discretion. *Merrill on Mandamus*, §310; *High on Extra, Rem.* (3d Ed.) §518." *State v. Ritchie*, 32 Utah 381, 91 Pac. 24, 29.

"In actions at law, costs upon the sustaining of a demurrer are not discretionary, but must be allowed in the amount specified by statute, \$15 after notice of trial and \$20 trial fee." *Paley v. Smith*, 132 N. Y. Supp. 152, citing 2 *Rumsey's Prac.* 273; *De Turekheim v. Thomas*, 113 App. Div. 123, 99 N. Y. Supp. 104, and cases therein cited.

Costs of Motion.—West Virginia code 1899, §4, c. 138 (Code 1906, §4127), empowering the court to give or withhold, in its discretion, costs on any motion, other than a motion for a judgment for money, authorizes judgment for costs incident to the motion, but has no reference to costs of the suit. *Bice v. Boothsville Tel. Co.*, 62 W. Va. 521, 59 S. E. 501.

Probate Cases in Maine.—The whole subject of costs and the allowance of counsel fees in all contested cases in the original or appellate court of probate rests in the discretion of the court, but that discretion must be exercised in the proceedings in which the costs were incurred and the services of counsel rendered. *Peabody v. Matlocks*, 88 Me. 164, 33 Atl. 900.

In an action for infringement of a trade-mark, costs are in the discretion of the trial court. *Low v. Hart*, 90 N. Y. 457.

Effect of Stipulations of Counsel. Where costs are discretionary, no stipulation of counsel can control the exercise of this discretion. *Cowen v.*

King, 54 App. Div. 331, 66 N. Y. Supp. 621; *Brodie v. O'Donnell*, 71 Misc. 530, 130 N. Y. Supp. 805.

53. *Bartlett v. Hodgdon*, 44 N. H. 472.

Granting Additional Allowance.—In a recent decision by the court of appeals of New York the whole question as to the amount or total allowance of additional costs was reviewed at length. It was held that they were to be granted or withheld in the discretion of the court, not being a matter of right, and that the proper exercise of that judicial discretion necessarily includes the power to correct mistakes or abuses in the granting or withholding of extra allowances, especially where the amount limited by statute has been either inadvertently or consciously exceeded. The court reviewed the prior decision for many years past and restated the rules compactly as follows: "(1) In no event can the total allowance in actions for partition exceed 5 per centum upon the value of the subject-matter involved. (2) For the purpose of fixing the allowance which may be made to the plaintiff, the value of the subject-matter involved is the value of the whole property, and for the purpose of fixing the allowance to any defendant the value of that particular defendant's interest is the value of the subject-matter involved. (3) The limitation that in no event shall the allowances to a plaintiff or to a party or two or more parties on the same side exceed \$2,000 means that the allowance to a plaintiff cannot exceed \$2,000, and the allowances to all the defendants, considered as a class or 'side,' shall not exceed another \$2,000." *Warren v. Rupert*, 203 N. Y. 250, 96 N. E. 417, 420.

54. *Schawacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935; *Walton v. Walton*, 19 Mo. 667; *Jones v. Ford*, 60 Tex. 129; *Cox v. Patten* (Tex. Civ. App.), 66 S. W. 64.

Rule in Equity. — And in equity cases the rule is well settled that the award of costs rests in the sound discretion of the trial court,"

Limitations on Discretion.—"Costs are purely matters of statutory regulation and may not be adjudged against a party upon merely equitable or moral grounds. *Coates v. Hill*, 120 Ill. App. 1. For the like reason it may be said that where the statute designates and directs a specific item to be taxed as costs and recovered by the successful party to a litigation, courts are not authorized to relieve the unsuccessful party of the payment of such costs upon merely equitable or moral grounds." *Crowe v. Taylor*, 134 Ill. App. 355, 358.

Additional Allowance of Costs.—It is within the discretion of the trial court to grant the additional allowance of costs under the New York Code, and the exercise of such discretion is reviewable only for abuse. *Town of North Hempstead v. Oelsner*, 133 N. Y. Supp. 320; *Rowe v. Granger*, 118 App. Div. 459, 103 N. Y. Supp. 439; *Johnston v. Mutual Reserve Life Ins. Co.*, 45 Misc. 316, 90 N. Y. Supp. 539, *affirmed*, without opinion, 110 App. Div. 888, 96 N. Y. Supp. 1132.

55. **U. S.**—*DuBois v. Kirk*, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. ed. 895; *Dodge v. Tulleys*, 144 U. S. 451, 12 Sup. Ct. 728, 36 L. ed. 501; *The Scotland*, 118 U. S. 507, 6 Sup. Ct. 1059, 30 L. ed. 153; *Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. ed. 688; *Tyler Min. Co. v. Sweeney*, 79 Fed. 277, 24 C. C. A. 578. **Ala.**—*Frances v. White*, 142 Ala. 590, 39 So. 174; *Connor v. Armstrong*, 91 Ala. 265, 9 So. 816; *Falkner v. Campbell Ptg. Press Co.*, 74 Ala. 359. **Cal.**—*Gutierrez v. Wege*, 145 Cal. 730, 79 Pac. 449; *Gray v. Dougherty*, 25 Cal. 266. **Colo.**—*Putnam v. Lyon*, 3 Colo. App. 144, 32 Pac. 492. **Conn.**—*Wilson v. Root*, 80 Conn. 227, 67 Atl. 482; *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Tomlinson v. Ward*, 2 Conn. 396. **Fla.**—*Mills v. Brett*, 56 Fla. 839, 47 So. 799; *Moyers v. Coiner*, 22 Fla. 422; *White v. Walker*, 5 Fla. 478. **Ga.**—*Guernsey v. Phinazy*, 113 Ga. 898, 39 S. E. 402; *Sparks v. Georgia*, etc. R. Co., 113 Ga. 1111, 39 S. E. 470; *Torras v. Reaburn*, 108 Ga. 345, 33 S. E. 989; *Davidson v. Story*, 106 Ga. 799, 32 S. E. 867; *Hearn v. Laird*, 103 Ga. 271, 29 S. E. 973; *Morgan v. Fidelity*,

etc. Co., 101 Ga. 389, 28 S. E. 857; *Ward v. Barnes*, 95 Ga. 103, 22 S. E. 133; *Williams v. Wheaton*, 86 Ga. 223, 277, 12 S. E. 634; *Ross v. Stokes*, 64 Ga. 758; *Pearce v. Chastain*, 3 Ga. 226, 46 Am. Dec. 423. **Ill.**—*Scott v. Beach*, 172 Ill. 273, 50 N. E. 196; *Rogers v. Tyley*, 144 Ill. 652, 32 N. E. 393; *Converse v. Rankin*, 115 Ill. 398, 4 N. E. 504; *Barton v. Mosher*, 62 Ill. 237; *Blue v. Blue*, 38 Ill. 9; *Walker v. Montgomery*, 156 Ill. App. 94; *Scott v. Aultman*, 113 Ill. App. 581, *affirmed*, 211 Ill. 612, 71 N. E. 1112, 103 Am. St. Rep. 215. **Kan.**—*Emporis v. Wittlesey*, 20 Kan. 17. **Ky.**—*Williamson v. Williamson*, 1 Metc. 303; *Kaye v. Louisville Bank*, 9 Dana 261. **Me.**—*Allan v. Allan*, 101 Me. 153, 63 Atl. 654; *Stilson v. Leeman*, 75 Me. 412; *Stone v. Locke*, 48 Me. 425. **Md.**—*Owings v. Rhodes*, 65 Md. 408, 9 Atl. 903; *Hamilton v. Schwehr*, 34 Md. 107. **Mich.**—*Citizens Savings Bank v. Vaughan*, 115 Mich. 156, 73 N. W. 143; *People v. Grand Rapids*, etc. Plank Road Co., 67 Mich. 5, 34 N. W. 250. **Mass.**—*Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37. **Mo.**—*Supreme Council Legion of Honor v. Nidelet*, 85 Mo. App. 283. **Mont.**—*Black v. Black*, 5 Mont. 15, 2 Pac. 317. **Nev.**—*Welland v. Huber*, 8 Nev. 203. **N. Y.**—*Stevens v. Central Nat. Bank*, 168 N. Y. 560, 61 N. E. 904; *Herrington v. Robertson*, 71 N. Y. 280; *Harvey v. Beckman*, 64 Misc. 395, 118 N. Y. Supp. 602; *Cottle v. N. Y.*, etc. R. Co., 27 App. Div. 604, 50 N. Y. Supp. 1008. **N. D.**—*State v. Budge*, 15 N. D. 205, 106 N. W. 293. **Ohio.**—*Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435; *Walpole v. Griffin*, Wright 95. **Ora.**—*Ison v. Sturgill*, 57 Ore. 109, 109 Pac. 579, 110 Pac. 535 (by express statute); *Security Sav.*, etc. Co. v. *MacKenzie*, 33 Ore. 209, 52 Pac. 1046. **Pa.**—*Wagner v. Philadelphia*, etc. R. Co., 81 Atl. 944; *Pennsylvania Ins. Co. v. Philadelphia Nat. Bank*, 195 Pa. 34, 45 Atl. 648; *Pile v. Pedrick*, 167 Pa. 296, 31 Atl. 646, 46 Am. St. Rep. 677; *O'Hara v. Stack*, 90 Pa. 477. **R. I.**—*Silvermann v. Shattuck*, 80 Atl. 184. **S. C.**—*Bowen v. True*, 79 S. C. 394, 60 S. E. 943; *Brown v. Rogers*, 76 S. C. 180, 56 S. E. 680; *Jennings v. Parr*, 66 S. C. 385, 44 S. E. 906; *Brown v.*

as well with respect to the period at which the court decides upon

Brown, 44 S. C. 378, 22 S. E. 412; Younger v. Massey, 41 S. C. 50, 19 S. E. 125. S. D.—Macomb v. Lake County, 13 S. D. 103, 82 N. W. 417. Tenn.—Snapp v. Purcell, 13 Lea 693; Hagar v. Wilson (Tenn. Ch. App.), 46 S. W. 1033. Tex.—Lacoste v. Duffy, 49 Tex. 767, 768; Payne v. Benham, 16 Tex. 364, 368; Walling v. Kinnard, 10 Tex. 508, 60 Am. Dec. 216; Cannon v. Hemphill, 7 Tex. 184, 207; Spiers v. Purcell, 2 Tex. Unrep. Cas. 624. Vt. Lamouille Valley R. Co. v. Bixby, 57 Vt. 548; Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Rep. 58. Va.—Margarity v. Shipman, 82 Va. 784, 1 S. E. 109; Dillard's Admr. v. Dillard, 77 Va. 820. Wash.—Churchill v. Stephenson, 14 Wash. 620, 45 Pac. 28. Wis.—Rosenheimer v. Krenn, 126 Wis. 617, 106 N. W. 20; Jones v. Jones, 71 Wis. 513, 38 N. W. 88; Portz v. Schantz, 70 Wis. 497, 36 N. W. 249.

"Whatever may be the law of England, or of other states, it is the settled law of this state that the statutes and rules regulating costs in courts of law and in courts of equity are entirely different. In courts of law, by statute (section 1325 of the Code of 1896, now section 3662 of the present Code), the successful part in civil actions is entitled to full costs, except in cases otherwise directed by law; whereas, in chancery, the rule is entirely different, and made so by statute (section 851 of the Code of 1896, now section 3222 of the present Code), by which it is provided that costs may be apportioned at the discretion of the chancellor. So it follows that, by statute, in courts of law the successful party recovers full costs, as to which the trial court has no discretion, except in cases otherwise provided by law; whereas, in courts of chancery, the costs are apportioned at the discretion of the chancellor." Sullivan Timber Co. v. Black, 159 Ala. 570, 48 So. 870, reviewing many prior decisions.

The total amount cannot exceed that authorized by statute. Paley v. Smith, 132 N. Y. Supp. 152.

In all the cases where costs have been held to be mandatory, and not discretionary, "it will be noted that it is specifically stated that the action is one at common law, and not

in equity." Paley v. Smith, 132 N. Y. Supp. 152, citing De Turckheim v. Thomas, 113 App. Div. 123, 99 N. Y. Supp. 104.

And even the costs in the appellate court are discretionary in equity cases. Forsyth v. Butler, 152 Cal. 396, 93 Pac. 90.

"In the federal practice in equity the giving or withholding costs or the apportionment and division thereof is a matter within the discretion of the court; such discretion, however, to be exercised, not arbitrarily, but with reference to the general principles of equity and special circumstances of each case. 2 Bates, Fed. Eq. Proc., §§842, 844; Primrose v. Fenno (C. C.) 113 Fed. 375; Electric Co. v. Scott (C. C.), 101 Fed. 524." Kell v. Trenchard, 146 Fed. 245, 76 C. C. A. 611.

In Georgia, in an equitable action, the judge may tax all the costs upon either party, and the exercise of such discretion will not be interfered with unless abused. Fitzpatrick v. McGregor, 133 Ga. 332, 65 S. E. 859.

Injunction Suits.—The taxing of costs in an equitable proceeding for an injunction is in the sound legal discretion of the court, and its decree in that regard will be reversed only when it is shown that such discretion has been abused. Ill.—Waterman v. Alden, 144 Ill. 90, 32 N. E. 972. Kan. McGillvray v. Moser, 43 Kan. 219, 23 Pac. 96. Okla.—Patten v. Ramsey, 120 Pac. 643 (decided under Comp. Laws 1909, §6117); Walker v. Walker, 17 Okla. 467, 88 Pac. 1127.

In a suit in equity to compel a defendant to comply with an unconstitutional statute, where the act is of long standing, its constitutionality never having been challenged before, and the defendant having acquiesced in its validity for many years, the court may, in the exercise of its discretion, divide the costs Kucker v. Sunlight Oil, etc. Co. (Pa.), 79 Atl. 747.

Complainant in Petition for Receiver.—One who improperly files a bill in equity asking for the appointment of a receiver may be decreed to pay the costs and expenses of the receivership. U. S.—Confer v. Sturley, 75 Fed. 168, 21 C. C. A. 288. Colo.—Cassidy v. Harrelson, 1 Colo. App. 458, 29 Pac.

them, as with respect to the parties to whom they are given.⁵⁶ And the exercise of this discretion will not be disturbed by an appellate court except in cases of manifest abuse.⁵⁷

525. **Ill.**—Myers v. Frankenthal, 55 Ill. App. 390. **Mont.**—Hickey v. Parrot Silver Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510. **Pa.**—Wagner v. Philadelphia, etc. R. Co., 81 Atl. 944, citing High on Receivers (4th ed.) §796.

It is within the discretion of the referee, under the New York practice, to deny a successful defendant his costs, even though there seems to be no reason for making him a party where he has united in the answer of his co-defendant, appears by the same attorney, and it does not appear that he was personally put to any trouble or expense in the defense of the action. Kelley v. St. Michael's Roman Catholic Church, 133 N. Y. Supp. 328.

A suit to enforce a mechanic's lien is an equitable action within the rule that ordinarily the giving of costs in equitable actions is in the discretion of the court. George v. Everhart, 57 Wis. 397, 15 N. W. 387.

Limitations on Discretion.—The discretion which resides in a court of equity "to award or give costs, must be understood to relate only to those costs in a suit, which are denominated 'general,' or properly 'costs in the cause,' and not such as may be said to be extraordinary, such as directing the costs of the suit to be paid out of a particular fund, or where the Court under special circumstances and a particular state of facts, developed by a proper course of pleading and demanded at the proper time, will direct counsel fees to be paid by a party either generally or out of a particular fund. See 3d Danl. Ch. Pr. 1517, 1553, 1583, 1767." Temple v. Lawson, 19 Ark. 148, 153.

56. 5 Danl. Ch. Pr. 15; Bennett College v. Carey, 3 Brown C. C. 320, 29 Eng. Reprint 602; Scarborough v. Burton, 2 Atk. 111, 26 Eng. Reprint 470.

The usual practice in equity is to award costs to the prevailing party, and the chancellor should not exercise his discretion otherwise, except when the losing parties can show that equity and good conscience require a

different judgment. Westfeldt v. North Carolina Min. Co., 177 Fed. 132, 100 C. C. A. 552; Sullivan Timber Co. v. Black, 159 Ala. 570, 48 So. 870.

57. **U. S.**—Tyler Min. Co. v. Sweeney, 79 Fed. 277, 24 C. C. A. 578. **Ark.**—Lackey v. Fayetteville Water Co., 80 Ark. 108, 96 S. W. 622. **Calo.**—Putnam v. Lyon, 3 Colo. App. 144, 32 Pac. 492. **Conn.**—Cowles v. Whitman, 10 Conn. 121. **Ga.**—Houston v. Polk, 124 Ga. 103, 52 S. E. 83; Guernsey v. Phinizz, 113 Ga. 898, 39 S. E. 402, 84 Am. Rep. 270; Torras v. Raeburn, 108 Ga. 345, 33 S. E. 989; Hamilton v. Du Pre, 103 Ga. 795, 30 S. E. 248. **Ill.**—Comstock v. Redmond, 252 Ill. 522, 96 N. E. 1073; Northern Pac. R. Co. v. Pacific & Miss. R. Co., 49 Ill. 356; Blue v. Blue, 38 Ill. 9; Frisby v. Ballance, 5 Ill. 287. **Miss.**—Sledge v. Obenchain, 59 Miss. 616. **Mo.**—Walton v. Walton, 19 Mo. 667. **Neb.**—Hering v. Simon, 77 Neb. 60, 108 N. W. 154. **N. Y.**—Herrington v. Robertson, 71 N. Y. 280; Brundage v. Brundage, 60 N. Y. 544. **N. D.**—Whitney v. Akin, 125 N. W. 470. **Ohio.**—Pennsylvania Fire Ins. Co. v. Carnahan, 19 Ohio C. C. 97, 10 Ohio Cir. Dec. 225, reversed on another point in 63 Ohio St. 258, 58 N. E. 805; Mutual Aid, etc. Co. v. Gashe, 18 Ohio C. C. 681, 6 Ohio Cir. Dec. 779; Her v. Akron Fireproof Constr. Co., 1 Ohio C. C. (N. S.) 546. **Pa.**—Pennsylvania Ins. Co. v. Philadelphia Nat. Bank, 195 Pa. 34, 45 Atl. 648. **S. C.**—Brown v. Brown, 44 S. C. 378, 28 S. E. 412. **Tenn.**—McDonald v. Unaka Timber Co., 88 Tenn. 38, 12 S. W. 420; State v. Lewis, 10 Lea 168. **Vt.**—Sanborn v. Kittredge, 20 Vt. 632. **Wis.**—Menz v. Beebe, 102 Wis. 342, 77 N. W. 913, 78 N. W. 601.

Where a court of equity has determined that a plaintiff should recover costs, it has exhausted its powers over the matter and cannot limit the amount. The law determines the amount (Hayes v. Douglas County, 92 Wis. 429, 65 N. W. 482, 53 Am. St. Rep. 926; In re Carroll's Will, 53 Wis. 228, 10 N. W. 275); nor after such a court has awarded costs can it withdraw them (Kiernan v. Agricultural

On the other hand it is equally well settled that the exercise of this discretion is not purely arbitrary,⁵⁸ and that the action of the trial court may be reversed or modified whenever it appears that there has been an abuse of the discretionary power.⁵⁹

In other words, all that is meant by the general rule that the giving of costs in courts of equity is entirely discretionary, is that these courts are not like ordinary courts, held inflexibly to the rule of giving costs to the successful party, but they will, in awarding costs, take into consideration the circumstances of the particular case before it, or situation or conduct of the parties, and exercise their discretion with reference to these points.⁶⁰ But while it is true that the pre-

Ins. Co., 3 App. Div. 26, 37 N. Y. Supp. 1070; *Gennert v. Butterick Pub. Co.*, 117 N. Y. Supp. 801, 804).

In an equity case the costs may be taxed against either party. *Johnson v. McKay*, 121 Ga. 763, 49 S. E. 757.

Receiver Improperly Appointed. After an exhaustive review of the authorities it was held in *Sullivan Timber Co. v. Black*, 159 Ala. 570, 48 So. 870, that the whole question of awarding compensation to a receiver improperly appointed rests in the sound discretion of the chancellor, subject to be raised by the appellate court only in case of abuse of the discretion.

Motion To Appoint Guardian.—The discretion of the court in taxing sheriff's fees, and mileage and witness fees on a motion for the appointment of a guardian will not be reviewed unless an abuse of discretion is shown. *Comstock v. Redmond*, 252 Ill. 522, 96 N. E. 1073.

In an action involving an accounting of the business affairs of a corporation, where the plaintiffs are given partial but substantial relief, and it appears just that the costs should have been taxed in the district court against the corporation in whose name the title to the property over which the parties are contending is vested, an order to that effect will not be disturbed on appeal. *Bennett v. Baum* (Neb.), 133 N. W. 439.

58. *Hamilton v. DuPre*, 103 Ga. 795, 30 S. E. 248.

This discretion accorded chancery courts in awarding costs is a legal discretion, to be exercised in accordance with general rules and former precedents, and does not authorize the chancellor to arbitrarily give or withhold

costs at pleasure. *Sullivan Timber Co. v. Black*, 159 Ala. 570, 48 So. 870, reviewing many prior cases.

In equity unless a person has been called into court by another or prejudiced by him in some way, the court cannot, in its discretion, make him liable for costs. *Menz v. Beebe*, 102 Wis. 342, 77 N. W. 913, 78 N. W. 601.

The discretion is not arbitrary, capricious, blind discretion, resulting from a view of the case, taken in combination with all its circumstances, and calling to its aid the issue of like questions, heretofore, upon cases as nearly analogous as can be found. *Clark v. Clark*, 4 Hayw. (Tenn.) 36, cited in *Burts v. Beard*, 11 Heisk. 472, 476.

In a case of doubt or novelty each party generally pays his own costs. *Adkins v. Edwards*, 83 Va. 300, 2 S. E. 435; *Magarity v. Shipman*, 82 Va. 784, 1 S. E. 109; *Beverley v. Brooke*, 4 Gratt. (Va.) 187; *Jones v. Mason*, 5 Rand. (Va.) 577; *Farmers Bank v. Reynolds*, 4 Rand. (Va.) 186; *Ashby v. Kiger*, 3 Rand. (Va.) 165; *Zane v. Zane*, 6 Munf. (Va.) 406; *Lewis v. Thornton*, 6 Munf. (Va.) 87; *Jackson v. Cutright*, 5 Munf. (Va.) 308; *Turner v. Turner*, 3 Munf. (Va.) 66; *Tabb v. Boyd*, 4 Call (Va.) 453.

59. *Ga.*—*Hamilton v. DuPre*, 103 Ga. 795, 30 S. E. 248. *Ill.*—*Walker v. Montgomery*, 249 Ill. 378, 94 N. W. 527; *Hering v. Simon*, 77 Neb. 60, 108 N. W. 154. *Neb.*—*Biester v. State*, 65 Neb. 276, 91 N. W. 416. *Ohio.*—*State v. Davis*, 18 Ohio C. C. 479, 10 Ohio Cir. Dec. 203.

60. *U. S.*—*Brooks v. Byam*, 2 Story C. C. 553, 4 Fed. Cas. No. 1,949. *Ala.*—*Randolph v. Rosser*, 7 Port. 249; *Hunt v. Lewin*, 4 Stew. & P. 138. *Ark.*

vailing party even in equity is *prima facie* entitled to costs, the unsuccessful party may show circumstances to overcome this presumption.⁶¹

2. **Right To Award Costs.**—a. *Particular Courts.*—Neither a court of law⁶² nor a court of equity⁶³ has power to award costs, unless such power is derived from statute.

The Supreme Court of the United States has power, in case of original jurisdiction, to award costs against either of the parties.⁶⁴

In some some jurisdictions it is held that a court may enter up a judgment for costs though it has no jurisdiction to hear and determine the cause.⁶⁵

b. *Power of Jury.*—It is a general rule that a jury have no power

Temple v. Lawson, 19 Ark. 148. Conn. Tomlinson v. Ward, 2 Conn. 396. Ky. Kaye v. Bank of Louisville, 9 Dana 261.

"It has sometimes been said that costs in chancery are largely in the discretion of that court, dependent upon the circumstances of the particular case. Yet the general rule in the nature of a principle is that the prevailing party in a suit in equity shall prevail as to costs as well as to the subject-matter of the suit, and it is the duty of the court to enforce this rule, unless the case discloses a reason why it should not be done. The discretion of the court is called into exercise only when the case discloses a show of reason, more or less strong, why costs should not be given." Doty v. Village of Johnson (Vt.), 77 Atl. 866.

61. When both parties are partly wrong, the court may refuse to allow costs to either. Blessengame v. Boyd, 178 Fed. 1, 101 C. C. A. 129.

62. County courts have no authority to tax costs in suits in equity over which the supreme court has exclusive jurisdiction. Davis v. Briggs, 3 How. Pr. (N. Y.) 171.

Award by Supreme Court.—"In recent years it has been the general practice to leave the costs below to be determined there on remand of the case, as that court is in better position in the exercise of discretion to do justice between the parties, yet where the case is one that does not by the rule above stated, call for the exercise of discretion the costs will be awarded by the supreme court." Doty v. Village of Johnson (Vt.), 77 Atl. 866.

63. Matter of Water Comra, 3 Edw. Ch. (N. Y.) 56; Struthers v. Christal, 3 Daly (N. Y.) 327.

No costs having been allowed to the defendants for proceedings in the state courts, either by the United States Supreme Court or the Court of Appeals, there is no power, either expressly or by implication, conferred by statute upon the special term to award costs in the courts of this state to the defendants in the action, although in actions of equity "the court may, upon the rendering of a final judgment," in its discretion award costs to any party as provided by section 3230 of the Code of Civil Procedure; since it would be unreasonable to hold that the statute impliedly confers the power to award the same costs in favor of and against each party, and as the plaintiffs succeeded upon the main controversy and the judgment of the courts of this state is in their favor, except as modified by the United States Supreme Court, the award of costs to them still stands, and the same costs cannot be awarded to the defendants without subverting the general rule that costs cannot be allowed to both parties for the same services in the same court. Stevens v. Central Nat. Bank, 168 N. Y. 560, 61 N. E. 904, reversing judgment, 35 App. Div. 35, 54 N. Y. Supp. 673.

64. Missouri v. Illinois, 202 U. S. 598, 26 Sup. Ct. 713, 50 L. ed. 1160; Pennsylvania v. Wheeling, etc. Bridge Co., 18 How. (U. S.) 460, 15 L. ed. 449.

65. Pope v. Jones, 79 Ga. 487, 4 S. E. 860. But the contrary has been held. McGinty v. Warner, 17 Minn. 41.

to award costs.⁶⁶ Accordingly nothing in the verdict can defeat the prevailing party's right to costs.⁶⁷

But if the jury do award costs an otherwise legal verdict will not be invalidated thereby—the part relating to costs will be rejected as surplusage.⁶⁸

c. *Power of Clerk of Court.*—A clerk of the court has no power to award costs since he is merely an officer of the court.⁶⁹

d. *Power of Commissioners.*—In some jurisdictions commissioners are given power by statute to award costs.⁷⁰

e. *Power of Referees and Arbitrators.*—In some jurisdictions referees are given the power to award costs.⁷¹

And while there is some contrariety of ruling on the question, arbitrators have implied power to award the costs of the arbitration when not expressly given by the submission, because such power is necessarily incident to the authority conferred on the arbitrators to determine the cause.⁷² Accordingly, an agreement to submit to arbi-

66. U. S.—*Day v. Woodworth*, 13 How. 363, 14 L. ed. 181. Ark.—*Wilson v. Newland*, 5 Ark. 373. Cal.—*Shay v. Tuolumne Water Co.*, 6 Cal. 286. Del.—*Adkins v. Campbell*, 6 Penna. 96, 64 Atl. 628. Ia.—*Meigs v. Parke*, Morr. 378. N. H.—*Tucker v. Cochran*, 47 N. H. 54. Pa.—*Ruth v. Edelman*, 2 Leg. Gaz. 125. S. C.—*Curlee v. Bond*, 1 Brev. 297. Tex.—*Garrett v. McMahan*, 34 Tex. 307; *Bader v. Wofford*, 9 Tex. 516.

It is the duty of the court to assess the costs in an ordinary civil action. *Southern Exp. Co. v. Maddox*, 3 Ga. App. 223, 59 S. E. 821, citing *Southern R. Co. v. Oliver*, 1 Ga. App. 734, 58 S. E. 244.

In an equitable proceeding the jury may recommend to the court the assessment of costs upon the respective parties, but cannot determine against which party they shall be taxed, under Ga. Civ. Code 1895, §4850. The presiding judge is to determine this, in the exercise of a sound discretion. *Stickland v. Hutchinson*, 123 Ga. 396, 51 S. E. 348.

67. *Nation v. Littler*, 59 Kan. 773, 52 Pac. 96.

68. Proffatt on Jury Trials, §413; *Hodge v. People*, 78 Ill. App. 378; *Lykins v. Hamrick*, 144 Ky. 80, 137 S. W. 852.

69. *Bailey v. Stone*, 41 How. Pr. (N. Y.) 346; *Jarvis v. Mohr*, 18 Wis. 188.

Costs follow the judgment as of

course, either on verdict, non-suit, or default, and practically are taxed, allowed and incorporated into the judgment by the clerk without any special order, unless upon objection or special hearing. *Lewis v. Ross*, 37 Me. 230, 59 Am. Dec. 49; *Neese v. Badford*, 83 Tex. 585, 19 S. W. 141; *Warren v. Shuman*, 5 Tex. 441.

70. *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533.

In New York a police commissioner cannot award costs. *People v. Greene*, 114 App. Div. 168, 99 N. Y. Supp. 679.

71. Del.—*Roe v. Stevenson*, 1 Penna. 80, 39 Atl. 586. Mass.—*Bacon v. Crandon*, 15 Pick. 79; *Nelson v. Andrews*, 2 Mass. 164. N. Y.—*Anderson v. De Braekeleer*, 25 Misc. 343, 55 N. Y. Supp. 721. Compare *People v. Newell*, 13 Barb. 86; *In re Vanderveer*, 4 Denio 249. S. C.—*Bollman v. Bollman*, 6 S. C. 29.

72. Cal.—*Dudley v. Thomas*, 23 Cal. 365. Conn.—*Alling v. Munson*, 2 Conn. 691. Del.—*Stewart v. Grier*, 7 Houst. 378, 32 Atl. 328. Mass.—*Warner v. Collins*, 135 Mass. 26. N. H.—*Chase v. Strain*, 15 N. H. 535; *Joy v. Simpson*, 2 N. H. 179. N. J.—*Den v. Exton*, 4 N. J. L. 197. N. Y.—*Strong v. Ferguson*, 14 Johns. 161; *Cox v. Jagger*, 2 Cow. 638; *Nichols v. Rensselaer Ins. Co.*, 22 Wend. 125; *In re Vanderveer*, 4 Denio 249. Pa.—*Schneider v. New York, etc. Gas Co.*, 98 Pa. 470;

tration a pending cause confers authority upon the arbitrators to make an award concerning costs that have accrued in the cause, though the submission is silent on the subject.⁷³ But in a few jurisdictions it has been held that arbitrators cannot award to either party his costs and disbursements, in the trial before them, unless expressly authorized so to do by the terms of the submission.⁷⁴

Young v. Shook, 4 Rawle 299; *Hewitt v. Furman*, 16 Serg. & R. 135; *Buckley v. Ellmaker*, 13 Serg. & R. 71. **S. C.** *Bollman v. Bollman*, 6 S. C. 29. **Vt.** *Burnell v. Everson*, 50 Vt. 449, *following* *Bowman v. Downer*, 28 Vt. 532; *Hawley v. Hodge*, 7 Vt. 237, and *overruling* *Morrison v. Buchanan*, 32 Vt. 289. **W. Va.**—*Henley v. Menefee*, 10 W. Va. 771, 782, *citing* *Morse on Arb.* 623. **Eng.**—*Cargay v. Aitcheson*, 2 B. & C. 170, 9 E. C. L. 52; *Mackintosh v. Blyth*, 1 Bing. 269, 8 E. C. L. 320; *Wood v. O'Kelley*, 9 East 436, 103 Eng. Reprint 639; *Roe v. Doe*, 2 T. R. 644, 100 Eng. Reprint 347.

In the absence of any provision to the contrary. *Morse Arb. & Award*, 623; *Russell Arb.* (9th ed.) p. 236; *Watson Arb. & Award*, 98; *Oakley v. Anderson*, 93 N. C. 108.

In the discretion of the arbitrators and umpire, who may direct to and by whom, and in what manner, those costs, or any part thereof, are to be paid, and may tax or settle the amount of costs to be paid. *In re Collyer-Bristow & Co.*, L. R. (1901), 2 K. B. Div. 839; *Malvern Urban Dist. Council v. Malvern L. Gas Co.*, (1901) 83 L. T. 326; *Street v. Street*, L. R. (1900) 2 Q. B. Div. 57; *Carr Bros. v. Dougherty*, 67 L. J. Q. B. 371.

In *Missouri* this is so by express statute. *McClure v. Shroyer*, 13 Mo. 104.

How Allowed.—In most jurisdictions unless the award allows costs and designates the amount and how they shall be paid, they will not be allowed to either party. **N. H.**—*School Dist. No. 3 v. Aldrich*, 13 N. H. 139. **N. J.** *Anderson v. Exton*, 4 N. J. L. 197; *Anonymous*, 2 N. J. L. 213. **N. C.** *Debrule v. Scott*, 53 N. C. 73. But it has been held that costs, though not mentioned, incident to the judgment. *Cloud v. Hughes*, 3 B. Mon. (Ky.) 375.

73. *Bird v. Routh*, 88 Ind. 47; *Vose v. How*, 13 Metc. (Mass.) 243.

Limitation on Arbitrator's Author-

ity.—The implied authority of the arbitrator is not, however, without limit. He may ordinarily make such award respecting the costs as he judges reasonable, including a compensation for his services, and the costs of the court. **Mass.**—*Warner v. Collins*, 135 Mass. 26. **N. Y.**—*Amsterdam v. Vanderveer*, 4 Denio 249. **Vt.**—*Burnell v. Everson*, 50 Vt. 449.

But he has no implied authority to allow one party counsel fees of the other. *Warner v. Collins*, 135 Mass. 26; *Amsterdam v. Vanderveer*, 4 Denio (N. Y.) 249.

And without special authority, arbitrators under an agreement *in pais*, where no cause is pending, have no power to award costs of arbitration. *Vose v. How*, 13 Metc. (Mass.) 243, *citing* *Gordon v. Tucker*, 6 Greenl. (Me.) 247, and *explaining* *Roe v. Doe*, 2 T. R. 644, 100 Eng. Reprint 347; *Bradley v. Tunstow*, 1 B. & P. (Eng.) 34.

74. U. S.—*Republic of Colombia v. Cauca Co.*, 106 Fed. 337. **Me.**—*Hanson v. Wilber*, 40 Me. 194. **Wis.**—*Dundon v. Starin*, 19 Wis. 261.

In *Maine* a contrary rule was adopted, the court deeming itself bound by precedent. *Walker v. Merrill*, 13 Me. 173; *following* *Gordon v. Tucker*, 6 Me. 247.

Conflict of Authorities.—It has been said by one court, adopting the opposite rule however, that the following cases decide that a submission of matters in controversy between parties, does not carry with it, as an incident, power to award, in any manner, upon the costs and expenses of the arbitration. *In re Vanderveer*, 4 Denio (N. Y.) 249, 252, *citing* *Peters v. Peirce*, 8 Mass. 398; *Bell v. Belson*, 2 Chit. 157, 18 E. C. L. 283; *Firth v. Robinson*, 1 B. & C. 277, 8 E. C. L. 77; *Wat. Arb.*, ch. 6; *Billings' Law of Rewards*, 187; *Candler v. Fuller*, *Willes* 62; *Browne v. Marsden*, 1 H. Bl. 223; *Bradley v. Tunstow*, 1

COSTS

3. Time for Determining.—The time to assess costs in any case is not confined to the time of verdict, but rests in the discretion of the court.⁷¹

4. Certificate.—**Necessity for.**—The statutes require a judge's certificate in certain kinds of award of costs can be made,⁷⁶ therefore it is of judgment.⁷⁷ But if made at the proper time in taxing officer.⁷⁸

5. Judgment or Decree for Costs.—**a. General rule,** when the allowance of costs is discretionary in the judgment,⁷⁹ otherwise no appeal can be taken. But a judgment for costs must be entered in

B. & P. 34; *Strutt v. Rogers*, 7 Taunt. 213; *Grove v. Cox*, 1 Taunt. 165. Thus it will be seen that the English cases are conflicting.

75. *Adkins v. Campbell*, 6 Penne. (Del.) 96, 64 Atl. 628.

76. Actions Involving Title to Real Estate.—**Mass.**—*Heims v. Ring*, 11 Allen 352. **N. Y.**—*Jackson v. Randall*, 11 Johns. 405; *Mumford v. Withey*, 1 Wend. 279 (holding that the fact that title to real estate was in question, must appear from the certificate and not be determined by referring to the pleadings); *LaFarge v. Eames*, 1 Wend. 99; *Bowen v. Holdredge*, 134 App. Div. 855, 119 N. Y. Supp. 199. **Pa.**—*Bowers v. Taylor*, 3 Del. Co. 334. **Wis.**—*Wausau Boom Co. v. Plumer*, 49 Wis. 112, 4 N. W. 1072.

In Pennsylvania under 22 and 23, Ch. II, c. 9, denying a plaintiff costs in trespass *quare clausum fregit*, in the court of common pleas, unless the court certifies that the title to land comes in question, does not preclude plaintiff from recovering costs, where they are awarded in the verdict of the jury, though the court does not make such certificate. *Hinds v. Knox*, 4 Serg. & R. (Pa.) 417.

If plaintiff recovers less than a designated amount in an action of trespass, he cannot have costs unless the court certifies that the trespass was wilful and malicious. *Coleman v. Thomson*, 6 Pa. Co. Ct. 126.

In Alabama where costs cannot exceed damages in actions of tort if the damages assessed do not exceed \$5, before a plaintiff can recover, the judge must certify that a larger amount of damages should have been allowed.

Guttery v. Bos 304; *Tippins v. So.* 564; *Galle*

77. Mich.—*Mich.* 488. *Mich. & Co.*, 63 *Mich. Simonds v. Bar* *v. Kaufman*, 1

78. Barney *Y.* 555; *Cooley* *Super.* 521, 17 *Supp.* 530, 24

79. U. S.—*Fed.* 521. *Ind.*—*son*, 151 *Ind.* 38 *Lucas v. Morse*, 223. **Mich.**—*General*, 43 *Mich. N. Y.*—*Kreitz* *People v. Densm* *well v. Sheldon*, *N. Y. Supp.* 707 *N. Y. Supp.* 530. *30 Ore.* 593, 48 *less Mfg. Co. v.* *pointment of re* *Southwell*, 15 *W.*

Order Allowin *v. Irvine*, 4 *Min*

In Maine, if the court is silent on costs, no costs to party. *Mather* *78 Atl.* 102; *Pea* *Me.* 164, 33 *Atl.* *78 Me.* 296, 4 *A.*

Otherwise wh judgment. *Lultgo* *(N. Y.)* 417; *V.* *(Tex. Civ. App.)*

80. Smith v. *Contra*, *City of V.* *(Tex. Civ. App.)*,

the action, and cannot be entered in favor of any one but a party.⁸¹

b. *Rendition*.—Although a case is settled by the parties before judgment, the court may still retain the action and render judgment for costs against both or either of the parties as is right and equitable.⁸²

Time of Rendition.—Usually until final judgment has been recovered, no order for costs or disbursements should be made.⁸³

c. *Requisites and Sufficiency*.—A specific or general judgment for costs is good, but usually the judgment is general in its nature.⁸⁴ Costs awarded *pendente lite* should be awarded by order, and not by judgment.⁸⁵

Necessity for Specifying Amount.—By practice in most states only a general judgment for costs is entered, without specifying the amount, and this blank is filled afterwards by the clerk.⁸⁶ The entry of judg-

81. *Patterson v. Officers of the Circuit Court*, 11 Ala. 740; *Winship v. Conner*, 43 N. H. 167.

82. *Standard Oil Co. v. Valley R. Co.*, 7 Ohio C. C. 442.

Where the parties stipulate for the settlement of an action, providing that each shall pay his own costs, the court does not thereby lose jurisdiction thereof, but may retain the same, award and tax costs, and render judgment therefor in accordance with the terms of the stipulation. *Interstate Crude Oil Co. v. Young* (Okla.), 118 Pac. 257.

83. Ill.—*Lee v. Yanaway*, 52 Ill. App. 23. Mich.—*Feige v. Babcock*, 111 Mich. 538, 70 N. W. 7, 3 Det. Leg. N. 753; *Saunders v. Tioga Mfg. Co.*, 27 Mich. 520; *Hemingway v. Peter*, 25 Mich. 202. N. Y.—*Weeks v. Cornwell*, 38 Hun 577; *Fredericks v. Niver*, 28 Hun 417. Compare *Missouri, etc. R. Co. v. Jenkins*, 79 Kan. 698, 101 Pac. 630, in which it is said: "A party who wishes to have an expenditure taxed as costs ought not to put off filing his statement until the cause is decided. There is no reason why he should not file it practically as soon as the amount is ascertained."

When the decree disposed of the issues involved and left nothing to be taken but the actual accounting there is no sufficient reason to delay the recovery of the attorney's fee until the account is taken, when such accounting is but incidental to the principal action. *Forrester v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 397, 76 Pac. 211, rehearing denied, 29 Mont. 397, 74 Pac. 1088.

But it is erroneous to allow costs long after the parties are out of court, and without notice to the other party (*Davis v. Harrison*, 2 J. J. Marsh [Ky.] 189), though in the form of supplementary judgment (*Denslow v. Gunn*, 68 Conn. 219, 35 Atl. 1125, after five months).

And a judgment for costs cannot be entered by a judge in vacation (*Ex parte State Bank*, 5 Ark. 463), though this alone is not sufficient ground for setting it aside (*In re Carman's Will* [Iowa], 48 N. W. 985).

84. U. S.—*Peyton v. Brooke*, 3 Cranch 92, 2 L. ed. 376. Ill.—*Jackson v. Cummings*, 15 Ill. 449. Mo.—*Dickerson v. Chrisman*, 28 Mo. 134. Tenn.—*Williams v. Henderson*, 1 Overt. 424. Tex.—*Griffith v. Missouri, etc. R. Co.* (Tex. Civ. App.), 108 S. W. 756.

In *King v. Allen*, 29 Mont. 5, 73 Pac. 1107, a finding that a survey was necessary in order to enable defendants to properly present their case is an adjudication of costs attendant on procuring the order therefor.

A general judgment for costs against all the defendants is good whether all defended or not. *Smith v. Harris*, 12 Ill. 461; *Dickerson v. Chrisman*, 28 Mo. 134.

85. *Robinson v. Scott*, 3 Litt. (Ky.) 233.

86. Ala.—*DeWitt v. Bigelow & Co.*, 11 Ala. 480. Ill.—*Smith v. Harris*, 12 Ill. 461. Ind.—*Koons v. Williamson*, 90 Ind. 599. Kan.—*Clippinger v. Ingram*, 17 Kan. 584. Mich.—*Hunt v. Middlesworth*, 44 Mich. 448, 7 N. W. 57. Mo.—*Bobb v. Graham*, 15 Mo.

ment has no effect on the right to tax costs and they may be inserted in the judgment without affecting its regularity.⁸⁷

In California, the clerk cannot insert the costs in the judgment at a subsequent term.⁸⁸

d. *Contents and Effect of Judgment.*—A judgment for costs, generally, includes all costs belonging to the case, whether prior or subsequent to the rendition of judgment.⁸⁹

App. 239. *Neb.*—Yankton, etc. R. Co. v. State, 49 Neb. 272, 68 N. W. 487. N. Y.—*In re Kelly*, 3 Hun 636. S. D. Mathewson v. Fredrich, 19 S. D. 423, 103 N. W. 656. *Va.*—Macon v. Crump, 1 Call 575. *Wash.*—Huntington v. Blakeney, 1 Wash. Ter. 111.

"As pointed out by Judge Bleckley in *McLendon v. Frost*, 59 Ga. 350, it is not usual for the court, at the time of the rendition of the judgment, to enter up the amount of costs, and it is the duty of the clerk to fill in the blank later, which may be done at any time whenever it becomes necessary; and, following this, it was held in *Williams v. Sewell*, 121 Ga. 665, 49 S. E. 732, that a judgment for costs in which no amount is stated is not void." *Williams v. Holland* (Ga. App.), 71 S. E. 760.

The omission to fill in such blank when issuing execution is clerical and may be corrected by amendment. *McLendon v. Frost*, *supra*.

The clerk in filling the blank left for costs merely acts in a ministerial capacity. *Butte Northern Copper Co. v. Radmilovich*, 38 Mont. 157, 101 Pac. 1078, citing *Orr v. Haskell*, 2 Mont. 350.

A form of judgment on a plea in abatement of an appeal was prescribed by the supreme court of errors of Connecticut in 1897, and concludes thus: "It is therefore considered and adjudged that the appeal abate and be dismissed and that the appellee recover \$— costs, and execution issue accordingly." *Sisk v. Meagher*, 82 Conn. 483, 74 Atl. 880.

In Tennessee a judgment is rendered for the costs generally, which is a recovery of all costs that have by law accrued, and when the costs are legally taxed and the amount ascertained, the judgment for costs is a judgment for that amount. *Gillett v. Roodman*, 5 Humph. (Tenn.) 44, cited in *State v. Alexandria*, 115 Tenn. 156, 90 S. W. 20.

87. *Leyde v. Martin*, 16 Minn. 38. *In Montana*, a blank left for an amount must be filled by the clerk in a reasonable time after the costs have been ascertained. *Orr v. Haskell*, 2 Mont. 350.

But statutes as to the time for inserting the amount are usually directory only, and the failure of the clerk to act in the time stated is not fatal to a recovery of costs by the party. *Smith v. Nelson*, 23 Utah 512, 65 Pac. 485.

Perfecting the Record.—A rule authorizing the clerk to perfect the record by inserting six cents at any time after the first day of the second term after judgment, if the costs are not then taxed and filed, does not, if the time he makes up the judgment authorize him to disregard them, though not taxed and filed within the period mentioned in the rule. *Bruere v. Britton*, 20 N. J. L. 268.

88. *Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418; *Chapin v. Border*, 16 Cal. 403.

89. *Peyton v. Brooke*, 3 Cranch (U. S.) 92, 2 L. ed. 376; *Brown's Admr. v. Hill Co.*, 5 Ark. 78.

But it does not include costs incurred by plaintiff against a co-defendant against whom there is no judgment (*Brown v. State*, 12 Ark. 623), or items not taxable as costs (*White v. White* (Cal.), 33 Pac. 399).

Judgments or orders for costs cannot be collaterally attacked. *Clark v. Southern Can Co.* (Md.), 81 Atl. 271.

A judgment which condemns certain defendants to pay costs, settles the question of their liability to do so. *State v. New Orleans Debenture Redemption Co.*, 112 La. 1, 36 So. 205.

Lien of Judgment.—The judgment for costs constitutes a lien on the property of the person against whom they are taxed, if the statutory requirements are complied with. *Id.*—*In re Brandes' Estates*, 145 Iowa 743, 122 N.

If new costs accrue, the judgment opens to receive them.⁹⁰

e. *Correction of Judgment.*—A judgment for costs may be corrected only on motion made at an early stage of the proceedings, and usually this motion comes too late at a subsequent term.⁹¹ A motion to strike costs from the judgment may also be employed.⁹²

Review.—When the allowance, apportionment or refusal of costs is a matter of right, a judgment allowing apportioning or refusing costs is reviewable the same as any other judgment affecting a substantial right.⁹³ But when the costs are within the discretion of the court, the exercise of such discretion will not be reviewed except for abuse or manifest error,⁹⁴ as in equity cases.⁹⁵

Modes of Review.—Questions involving costs may always be reviewed in proceedings to review the principal judgment.⁹⁶

W. 954; *Morgan v. Koestner*, 83 Iowa 134, 49 N. W. 80. Mo.—*Bobb v. Graham*, 15 Mo. App. 289. N. C.—*Long v. Walker*, 105 N. C. 90, 10 S. E. 858. S. D.—*Mathewson v. Frederich*, 19 S. D. 423, 103 N. W. 656.

90. *Peyton v. Brooke*, 3 Cranch (U. S.) 92, 2 L. ed. 376.

91. *Noland v. Lock*, 16 Ala. 52; *Gaines v. Mensing, etc. Co.*, 64 Tex. 325; *Hedgecoxe v. Conner* (Tex. Civ. App.), 43 S. W. 322, *affirmed*, 93 Tex. 663 (no opinion); *Parker v. Boyd* (Tex. Civ. App.), 42 S. W. 1031.

A motion cannot be made to alter and vacate a judgment for costs at a term of the court subsequent to that at which it was rendered. *Noland v. Lock*, 16 Ala. 52; *Olson v. Lamb*, 61 Neb. 484, 85 N. W. 397.

The court may relieve a party from a judgment for costs and disbursements taken against him through his mistake, inadvertence, surprise or excusable neglect. *Weiss v. Meyer*, 24 Ore. 108, 32 Pac. 1025. And see *Maupin v. Whitson*, 2 Heisk. (Tenn.) 1.

92. *Cornwell v. Sheldon*, 134 App. Div. 58, 118 N. Y. Supp. 707.

Bill of review to correct an error in calculation will not lie, motion being proper. *Young v. Henderson*, 4 Hayw. (Tenn.) 189. See *Burts v. Beard*, 11 Heisk. (Tenn.) 472; *Clark v. Clark*, 4 Hayw. (Tenn.) 36.

93. *Russell v. Giles*, 31 Ohio St. 293; *Bridgmans v. Wells*, 13 Ohio 43; *Edwards v. Knight*, 8 Ohio 375; *Bittle v. Hay*, 5 Ohio 269; *Bell v. Bates*, 3 Ohio 380; *State v. Comrs.*, 14 Ohio C. C. 26, 7 Ohio Cir. Dec. 351, *affirming* 6 Ohio Dec. 240; *Kinney's Admr. v. Lockwood, Wright* (Ohio) 340.

94. *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435; *Bloomington v. Stein*, 42 Ohio St. 168; *Wagoner v. Loomis*, 37 Ohio St. 571; *Diehl v. Friester*, 37 Ohio St. 473; *Armstrong v. McAlpin*, 18 Ohio St. 184; *State v. Davis*, 18 Ohio C. C. 479, 10 Ohio Cir. Dec. 203; *Tyler v. Walker*, 101 Tenn. 306, 47 S. W. 424; *State v. Lewis*, 10 Lea (Tenn.) 168.

In some states a judgment will not be reviewed for an error as to costs alone (*Pritchard v. Evans*, 31 W. Va. 137, 5 S. E. 461; *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. 168; *King v. Burdett*, 12 W. Va. 688; *Boggess v. Robinson*, 5 W. Va. 402), especially where the amount thereof is trivial. The maxim *de minimum lex non curat* applies (Ky.—*Tandy v. Hatcher*, 9 Ky. L. Rep. 721. Me.—*Wood v. Leach*, 69 Me. 555. Minn.—*Thomas v. Craig*, 60 Minn. 501, 62 N. W. 1133. See also *State v. Sloan*, 69 N. C. 128).

A modification of a report of a referee as to a matter of costs, in a case where the taxation of costs is a matter of discretion, cannot be reviewed where none of the testimony before the referee is preserved in the record. *Hattenstein v. Conrad*, 9 Kan. 435.

95. U. S.—*DuBois v. Kirk*, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. ed. 895; *Wood v. Weimar*, 104 U. S. 786, 26 L. ed. 779. N. Y.—*Rogers v. Holly*, 18 Wend. 350. S. C.—*Lewis v. Wilson*, 1 McCord Eq. 210. Vt.—*Joslyn v. Parlin*, 54 Vt. 670. Va.—*Ashby v. Kiger*, 3 Rand. 165.

96. See *Brimson v. State*, 63 Ohio St. 347, 58 N. E. 803; *Moore v. Boyer*, 42 Ohio St. 312; *Russell v. Giles*, 31

COSTS

Objection in Court Below.—An appellant cannot be point of costs in the supreme court when he has neglected attention of the court of the first instance to it.⁹⁷

Presumption as to Correctness.—A judgment for costs by the court below, will be presumed correct on appeal.

f. Interest on Costs.—As a general rule costs do not interest,⁹⁹ but it has been held that the allowance of interest is at the discretion of the court.¹

g. Injunction Against Enforcement.—A chancery court may join the judgment or execution thereon of a court of law in costs, where it was obtained or rendered by fraud, accident, and the complaining party is free from fault.²

6. Compelling Award.—Mandamus will not lie to compel a court to award costs.³

G. TAXATION OF COSTS.—**1. In General.**—The tax on costs relates to procedure only.⁴

Ohio St. 293; *Cochrane v. State*, 30 Ohio St. 61; *Bridgmans v. Wells*, 13 Ohio St. 43; *Edwards v. Knight*, 8 Ohio 375; *Crull v. Morgan*, 11 Ohio C. C. 537, 5 Ohio Cir. Dec. 274.

97. Cal.—*Muir v. Meredith*, 82 Cal. 19, 22 Pac. 1080. **Ill.**—*Trodden v. Cleveland Stone Co.*, 53 Ill. App. 206. **Ind.**—*Urton v. Luckey*, 17 Ind. 213. **Ia.**—*Allen v. Seaward*, 86 Iowa 718, 52 N. W. 557. **Kan.**—*Moore v. Toennisson*, 28 Kan. 608. **N. C.**—*Hall v. Younts*, 87 N. C. 285. **S. C.**—*Rabb v. Patterson*, 42 S. C. 528, 20 S. E. 540. **Tex.**—*Harris v. Monroe Cattle Co.*, 84 Tex. 674, 19 S. W. 869. See also *Bridge v. Samuelson*, 73 Tex. 522, 11 S. W. 539; *Wiebusch v. Taylor*, 64 Tex. 53; *Allen v. Woodson*, 60 Tex. 651, 653; *Jones v. Ford*, 60 Tex. 127, 132.

98. Ill.—*Welch v. Wallace*, 8 Ill. 489. **Ia.**—*Yeager v. Circle*, 1 Greene 438. **Mo.**—*Bambrick Bros. Const. Co. v. McCormick* (Mo. App.), 137 S. W. 43. **Tex.**—*Latham v. Taylor*, 15 Tex. 247; *Walling v. Kinnard*, 10 Tex. 508.

And where they have been awarded to neither party, the appellate court will treat this as equivalent to an offset of plaintiff's against defendant's costs. *Lanyon v. Woodward*, 65 Wis. 543, 27 N. W. 337.

99. Baum v. Reed, 74 Pa. 320; *Green, Rhea Co. v. Holman*, 107 Tenn. 544, 64 S. W. 889; *Gatewood v. Palmer*, 10 Humph. (Tenn.) 466.

Judgments for costs do not bear interest; but the lien as to costs paid by the wife in a divorce suit will include

interest from the date of judgment. *Ghent v. Boyd*, App. 88, 43 S. W. 891. *Mer v. Glover*, 73 Ind. 111. It is held that a judgment for "judgment for money" has the meaning of a statute relating to interest and bears interest from the date of the return of the verdict of the court, until the same is satisfied.

1. Enright v. Hubbard, 197.

Time Interest Accrues.—Costs in any judicial proceeding are not to be paid by the party or other person in whose favor the judgment or order is made, until the time when execution is authorized. This does not apply to costs or other costs not ordered, or for which execution is not authorized. *Emmitt v. Ohio St.*, 82.

2. Williams v. Pile, 104 S. W. 833, citing *Williams v. Penny*, 11 Humph. (Tenn.) 466; *land v. Jones*, 2 Heisk. (Griffith v. Missouri, etc. I. Civ. App.), 108 S. W. 756 (of petition).

3. State v. Judge of Circuit Court, 3 Wis. 809.

4. Lew v. Bray, 81 Conn. Atl. 628; *Fessenden v. Nichols*, Mass. 316.

2. Manner of Taxing.—Costs are usually taxed by the clerk,⁵ under the direction and supervision of the court,⁶ because the taxation of costs is ordinarily a mere ministerial duty.⁷ But he must proceed in accordance with the law existing at the time when the judgment was rendered.⁸

5. U. S.—*Craig v. Leitensdorfer*, 127 U. S. 764, 8 Sup. Ct. 1393, 32 L. ed. 322; *Byers v. Surget*, 19 How. 303, 15 L. ed. 670. **Ill.**—*Bogar v. Walker*, 89 Ill. App. 457. **Ind.**—*Palmer v. Glover*, 73 Ind. 529. **Mich.**—*Abbott v. Mathews*, 26 Mich. 176. **N. C.**—*Walton v. Sugg*, 61 N. C. 98. **Ohio.**—*Wilkins v. Huse*, 9 Ohio 154.

When double costs are allowed by statute the clerk adjusts them. *Wheeler v. Hotchkiss*, 18 How. Pr. (N. Y.) 468.

"The only judgment for costs which the clerk has authority to enter is for costs which have been taxed. The entry of costs in the judgment, while a motion to tax them was pending, was without authority, and the issuance of an execution for the collection of such costs and the levy upon plaintiff's property was improvident and untimely. The motion to recall the execution should have been granted, as well as the motion to tax costs." *Kaiser v. Barron*, 153 Cal. 474, 95 Pac. 879.

Construction of Statute.—"The authority of the clerk to tax costs upon the application of a party, and without an express order of the court, is to be found in section 3262 of the Code of Civil Procedure. A critical reading of that section in conjunction with those which immediately follow it shows that it was intended to apply to cases in which costs are to be inserted in a judgment or final order." *Carter v. Builders' Const. Co.*, 134 App. Div. 553, 119 N. Y. Supp. 670, 671.

6. U. S.—*Pennsylvania v. Wheeling, etc. Co.*, 18 How. 460, 15 L. ed. 449. **D. C.**—*Williams v. Getz*, 17 App. Cas. 388. **Ky.**—*Ellison v. Stevenson*, 6 T. B. Mon. 271. **Md.**—*Council of Baltimore v. Baltimore Co. Comrs.*, 19 Md. 554. **N. Y.**—*Matthews v. Matson*, 3 Civ. Proc. 157.

Power of Court.—"Undoubtedly the court has the power, which is frequently exercised, to refer the taxation to costs in any case to the clerk, as, for instance, when costs are directed to be paid as a condition of granting or

denying a motion. So also the court has in some cases, by especial direction, ordered that the fees of a referee should be taxed by the clerk in the first instance. In such cases, however, the authority of the clerk to tax the costs rests upon the order of the court, and not upon his statutory authority as the taxing officer." *Carter v. Builders' Const. Co.*, 134 App. Div. 553, 119 N. Y. Supp. 670, 671.

Fees of Officers.—The usual and orderly method of taxing fees due officers of the court is for the clerk, in the first instance, to ascertain and enter them on the record, subject to review by the court on appeal. *Hoystradt v. Delaware, etc. R. Co.*, 182 Fed. 880; *Harger v. Comrs.*, 12 Pa. 251; *Irwin v. Hanthorn*, 6 Pa. Super. 135.

And so ascertained and taxed they become costs in favor of the successful party and attach themselves to the judgment, which is finally entered in the case, for the benefit of those to whom they belong. *Ellsbre v. Ellsbre*, 28 Pa. 172.

Persons Not Parties.—In South Carolina, the clerk cannot tax costs against one not a party to the action, as for example, an assignee of the cause of action *pendente lite*, this power can be exercised only by the court after notice to the party alleged to be liable, and opportunity given him to be heard on a rule to show cause. *State v. Marshall*, 28 S. C. 559, 6 S. E. 564, *reaffirmed*, *Walker v. Doty*, 76 S. C. 464, 57 S. E. 181.

7. Mich.—*Abbott v. Mathews*, 26 Mich. 176. **Mont.**—*Butte Northern Copper Co. v. Radmilovich*, 39 Mont. 157, 101 Pac. 1078. **Wis.**—*Jarvis v. Mohr*, 18 Wis. 188, and, if erroneous, may be corrected on motion. *Patten v. Cox*, 97 Tex. 253, 77 S. W. 1025.

8. "In any event, it is the duty of the clerk to tax the costs according to the law applicable under the judgment rendered, and his action in so doing can only be upheld so far as it is sustained by the law. *Price v. Barnes, et al.*, 7 Ind. App. 1-11, 31 N. E. 809, 34

Nor is a formal taxation by the clerk always required.⁹

But after the clerk has taxed the costs in accordance with the cost bill presented to him, his authority ceases and he cannot on his own initiative strike any item from the bill.¹⁰

In some jurisdictions others than clerks are authorized to tax costs.¹¹

Discretion of Clerk. — The clerk can exercise no judicial power in granting or refusing the costs of the action to any party;¹² he can only ascertain and determine what items of costs and disbursements the party presenting costs for adjustment is, by law, entitled to.¹³

Compelling Taxation by Clerk. — It seems that the clerk may be compelled to perform his duty and tax the costs either by mandamus, or by order of court directing him to tax them.¹⁴

3. Limitations as to Time. — Costs are not usually taxed until after verdict or final judgment in the cause,¹⁵ the time limit varying in different jurisdictions.¹⁶

N. E. 408." *Todd v. Howell* (Ind. App.), 96 N. E. 618.

9. As in the settlement of pending suits. *Crane v. Gurnee*, 75 N. J. Eq. 104, 71 Atl. 338.

10. *La Rosa v. Wilner*, 54 Misc. 574, 104 N. Y. Supp. 952.

11. **A Justice.**—*Parmalee v. Town of Bethlehem*, 57 Conn. 270, 18 Atl. 94.

A circuit court commissioner in a proceeding before him. *Watson v. Randall*, 44 Mich. 514, 7 N. W. 84; *Bliss v. Connecticut & P. R. Co.*, 47 Vt. 715.

The report of commissioners appointed to tax costs should show what items are allowed. *Morse v. Allen*, 45 N. H. 571.

12. *Abbott v. Mathews*, 26 Mich. 176; *Williams v. Cassady*, 22 Hun (N. Y.) 180; *Kaplan v. Olsen*, 64 Misc. 437, 118 N. Y. Supp. 634.

Determining what portion of costs and disbursements it is "just and reasonable" that a party should pay is a judicial act. *Jarvis v. Mohr*, 18 Wis. 188. So determining the compensation of a master. *Rickert v. Suddard*, 184 Ill. 149, 56 N. E. 344.

13. *Bailey v. Stone*, 41 How. Pr. (N. Y.) 346.

He must satisfy himself that the items proposed are correct, though the taxation is not opposed. *Crosley v. Cobb*, 37 Hun (N. Y.) 271.

14. *State v. Reesa*, 57 Wis. 422, 15 N. W. 383.

15. *Patton v. Cox*, 97 Tex. 253, 77 S. W. 1025.

"The costs are perhaps never in fact taxed until the judgment is rendered; and in many cases, cannot be taxed until afterwards, and where this is the case the amount ascertained is usually, under direction of the court, entered *nunc pro tunc* as part of the original judgment. And this mode of proceeding is necessary for the purposes of justice, in order to afford the necessary time to examine and decide upon the several items of costs, to which the successful party is lawfully entitled." *Sizer v. Many*, 16 How. (U. S.) 98, 14 L. ed. 861.

A motion to tax costs made before final judgment is premature and should be overruled. *Sunman v. Babcock*, 4 Ind. 554. See *Slauson v. Walkins*, 14 Jones & S. (N. Y.) 172.

A memorandum of costs presented before the findings are filed is premature and should be stricken out. *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. 795.

16. In New York, the municipal court act (§341, Laws, 1902, ch. 580) contains no time limit in which costs must be taxed, and so the practice is the same as in courts of record. *Goldstein v. Godfrey Co.*, 70 Misc. 225, 126 N. Y. Supp. 620.

In *Allen v. Wells, Fargo Co.*, 48 Misc. 610, 95 N. Y. Supp. 597, the court held that "there was no irregularity in the taxation of costs, in that more than five days had elapsed from the date when the judgment was rendered. The insertion of costs was not an amend-

An unreasonable and inexcusable delay in taxing costs is fatal where there is no statute regulating the time.¹⁷ But in some states a motion to tax costs may be filed in a cause after the term at which the case is disposed of.¹⁸

ment of the judgment, since the statute evidently contemplates that the judgment is not complete until the costs are inserted (§§341, 342, Municipal Court Act), and no limit of time is fixed for the taxation after judgment is 'rendered.'"

Reasonable Rule.—A rule of court restricting taxation to four days after judgment is reasonable. *Flisher v. Allen*, 141 Pa. 525, 21 Atl. 672.

In Wisconsin, under laws, 1882, ch. 202, where the successful party fails to tax his costs within sixty days he waives his right thereto. *Fox River Flour, etc., Co. v. Kelley*, 70 Wis. 305, 35 N. W. 744.

In Idaho, act Feb. 14, 1899, amending Rev. St., §4912 (acts 1899, pp. 231, 232), providing that the successful party must file his memorandum of costs within five days from entry of verdict or service of notice of the court's decision, is mandatory. *Stickney v. Berry*, 7 Idaho 303, 62 Pac. 924.

In California, the Code of Civ. Proc., §1033, provides that "the party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict, or notice of the decision of the court or referee, . . . a memorandum of the items of his costs and necessary disbursements in the action or proceeding." *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. 795; *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409; *Mulally v. Irish-American Ben. Soc.*, 69 Cal. 559, 11 Pac. 215.

In Montana (Rev. Codes, §7170, taken from California Code of Civ. Proc., §1033), the decision referred to is the finding of facts and conclusions of law signed by the court and filed with the clerk, and such five days is not to be computed from the date upon which the court orally announced its decision. *McDonnell v. Huffine* (Mont.), 120 Pac. 792, following, *Porter v. Hopkins*, 63 Cal. 53.

In Washington, 2 Ballinger's Ann. Code & St., §5173, provides that a cost

bill shall be filed with the clerk of the court within ten days after the judgment. *Matheson v. Ward*, 24 Wash. 407, 64 Pac. 520.

In Nevada, the statute requires a memorandum of the costs to be given to the clerk "within two days after the verdict or decision." *Sholes v. Stead*, 2 Nev. 107.

17. A motion to retax after judgment satisfied is too late when no excuse is shown for the delay. *Missouri, etc., R. Co. v. Jenkins*, 79 Kan. 698, 101 Pac. 630.

One Year After Judgment.—An application for taxation of costs in chancery will not be heard unless for special reasons where it was not made until one year after judgment. *Allen v. Haskell*, 31 Me. 589.

Texas.—The statute does not state the time when the clerk shall give the certificate upon the affidavit of the witness, nor when he shall tax it in the bill of costs, or tax the costs against the party cast in the suit. "Justice Wheeler, in noticing this fact, says: 'On general principles, the fees must be claimed and taxed before the issuing of execution, but the law does not require that this be done before the expiration of the term of the court at which the case was tried. In this case the fees were taxed after the adjournment of the court, but before execution issued. The district court adjudged them rightly taxed.'" *Houston, etc., R. Co. v. Jones*, 46 Tex. 133, 140; *Hardy v. De Leon*, 7 Tex. 466, 467. See, also, *Morgan v. North Texas Nat. Bank* (Tex. Civ. App.), 34 S. W. 133.

18. *Cairo Brew. Co. v. Hogg*, 141 Mo. App. 391, 125 S. W. 831; *Turner v. Butler*, 66 Mo. App. 380.

If the motion is based on the ground that the costs should have been taxed against the other party, it must be made within four days after trial and judgment. *Paul v. Minneapolis Threshing Mach. Co.*, 87 Mo. App. 647.

First Day of Second Term.—*Northampton Live Stock Ins. Co. v. Stewart*, 40 N. J. L. 103.

4. Filing and Hearing of Motion.—A motion to tax costs should ordinarily be filed by a party to the suit.¹⁹

When the record contains the statement that it contains all of the evidence considered on the hearing of a motion to tax costs, there is no presumption that the judge took into consideration certain facts, of which he had actual knowledge, in the determination of such motion.²⁰

5. Notice of Taxation.—In many states notice of the taxation of costs must be given the opposite party,²¹ unless he has actual notice thereof.²² But a judgment rendered without notice of the taxation of costs is not for that reason void,²³ nor cause for setting it aside.²⁴

Time and Manner of Serving.—Notice of taxation must be served within the time prescribed by the statute.²⁵ When the statute pre-

19. *Cairo Brew. Co. v. Hogg*, 141 Mo. App. 391, 125 S. W. 831.

20. *Griffith v. Montandon*, 4 Idaho 75, 35 Pac. 704.

21. Cal.—*Riddle v. Harrell*, 71 Cal. 254, 12 Pac. 67. Ia.—*Mock v. Chalstrom*, 121 Iowa 411, 96 N. W. 909. N. Y.—*Bowery Nat. Bank v. Hart*, 132 N. Y. Supp. 1119. S. C.—*Cureton v. Westfield*, 24 S. C. 457. Wis.—*Johnson v. Curtis*, 51 Wis. 595, 8 N. W. 489; *Perkins v. Davis*, 16 Wis. 470; *Hitchcock v. Merrick*, 15 Wis. 522.

A defendant, against whom the bill has been dismissed with costs to be paid by the plaintiff, and received by the plaintiff out of the estate to be administered in the cause, is not bound to serve the parties interested in the estate with a warrant to attend the taxation, but may proceed with the taxation, serving the plaintiff only with the warrant. *Lauder v. Ingersoll*, 6 Hare 73, 67 Eng. Reprint 1088.

A mere intermeddler, without any interest in the suit, and whose answer has been stricken out, is not entitled to notice. *Adams v. Myers*, 61 Wis. 385, 21 N. W. 250.

Covenants in a Deed.—Under Iowa code, §4226, relating to taxation of costs in actions to quiet title no notice of taxation is necessary to plaintiff's grantor, where the action is based on covenants in a deed executed by such plaintiff, but no costs are taxable against the other defendants unless on notice. *Mock v. Charlstrom*, 121 Iowa 411, 96 N. W. 909.

Business of Ordinary Nature.—In South Carolina, it has been held that notice is not necessary where the costs taxed are for such ordinary business

that they cannot admit of dispute. *Price v. McGee*, 1 Brev. 455.

In case of a dismissal, costs may be awarded against the party in his absence and without notice because costs are incidental to the judgment. *Gaffey v. Mann*, 5 Cal. App. 712, 91 Pac. 172. 22. *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409.

23. *Lindholm v. Itasca Lumb. Co.*, 64 Minn. 46, 65 N. W. 931; *Jakobsen v. Wigen*, 52 Minn. 6, 53 N. W. 1016; *Gilmartin v. Smith*, 4 Sandf. (N. Y.) 684; *Stimson v. Huggins*, 16 Barb (N. Y.) 653; *Haffnung v. Grove*, 18 Abb. Pr. (N. Y.) 14.

In some states, however, failure to give notice before taxing is held to be a deprivation of property without due process of law. *Bell v. Superior Court*, 150 Cal. 31, 87 Pac. 1031; *State ex rel. Hurley v. District Court*, 27 Mont. 40, 69 Pac. 244.

An objection that no notice was given will not avail on appeal, if no remedy was sought below. *Stevens v. McMillin*, 37 Minn. 509, 35 N. W. 372.

24. N. Y.—*Mabbett v. Kelly*, 2 How. Pr. 62; *Stimson v. Huggins*, 16 Barb. 658. S. C.—*Shaw v. Kelly*, 2 Mill Const. 317. Eng.—*Field v. Partidge*, 7 Ex. 689, 21 L. J. Ex. 269, 16 Jur. 413; *Ilderton v. Sill*, 2 C. B. 249, 52 E. C. L. 249, 15 L. J. C. P. 1.

Otherwise, under some statutes. *Channing v. Davis*, 16 Wis. 470.

25. Thus, under a statute requiring two days' notice a notice was sufficient where the costs were taxed on October 30th, upon a notice dated and served on October 28th. *Diedrich v. Nachtsheim*, 33 Wis. 225.

The service of a notice before entry

scribes the manner of service,²⁶ or by whom service may be made,²⁷ those requirements must be followed.

6. Memorandum or Cost Bill.—a. *As To Filing.*—The party who prevails must file with the clerk a memorandum or bill of costs.²⁸

This requirement of the statute is for the purpose of giving the opposite party an opportunity of contradicting or disproving the items charged upon a motion to retax costs, and to inform the court of the facts in the case,²⁹ and, therefore, the party entitled, in order to obtain costs, must comply strictly with the statute.³⁰ But in the absence of statute requiring it a cost bill need not necessarily be filed

of judgment is a mere irregularity. *Murphy v. Mulvena*, 108 Mich. 347, 66 N. W. 224.

If only 14 days' notice is given when by statute 18 days' should be given, the defect is waived by addressing a letter to the judge of the trial court opposing the motion, both on technical grounds and on the merits. *Nayler v. Adams*, 15 Cal. App. 353, 114 Pac. 997.

The notice must give the other side sufficient time to appear. *Goodyear v. Baird*, 11 How. Pr. (N. Y.) 377.

26. Deposit in the post-office is not a valid service where the statute requires personal service. *Thompson v. Brannon*, 76 Cal. 618, 18 Pac. 783. And see *Brown v. Ferguson*, 2 How. Pr. (N. Y.) 128.

On and by Whom Served.—Notice must be served on the attorney and not on counsel in the cause (*Jackson v. Larroway*, 2 Johns. Cas. [N. Y.] 114), but where a rule is taken by experts to have their fees taxed, notice must be served on all parties to the suit (*State v. Gauthreaux*, 35 La. Ann. 1168).

Attorney, not party. *Green v. Kindy*, 1 Mich. N. P. 41.

Parties Not Appearing in the action are not entitled to notice. *Holler v. Giordano*, 18 N. Y. Supp. 538.

27. The clerk may give notice if the statute does not specify who shall do it. *Cureton v. Westfield*, 24 S. C. 457.

28. Cal.—*Bell v. Superior Court*, 150 Cal. 31, 87 Pac. 1031; *Chapin v. Broder*, 16 Cal. 403; *Bell v. Thompson*, 8 Cal. App. 483, 97 Pac. 158. **N. Y.** *Bowery National Bank v. Hart*, 132 N. Y. Supp. 1119. **Ore.**—*Egan v. North American Savings, etc., Bldg.*, 45 Ore. 131, 77 Pac. 392, 76 Pac. 774. **Utah.** 92. **Wash.**—*Kane v. Kane*, 35 Wash. Cole v. Ducheneau, 13 Utah 42, 44 Pac. 517, 77 Pac. 842.

If the notice is not accompanied with a copy of the proposed bill of costs or disbursements to be taxed, properly itemized, the taxation is irregular. *Johnson v. Curtis*, 51 Wis. 595, 8 N. W. 489.

In Oregon, §568, B. & C. Comp., as amended by Laws, 1903, ch. 209, does not apply to the taxation of costs in the supreme court. *Zenske v. Zenske*, 55 Ore. 65, 105 Pac. 249, 103 Pac. 648; *Allen v. Standard Box, etc., Co.*, 53 Ore. 10, 98 Pac. 509, 96 Pac. 1109, 97 Pac. 555; *Heywood v. Doernbecher Mfg. Co.*, 48 Ore. 369, 86 Pac. 357, 87 Pac. 530.

29. Cole v. Ducheneau, 13 Utah 42, 44 Pac. 92.

30. Butte, etc., Copper Co. v. Radmilovich, 39 Mont. 157, 101 Pac. 1073, 1081.

Otherwise, he waives his right. *Linnville v. Scheeline*, 30 Nev. 106, 93 Pac. 225, citing, *State v. District Court*, 26 Nev. 258, 66 Pac. 743; *Smith v. Alford*, 31 Utah 346, 88 Pac. 16.

In Oregon, failure to file or serve the cost bill within five days after the judgment is affirmed by the supreme court affects only disbursements and not costs. *Anderson v. Adams*, 44 Ore. 529, 76 Pac. 16; *McFarlane v. McFarlane*, 43 Ore. 477, 75 Pac. 139, 73 Pac. 203.

If a cost bill is not filed within the time required by the statute it will be struck out on motion; nor is it any excuse that counsel relied upon some one to furnish him the items therefor, but he neglected so to do until the time had elapsed. *Matheson v. Ward*, 24 Wash. 407, 64 Pac. 520, citing, *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409.

Computation of Time.—The date when the court ordered judgment is to be considered in computing the time within which, under the statute, the

before it is served, and it may be served before the judgment is filed.³¹

The memorandum may be amended on motion and leave of court to supply uncertainties in original memorandum, if no new items are sought to be added. Nor is it necessary to make a showing of inadvertence, surprise or excusable neglect to warrant the court in allowing such amendment.³²

The presumption is in favor of the correctness of the cost bill, when made by the proper officer.³³

b. *Specification of Items.*—Each specific item claimed as costs must be stated separately in the memorandum or cost bill,³⁴ and specified in numbers or in words at length.³⁵ It is insufficient to state them merely as other expenses.³⁶

In the case of witnesses the memorandum of the items of costs should state the name and place of residence of each witness, the distance traveled from his place of residence to the place of trial, when mileage is to be allowed, and the number of days such witness actually attended in court.³⁷

cost bill must be filed. *Kinsley v. New Vulture Min. Co.*, 11 Ariz. 66, 90 Pac. 438, 110 Pac. 1135.

31. *Kane v. Kane*, 35 Wash. 517, 77 Pac. 842.

Objection may be waived by conduct of parties. *Smith v. Alford*, 31 Utah 346, 88 Pac. 16.

32. Cal.—*Burnham v. Hayes*, 3 Cal. 115, 58 Am. Dec. 389. Mont.—*Neary v. Northern Pac. R. Co.*, 41 Mont. 480, 110 Pac. 226. Ore.—*Willis v. Lance*, 28 Ore. 371, 43 Pac. 384. Utah.—*Dignan v. Nelson*, 26 Utah 186, 72 Pac. 936.

33. *Lockhart v. Lytle*, 51 Tex. 601.

34. U. S.—*Beckwith v. Easton*, 4 Ben. 357, 3 Fed. Cas. No. 1,212. Ga.—*Peters v. State*, 9 Ga. 109. Mich.—*Duncombe v. Richards*, 47 Mich. 646, 11 N. W. 186. N. Y.—*The Central Park Case*, 12 Abb. Pr. 107; *Shannon v. Brower*, 2 Abb. Pr. 377; *Rogers v. Rogers*, 2 Paige 458. Ore.—*Walker v. Goldsmith*, 16 Ore. 161, 17 Pac. 865; *Crawford v. Abraham*, 2 Ore. 163. Wash.—*Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 710.

For the form of an itemized memorandum of costs, see *Griffith v. Montandon*, 4 Idaho 75, 35 Pac. 704; *Smith v. Williamson*, 11 N. J. L. 313.

Constable's fees (*Smith v. Williams*, 11 N. J. L. 313), sheriff's fees, clerk's fees (*Duplantier v. Wilkins*, 19 La. Ann. 112) and counsel fees are not recoverable, unless such fees are included

in the memorandum or bill of costs (*McKinney v. Roberts* (Cal.), 8 Pac. 3).

Where, under any statute or rule of court costs depend on facts not ascertainable from the record of the case, the cost bill should itemize and charge so that the opposing party may know what is claimed. *Potwin v. Brashear*, 9 Wash. 460, 37 Pac. 710.

In case of several defendants, the fact that the items are stated to be for services performed for both defendants and not for one alone, would not authorize the court to strike these items from the cost bill. *Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210.

35. *Wallen v. McHenry*, 2 Yerg. (Tenn.) 310; *Hopkins v. Godbehire*, 2 Yerg. (Tenn.) 241. But the abbreviation of the items will not affect the validity of the execution as to the principal debt. *Atkinson v. Micheaux*, 1 Humph. (Tenn.) 312, 319; *Hopkins v. Waterhouse*, 2 Yerg. (Tenn.) 230.

36. *Harrison v. Thompson*, 9 Ga. 310; *Peters v. State*, 9 Ga. 109.

That master's fees are itemized as stenographer's fees, is immaterial, if the amount is correct under the statute. *Harris v. Schilling*, 108 Ill. App. 116.

37. Idaho.—*Stickney v. Berry*, 7 Idaho 303, 62 Pac. 924. Mich.—*Jeffery v. Hursch*, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7. N. Y.—*Ehle v. Bingham*, 4 Hill 595. Pa.—*Baumgardner v. Shoff*, 2 Del. Co. 76; *Brown v. Brown*, 12

Sheriff's Fees.—A memorandum of the items of the sheriff's fees for subpoenaing are not sufficiently set out in the bill of costs unless it shows upon whom the subpoenas were served, where they were served, and the number of miles traveled in making the service.³⁸

c. **Verification.**—A cost bill or memorandum must be verified,³⁹ and in as specific and formal a manner as a pleading.⁴⁰

As Evidence.—A verified memorandum of costs is *prima facie* evidence of the correctness of the items of disbursements,⁴¹ and the bur-

Lanc. Law Rev. 114; *Herr v. Kenner*, 1 Lanc. Law Rev. 58. **Tenn.**—*Hopkins v. Godbehire*, 2 Yerg. 241. **Utah.**—*Garr v. Cranney*, 25 Utah 193, 70 Pac. 853; *Cole v. Ducheneau*, 13 Utah 42, 44 Pac. 92.

Where a cost bill contained the name of each witness and his place of residence, this being followed by certain figures in two columns, one designated "days" and the other "mileage," and by the total amount claimed by the witness, the court held that this manner of stating the items was insufficient in that it did not advise the other party how many days each were in attendance or how many miles each traveled. *Garr v. Cranney*, 25 Utah 193, 70 Pac. 853.

"The charge of each witness should be separately taxed, and thus carried into the bill of costs accompanying the execution," so as to give the defendant notice of each item of costs he is required to pay. *Houston, etc., R. Co. v. Jones*, 46 Tex. 133.

38. *Brown v. Brown*, 12 Lanc. Bar (Pa.) 114; *Cole v. Ducheneau*, 13 Utah 42, 44 Pac. 92.

The plaintiff filed the following taxed bill of costs: "Marshal's fees, subp. wit. for plaintiff, \$43.00." The names of thirteen witnesses appear in the taxed bill of costs, and the sum of \$125.40 is taxed for their travel and attendance. It appears from it that these thirteen witnesses traveled from one to fourteen miles each, and were present in court from five to six days; but it nowhere appears in the taxed bill of cost or elsewhere in the record where any of these witnesses resided. The memorandum of the items of the sheriff's fees was not sufficiently set out. As the witnesses are entitled to mileage only one way, their place of residence should be given. *Cole v. Ducheneau*, 13 Utah 42, 44 Pac. 92.

When it does not affirmatively appear that an item for \$36.90, sheriff's fees for serving summons, was excessively incorrect, it is no objection that it should be itemized to authorize its allowance. *Theresa Village Mut. Fire Ins. Co. v. Wisconsin Cent. R. Co.*, 144 Wis. 321, 128 N. W. 103.

39. **U. S.**—*Jerman v. Stewart*, 12 Fed. 271 (Rev. St., §984, applies to other than government cases); *Beckwith v. Easton*, 4 Ben. 357, 3 Fed. Cas. No. 1,212. **Cal.**—*Yorba v. Dobner*, 90 Cal. 337, 27 Pac. 185. **Minn.**—*Andrews v. Cressy*, 2 Minn. 67. **Mont.**—*Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 102 Pac. 988. **N. Y.**—*Rogers v. Rogers*, 2 Paige 458. **Ore.**—*Walker v. Goldsmith*, 16 Ore. 161, 17 Pac. 865; *Cross v. Chester*, 4 Ore. 114.

Costs not paid are not disbursements, within the rule requiring verification. *Cureton v. Westfield*, 24 S. C. 457.

The Affiant.—Even though the statute requires verification by a party, an attorney may verify. *Burnham v. Hayes*, 3 Cal. 115, *followed*, in *Morris v. Rodgers*, 26 Ore. 577, 38 Pac. 931.

40. *Genesee County Sav. Bank v. Ottawa Circuit Judge*, 54 Mich. 305. 20 N. W. 53; *Crawford v. Abraham*, 2 Ore. 163. See *Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 102 Pac. 988.

In **Michigan**, under Comp. Laws, §7425, an affidavit is not sufficiently specific in stating that the expense of drawing and engraving a map is "necessary to the proper preparation of this case for hearing." *Maxwell v. Bay City Bridge Co. (Mich.)*, 51 N. W. 963.

41. *Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 102 Pac. 988, 992; *Brande v. Babcock Hdw. Co.*, 35 Mont. 256, 88 Pac. 949, 119 Am. St. Rep. 858; *King v. Allen*, 29 Mont. 5, 73 Pac. 1107; *Gause v. Edminston*, 35 Tex. 69, *citing Crawford v. Crain*, 19 Tex. 145, 146. See also *Lockhart v. Lytle*, 51

den of overcoming this *prima facie* showing is upon the objecting party.⁴²

d. *Objections and Counter Affidavits.*—Objections to any items in a cost bill must be made before the clerk or other taxing officer at the time and in the manner prescribed by statute or rule of court, in order to be available on appeal,⁴³ and the parties filing the objections are bound by the specifications in their notice to the adverse party and cannot go out of them.⁴⁴

Tex. 601, 604; Houston, etc. R. Co. v. Jones, 46 Tex. 133; Morgan v. North Texas Nat. Bank (Tex. Civ. App.), 34 S. W. 138.

In the case of *King v. Allen*, 29 Mont. 5, 73 Pac. 1107, Mr. Chief Justice Brantly, speaking for this court, said: "The rule is well established by the authorities that where, under a statute or rule of court, a requirement is made that, in order to recover costs, the party claiming them must, within a specified time, serve upon his adversary and file with the clerk a memorandum of the items thereof, duly verified, such memorandum is *prima facie* evidence that the items were necessarily expended, and are properly taxable, unless as a matter of law, they appear otherwise upon the face. The burden of overcoming this *prima facie* case rests upon the adverse party, and the party filing the memorandum is required to furnish further proof only in rebuttal. Hence upon the trial of a motion to tax costs, if the adverse party does not overturn the *prima facie* case made by the verified memorandum the objection should be overruled." *Brande v. Babcock Hdw. Co.*, 35 Mont. 256, 88 Pac. 949.

The attorney's affidavit to a memorandum of costs, unless contradicted, should control the court in taxing the costs. *Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210.

In *Massachusetts*, the certificate of a witness is usually conclusive when no suspicions attend it without affidavit. *Cook v. Holmes*, 1 Mass. 295, followed and cited in *Primrose v. Fenno*, 113 Fed. 375.

42. *Cal.*—*Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 Pac. 536. *Idaho.* *Griffith v. Montandon*, 4 Idaho 75, 35 Pac. 704. *Mont.*—*Ismar v. Altenbrand*, 42 Mont. 188, 111 Pac. 849; *Brande v. Babcock Hdw. Co.*, 35 Mont. 263, 88

Pac. 949; *King v. Allen*, 29 Mont. 5, 73 Pac. 1107.

The burden is upon the party moving to strike an item from the memorandum of costs to show that the charge is not a legal and proper one, because an item included in the verified memorandum of the costs, properly filed, is *prima facie* correct. *Meyer v. San Diego*, 132 Cal. 35, 64 Pac. 124.

43. *Minn.*—*Davidson v. Lamprey*, 17 Minn. 32. *Ore.*—*Hammer v. Downing*, 39 Ore. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30; *Hislop v. Moldenhauer*, 24 Ore. 106, 32 Pac. 1026; *Cross v. Chichester*, 4 Ore. 114. *Wis.*—*State v. Wertzel*, 84 Wis. 344, 54 N. W. 579; *Kirst v. Wells*, 47 Wis. 56, 1 N. W. 357.

Verification of Objections.—Statutes requiring objections to items in the cost bill to be verified, are liberally construed; accordingly a supplemental affidavit, filed at the same time the cost bill is filed, explaining the controverted items is sufficient. *Heywood Bros. v. Doernbecher Mfg. Co.*, 48 Ore. 359, 87 Pac. 530.

Time of Filing Objections.—An objection to an item on the ground of excessiveness comes too late, if not filed until three months after taxation. *Moritz v. Herskovitz*, 46 Wash. 192, 89 Pac. 560.

The time allowed by law to object to a cost bill is a limitation upon the right to controvert any item thereof and is a statutory provision designed for the benefit of the prevailing party to a judgment. *Hammer v. Downing*, 39 Ore. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30. See *Com. v. Selznick*, 20 Pa. Co. Ct. 128.

The party prejudiced, and not a third person, must interpose objections. *Von Cotzhausen v. H. W. Johns Mfg. Co.* (Wis.), 82 N. W. 716.

44. *State v. Allen*, 26 N. J. L. 145,

Counter Affidavits. — When the items of a cost bill are denied by the affidavit of the party against whom such costs are claimed, the onus of proof is on the party claiming the costs.⁴⁵

7. Items of Costs Taxable. — a. *General Rule.* — Costs *eo nomine* being entirely dependent upon statute, the right to tax any particular item must be derived from some statute, conferring the right in no uncertain terms.⁴⁶ Or to state the rule more fully, nothing can be taxed as costs in an action except such items as are prescribed by statute or are expressly authorized by the consent or agreement of the parties.⁴⁷ Long continued usage or inveterate practice in the clerk's office will not justify the taxation of an item for which there is no legislative warrant.⁴⁸ But if from the true intent and spirit of a

holding that the successful party in a motion to strike out objectionable items is entitled to the costs of the proceeding.

General objections will not justify a review of specific items. *Von Cotzhausen v. H. W. Johns Mfg. Co. (Wis.)*, 82 N. W. 716.

45. *Griffith v. Montandon*, 4 Idaho 75, 35 Pac. 704.

46. **U. S.**—*United States v. McMillan*, 165 U. S. 504, 17 Sup. Ct. 395, 41 L. ed. 805; *United States v. Sanborn*, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. ed. 112; *United States v. Waters*, 133 U. S. 208, 10 Sup. Ct. 249, 33 L. ed. 594; *United States v. Averill*, 130 U. S. 335, 9 Sup. Ct. 546, 32 L. ed. 977; *Flanders v. Tweed*, 15 Wall. 450, 21 L. ed. 203; *The Baltimore*, 8 Wall. 377, 19 L. ed. 463. **Ala.**—*Henry v. Murphy & Co.*, 54 Ala. 246. **Cal.**—*Williams v. Atchison*, etc. R. Co., 156 Cal. 140, 103 Pac. 885. **Ill.**—*Wilson v. Clayburgh*, 215 Ill. 506, 74 N. E. 799; *Roby v. Chicago Title, etc. Co.*, 194 Ill. 228, 62 N. E. 544; *Brueggemann v. Young*, 128 Ill. App. 200. **Me.**—*Porteous v. Miller*, 107 Me. 155, 77 Atl. 710. **Mont.**—*Montana Ore Purchasing Co. v. Boston Min., etc. Co.*, 27 Mont. 288, 70 Pac. 1114. **N. J.**—*Fitzsimmons v. Bonavita*, 77 N. J. Eq. 277, 76 Atl. 313, 315; *Booraem v. North Hudson County R. Co.*, 44 N. J. Eq. 70, 14 Atl. 106. **Ohio.**—*Farrier v. Cairns*, 5 Ohio 45; *Bell v. Bates*, 3 Ohio 380; *State v. Comrs.*, 14 Ohio C. C. 26, 7 Ohio Cir. Dec. 351, *affirming* 6 Ohio Dec. 240; *State v. Coates*, 8 Ohio N. P. 682, 11 Ohio Dec. 670. **S. D.**—*Elfring v. New Birdsall Co.*, 17 S. D. 350, 96 N. W. 703.

A public officer claiming fees should show clear authority of law. *Ward v.*

Barnes, 95 Ga. 103, 22 S. E. 133; *Thomas v. Thomas*, 61 Ga. 70; *Stamper v. State*, 11 Ga. 643.

In Ohio the successful party in an ordinary action recovers only the fees of witnesses and court officers, leaving his own personal expenses in preparing the case, in attending the trial, and his attorney's fees for preparation and for trial, to be paid without reimbursement. *Pope v. Pollock*, 46 Ohio St. 367, 21 N. E. 356; *Watson v. Watson*, 21 Ohio C. C. 249, 11 Ohio Cir. Dec. 463.

Adversary Costs Not Taxed.—*Russell v. Giles*, 31 Ohio St. 293; *Bliss v. Long*, 5 Ohio 276; *Crull v. Morgan*, 11 Ohio C. C. 537, 5 Ohio Cir. Dec. 274; *State v. Coates*, 8 Ohio N. P. 682, 11 Ohio Dec. 670; *Naper v. Bowers*, *Wright (Ohio)* 692.

Costs on execution have no place in the cost bill; the sheriff adds them as they are made. *Potwin v. Blashear*, 9 Wash. 460, 37 Pac. 710.

47. *Schawacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935; *Langan v. Whalen*, 77 Neb. 658, 110 N. W. 668.

Costs as between party and party are confined to the costs allowed by the free bill, differing from costs as between solicitor and client, which include all reasonable expenses and counsel fees. *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *In re Paschal*, 10 Wall. (U. S.) 483, 19 L. ed. 992.

Fees of guardian ad litem are not allowable as costs under the usual costs statute. *Warner v. Warner*, 83 Kan. 548, 112 Pac. 97; *Prest v. Black*, 63 Kan. 682, 66 Pac. 1017.

48. *Booraem v. North Hudson County R. Co.*, 44 N. J. Eq. 70, 14 Atl. 106.

statute it appears that an item is taxable it may be allowed, though not designated in terms.⁴⁹

If the amount of costs is not specifically limited by statute, it may be any sum the court sees fit to give.⁵⁰ In some states the statutes restrict the recovery of costs to those necessarily incurred.⁵¹

b. *Particular Items.* — (I.) *Allowance to Attorney.* — (A.) *DEPENDENT UPON STATUTE.* — The right to allow attorney's fees as costs in the cause, is regulated and controlled by the statutes in the various jurisdictions, and the decisions of courts outside the jurisdiction must be resorted to with caution.⁵²

Stipulations to pay attorney's fees as a part of the costs of an action are invalid in some states,⁵³ but in others the agreement of the parties in such cases will be accepted by the court, unless the fee is clearly excessive.⁵⁴

Unless under special statutory provision⁵⁵ or by express agreement of

49. *Schawacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935, compensation of referees. *etc., Co. v. Sennt*, 4 Ohio N. P. 346, 7 Ohio Dec. 224.

50. *Aikman v. Harsell*, 31 Hun (N. Y.) 634, 636, *affirmed*, 98 N. Y. 186; *Senter v. Petheram*, 118 N. Y. Supp. 347. But see *Hayes v. Douglas Co.*, 92 Wis. 429, 65 N. W. 482.

51. *Griffith v. Montandon*, 4 Idaho 75, 35 Pac. 704; *Swartzell v. Rogers*, 3 Kan. 375.

Costs of unnecessary papers not only cannot be taxed against the unsuccessful defendant, but the prevailing party will be held liable for such costs. *Sommercamp v. Catlow*, 1 Idaho 716; *Crippen v. Brown*, 11 Paige (N. Y.) 628.

52. *Aldrich v. Maher*, 153 Ill. App. 413.

In California, attorney's fees can be allowed only for services rendered and for the value of such services. *Graham v. Light*, 4 Cal. App. 400, 88 Pac. 373.

Taxation of Attorney's Fee in Supreme Court. — A proceeding in the United States Supreme Court, "under its original jurisdiction, against a judge of an inferior court of the United States, to obtain a writ of mandamus requiring him to proceed in a cause pending in court before him, is a civil cause, and a docket fee is, therefore, taxable in favor of the attorney of the prevailing party as part of the costs." *Ex parte Hughes*, 114 U. S. 548, 5 Sup. Ct. 1008, 29 L. ed. 281.

53. *Leavans v. Ohio Nat. Bank*, 50 Ohio St. 591, 34 N. E. 1089; *State v. Taylor*, 10 Ohio 378; *Permanent Sav.*,

If parties in their contract stipulate for the payment of the "expenses of collecting the debt" the court may instruct the jury to find attorney's fees as reasonable costs. *Roberts v. Palmore*, 41 Tex. 617.

But such a stipulation will not control in favor of a party who has broken the contract, although suit is brought and a recovery had in part on such contract. *Park v. Kribs*, 24 Tex. Civ. App. 650, 60 S. W. 905.

Parol evidence cannot be allowed to show that a written agreement to pay costs was intended to include attorney's fees. *McDonald v. Page*, *Wright* (Ohio) 121.

54. Cal. — *Miller v. Kehoe*, 107 Cal. 340, 40 Pac. 485. Md. — *Hollander v. Central Metal, etc., Co.*, 109 Md. 131, 71 Atl. 442. Mo. — *Baldauf v. Peyton*, 135 Mo. App. 492, 116 S. W. 27.

55. Ark. — *Kansas City So. R. Co. v. Marx*, 72 Ark. 357, 80 S. W. 579. Cal. — *Caffey v. Mann*, 3 Cal. App. 124, 84 Pac. 424. Ill. — *Hopkins v. O'Gara Coal Co.*, 140 Ill. App. 282. Ia. — *Van Buren County Sav. Bank v. Rockwell*, 134 N. W. 424; *Hurni v. Sioux City Stockyards Co.*, 138 Iowa 475, 114 N. W. 1074. N. J. — *Diocese of Trenton v. Toman* (N. J. Eq.), 70 Atl. 881. N. Y. — *House v. Amsdell Brew. Co.*, 133 App. Div. 486, 117 N. Y. Supp. 796; *Dollard v. Koronsky*, 61 Misc. 392, 113 N. Y. Supp. 793, *affirmed*, 133 App. Div. 896, 118 N. Y. Supp. 1103. Ohio. — *Coal Co. v. Rosser*, 53 Ohio St. 12, 41 N. E. 263.

the parties, it is improper to make an allowance of attorney's fees."

Wash.—*Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 105 Pac. 825.

One applying to have an attorney's fee taxed as costs under the statute has the burden of making complete proof, of his right and of the amount. *Sanitary Dist. of Chicago v. Curran*, 132 Ill. App. 241.

Attorneys from foreign states associated with local counsel may also claim their fees, if allowed to licensed attorneys within the state. *Baldauf v. Peyton*, 135 Mo. App. 492, 116 S. W. 27.

A school teacher suing for wages is not a laborer, clerk or servant within the meaning of a statute allowing either of the latter to tax an attorney's fee. *School Dist. No. 94 v. Gauthier*, 13 Okla. 194, 73 Pac. 954.

In Texas, a reasonable attorney's fee may be taxed in favor of a non-resident cited by publication and not appearing, an attorney being appointed by the court to represent him. *Williams v. Sapieha*, 94 Tex. 430, 61 S. W. 115.

Liability of Executor.—Solicitor's fees ordered to be paid by an executor as such, are payable from the estate of the testator. *Lewis v. Sedgwick*, 223 Ill. 213, 79 N. E. 14.

In Georgia, under Civ. Code, 1895, §3796, unless the defendant was stubbornly litigious, or had acted in bad faith, he is not liable for attorney's fees. *Macon, etc. R. Co. v. Stewart*, 125 Ga. 88, 54 S. E. 197; *Edwards v. Kellogg*, 121 Ga. 373, 49 S. E. 279; *Macon, etc. R. Co. v. Stewart*, 120 Ga. 890, 48 S. E. 354; *Traders' Ins. Co. v. Mann*, 113 Ga. 381, 45 S. E. 426; *Mohr-Weil Lumb. Co. v. Russell*, 109 Ga. 579, 34 S. E. 1005; *Robinson v. Holst*, 96 Ga. 19, 23 S. E. 76.

But something more must be proved than refusal to pay without suit. *Pferdmenges, Prever & Co. v. Butler, Stevens & Co.*, 117 Ga. 400, 43 S. E. 695.

In New Jersey the chancery act (P. L. 1902, p. 540, §91) provides that it shall be lawful to include in the complainant's costs, to be collected as part thereof, a counsel fee to be fixed by the chancellor on final decree. This is something that may or may not be done, in the discretion of the chancellor, in cases where costs are given

against a defendant; but where the complainant does not recover costs he cannot have a counsel fee awarded. *Diocese of Trenton v. Toman* (N. J. Eq.), 70 Atl. 881.

56. **U. S.**—*Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164; *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 32 Fed. 684. **Ala.**—*Barnett v. Tedescke*, 154 Ala. 474, 45 So. 904. **Cal.**—*Hays v. Windsor*, 130 Cal. 230, 62 Pac. 395. **Colo.**—*Spencer v. Murphy*, 6 Colo. App. 453, 41 Pac. 841. **Ga.**—*Mohr-Weil Lumb. Co. v. Russell*, 109 Ga. 579, 34 S. E. 1005; *Wall v. Johnson*, 88 Ga. 524, 15 S. E. 15; *Ball v. Vason*, 56 Ga. 264; *Southern Bell Tel., etc. R. Co. v. Beach*, 8 Ga. App. 720, 70 S. E. 137. **Ill.**—*Eimer v. Eimer*, 47 Ill. 373; *Constant v. Matteson*, 22 Ill. 546; *Bortree v. Macon*, 121 Ill. App. 111; *Washburne v. Burke*, 84 Ill. App. 587. **La.**—*Jones v. School Board*, 140 Iowa 179, 118 N. W. 265; *Grapes v. Grapes*, 106 Iowa 316, 76 N. W. 796; *Denby v. Fie*, 106 Iowa 299, 76 N. W. 702; *Boardman v. Marshalltown Groc. Co.*, 105 Iowa 445, 75 N. W. 343; *Newall v. Sanford*, 13 Iowa 463; *Blake v. Blake*, 13 Iowa 40. **La.**—*Rabb v. Pilot*, 52 La. Ann. 1534, 28 So. 120. **Md.**—*Hollander v. Central Metal, etc. Co.*, 109 Md. 131, 71 Atl. 442; *Hamilton v. Trundle*, 100 Md. 276, 59 Atl. 719. **Mass.**—*Rowland v. Maddock*, 183 Mass. 360, 67 N. E. 347. **Mo.**—*Berry v. Rood*, 209 Mo. 662, 108 S. W. 22; *Albers v. Merchants' Exchange*, 138 Mo. 140, 39 S. W. 473; *City of St. Louis v. Meintz*, 107 Mo. 611, 18 S. W. 30. **Neb.**—*Hering v. Simon*, 77 Neb. 60, 108 N. W. 154; *Otoe Co. v. Brown*, 16 Neb. 394, 20 N. W. 274, 641; *Hardy v. Miller*, 11 Neb. 395, 11 N. W. 475; *Dow v. Updike*, 11 Neb. 95, 7 N. W. 857. **N. D.**—*Casseday v. Robertson*, 125 N. W. 1045; *Power v. King*, 18 N. D. 600, 120 N. W. 543. **Ohio.**—*Pope v. Pollock*, 46 Ohio St. 367, 21 N. E. 356; *Second Nat. Bank v. Hemingrav*, 34 Ohio St. 381; *In re Seeger*, 7 Ohio N. P. 207, 1 Ohio Dec. 113; *Hopple v. Hopple*, 14 Ohio Dec. (N. P.) 285; *Permanent Sav., etc. Co. v. Sennt*, 4 Ohio N. P. 346, 7 Ohio Dec. 224; *McDonald v. Page, Wright*, 121 Pa.—*Grubbs' Appeal*, 82 Pa. 23; *Kaufmann v. Kirker*, 22 Pa. Super. 201; *Porter v. English*, 1 Phila. 85. **Va.**—*Rixey*

If attorney's fees cannot be taxed as costs *a fortiori* the costs of a proceeding to ascertain the amount of such fees cannot be taxed.⁵⁷ And where an attorney is a party to an action, and obtains a judgment in his favor, he is entitled to the same costs, including attorney's fees, as if he had conducted the action as attorney for some other person, and not merely to the costs which another not an attorney suing or defending in person would be entitled to.⁵⁸ But the general rule is that an attorney who acts for himself is not entitled to a counsel fee against his adversary.⁵⁹

While as a general rule an executor, administrator, guardian or trustee who is an attorney, cannot recover for professional services rendered the estate, this rule does not apply when such costs are not payable out of the trust funds.⁶⁰

(B.) AMOUNT. — The amount allowable as attorney's fees, where such fees are allowable, should be governed by the doctrine of *quantum meruit*, and the amount involved should not control.⁶¹ Where allowed

v. Rixey, 103 Va. 414, 49 S. E. 586. Wash.—*Larson v. Winder*, 14 Wash. 647, 45 Pac. 315.

Under Statute of Gloucester.—The statute of Gloucester, "it has been said 'was the original of costs *de incremento*' and that under this statute, 'when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause.'" *Cleveland, etc. R. Co. v. Bartrom*, 11 Ohio St. 457.

In condemnation proceedings attorney's fees are not a proper item. *Hester v. Comrs.*, 84 Mich. 450, 47 N. W. 1097; *St. Louis v. Meintz*, 107 Mo. 611, 18 S. W. 30.

On collection of inheritance tax directed by the county court the fees of the attorney employed in making the collection will be taxed. *Harrison v. Johnston*, 109 Tenn. 245, 70 S. W. 414.

On a rule for restitution attorney's and argument fee allowed. *McChesney v. Rogers*, 8 N. J. L. 272.

In Illinois "solicitor's fees under no circumstances, aside from the agreement of the parties, can be allowed or taxed as costs in the cause. *Wilson v. Clayburgh*, 215 Ill. 506. They are not taxable against a party to the cause. The extreme, on this proposition, to which the courts of this state have gone, is the allowance of solicitor's and attorney's fees out of trust funds, where such funds have been the object of protection through litigation eventuating in the decree

for judgment in the cause." *Aldrich v. Maher*, 153 Ill. App. 413.

In a federal court of equity counsel fee may be allowed in the discretion of the court where there has been a direct benefit. *Cuyler v. Atlantic, etc. R. Co.*, 132 Fed. 570.

57. *Aldrich v. Maher*, 153 Ill. App. 413, fees of master on reference.

Such fees are not included in "expenses," (*Marshall Fish Co. v. Hadley Falls Co.*, 5 Cush. (Mass.) 602); nor in "costs." (*N. Y.—City of Lockport v. Fitts*, 39 Hun 221. *N. D. Power v. King*, 18 N. D. 600, 120 N. W. 543; *Engholm v. Ekrem*, 18 N. D. 185, 119 N. W. 35. *Utah.—Smith v. Fisher*, 3 Utah 25.)

58. 1 Archb. Pr. 80, and the following cases: *State v. Berry*, 42 N. J. L. 60; *Flaacke v. City of Jersey*, 33 N. J. Eq. 57; *Jervis v. Dewes*, 4 Dowl. (Eng.) 764; *Parsloe v. Foy*, 2 Dowl. P. C. (Eng.) 181; *Leaver v. Whalley*, 2 Dowl. (Eng.) 80.

59. Cal.—*Patterson v. Donner*, 48 Cal. 369. Ill.—*Garrett v. Peirce*, 74 Ill. App. 225. La.—*Ealer v. McAllister & Co.*, 19 La. Ann. 21. N. J.—*Ordinary v. Connolly*, 75 N. J. Eq. 521, 72 Atl. 363; *Flaacke v. Jersey City*, 33 N. J. Eq. 57. N. Y.—*Jordans v. Van Hoesen*, 18 Wend. 648.

60. *Ordinary v. Connolly*, 75 N. J. Eq. 521, 72 Atl. 363.

61. *In re Assignment of Reefer*, 6 Ohio N. P. 338, 9 Ohio Dec. 326.

In Indiana, under Rev. St., §824, an attorney fee of \$2.50 for each defend-

the fee is presumed to be reasonable in the absence of any showing to the contrary.⁶²

(II.) **Statutory Costs.**—The different state statutes provide what items are taxable and the amount taxable as costs, and similar provision is made in the United States Revised Statutes.⁶³ Only the costs therein described can be recovered as costs against the opposite party.⁶⁴

(III.) **Officers' Fees.**—(A.) **IN GENERAL.**—Officers are not entitled to receive fees or other compensation for any service rendered by them

ant is not taxable until the deposition has both been taken and admitted in evidence. *Barnardin v. Northall*, 83 Fed. 241.

In *New Jersey* court of chancery a solicitor cannot be allowed more than three term fees. *Pearman v. Gould* (N. J.), 8 Atl. 285.

Under §7 of the Anti-Trust Act of July 2, 1890, allowing a successful plaintiff to recover damages and the costs of the suit, including a reasonable attorney's fee, for a violation of the provision of the act, the amount of the attorney's fee to be allowed as costs is within the discretion of the trial court; and an allowance of \$750 as counsel fee was held reasonable where the trial took five days, notwithstanding the fact that the verdict rendered was for \$500, it appearing from the evidence that \$750 to \$1000 would be a reasonable fee. *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. ed. 608.

62. *Hurni v. Sioux City Stockyards Co.*, 138 Iowa 475, 114 N. W. 1074.

The trial court is not required to take testimony as to the reasonable amount of an attorney's fee which is to be taxed as part of the costs in the absence of any offer of evidence on the subject. *Hurni v. Sioux City Stockyards Co.*, 138 Iowa 475, 114 N. W. 1074.

63. **Docket fee** of twenty dollars, where there is a jury (civil or criminal) or before referees, or on a final hearing in equity or admiralty, is taxable. United States Rev. St., §824; Act, Feb. 26, 1853, ch. 80, 10 St. at L. 161, 162; *United States v. Sanborn*, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. ed. 112; *Flanders v. Tweed*, 15 Wall. (U. S.) 450, 21 L. ed. 203. See *United States v. Southern Pac. R. Co.*, 172 Fed. 909.

Where judgment is rendered without

a jury, ten dollars. United States Rev. St. §824; *Flanders v. Tweed*, 15 Wall. (U. S.) 450, 21 L. ed. 203.

U. S. Rev. St., §§823 and 824, (U. S. Comp. St. 1901, p. 632), provide that in interlocutory proceedings, attorneys shall be allowed certain fees, and no others. On the subject of attorney fees this act controls. It makes no provision for attorney fees on motions. Hearing on a motion is not a final hearing of the cause, upon which the statutory docket fee may be taxed. Therefore, no attorney fee can be allowed on a motion to set aside service of process. *Michigan Aluminum Foundry Co. v. Aluminum Co. of America*, 190 Fed. 903.

"There is a provision for an attorney fee of \$2.50 for each deposition taken and admitted in evidence in a cause." This means a trial or final hearing, and not an interlocutory hearing. *Stimpson v. Brooks*, 3 Blatchf. 456, Fed. Cas. No. 13,454; *Nail Factory v. Corning*, 7 Blatchf. 16, Fed. Cas. No. 14,197; *Spill v. Manufacturing Co.* (C. C.), 28 Fed. 870." *Michigan Aluminum Foundry Co. v. Aluminum Co. of America*, 190 Fed. 903.

In cases at law when the cause is discontinued, and for *scire facias*, and other proceedings on recognizances, a fee of five dollars may be taxed. U. S. Rev. St. 824. And for each deposition taken and admitted in evidence in a cause, two dollars and fifty cents. U. S. Rev. St., §824; *Missouri v. Illinois*, 202 U. S. 598, 26 Sup. Ct. 713, 50 L. ed. 1160. For each witness examined before an examiner the same fee may be charged. *Missouri v. Illinois*, 202 U. S. 598, 26 Sup. Ct. 713, 50 L. ed. 1160.

64. *United States v. Waters*, 133 U. S. 208, 10 Sup. Ct. 249, 33 L. ed. 594; *Flanders v. Tweed*, 15 Wall. (U. S.) 450, 21 L. ed. 203.

further than is specifically provided for by statute.⁶⁵

(B.) AUDITORS AND MASTERS' FEES.—The fees of auditors⁶⁶ and masters in chancery,⁶⁷ are taxable as part of the costs in the case and are payable by the party at whose instance such officer was appointed.⁶⁸

(C.) CLERK'S FEES.—The right of a clerk of court to recover his fees,⁶⁹ as well as the amount recoverable, is regulated by statute in

65. *Ga.*—Ward *v.* Barnes, 95 *Ga.* 103, 22 S. E. 133; Thomas *v.* Thomas, 61 *Ga.* 70. *Ore.*—Pugh *v.* Good, 19 *Ore.* 85, 23 *Pac.* 827. *Tenn.*—Johnson *v.* State, 94 *Tenn.* 499, 29 S. W. 963; Morgan *v.* Pickard, 86 *Tenn.* 208, 9 S. W. 690; State *v.* Martin, 10 *Lea* 549.

It is only where an officer of court performs a service imposed upon him by law that his fees may be taxed and recovered from the losing party, unless he performs such service as agent. Alexander *v.* Harrison, 2 *Ind. App.* 47, 28 N. E. 119.

By the act of 1853 costs to officers are excluded where they are not specifically appointed by statute. Thorne *v.* The Victoria, 23 *Fed. Cas.* No. 13,988.

Official Search by Proper Officer of Another State.—"While §3256 of the Code does not, in terms, mention fees paid for an official search, yet the section as a whole, by necessary implication, includes such fees among the disbursements which may be taxed; and it was so held even before the section was amended so as to provide for the fees of unofficial searches." Rose *v.* Swarthout, 73 *Misc.* 583, 133 N. Y. *Supp.* 557, 559, citing *Equitable Life Assur. Soc. v. Hughes*, 125 N. Y. 106, 112, 26 N. E. 1, 11 L. R. A. 280.

Fees of officers are included in the term "costs" in a statute giving costs in general, and are properly taxable as disbursements in the case. *Pennsylvania R. Co. v. Keiffer*, 22 *Pa.* 356.

66. *Ga.*—Brantley *v.* Greer, 71 *Ga.* 12; Green *v.* Frank, 63 *Ga.* 78. *Ky.* Clay *v.* Miller, 2 *Litt.* 279. *Md.*—Dorsey *v.* Hammond, 1 *Bland* 463. *Mass.* Lincoln *v.* Taunton Copper Mfg. Co., 13 *Allen* 276.

Accounts of Long Standing.—Baker *v.* Milde (*Tex. Civ. App.*), 33 S. W. 152.

The federal practice in Massachusetts is to tax against the defeated party the expenses of an auditorship not borne by the public authorities. *Primrose v. Fenno*, 113 *Fed.* 375.

Relationship.—The fact that the judge is related to the auditor within the fourth degree of affinity does not disqualify him from awarding the auditor costs, since he is not a party to the cause. *Brantley v. Green*, 71 *Ga.* 11.

67. *Miller v. Calumet Lumber, etc. Co.*, 121 *Ill. App.* 56; *Timmonds v. Wheeler*, 12 *Ohio C. C.* 19, 5 *Ohio Cir. Dec.* 625, *affirmed*, 52 *Ohio St.* 641, 44 N. E. 1149.

A defendant whose contest made a master necessary, and who is defeated, must pay the master's fees. *Everett v. Haulenbeck*, 77 *Fed.* 12.

"Under Revisal 1905, §1268, fees of referees and commissioners to take depositions may be taxed against either party or apportioned among the parties in the discretion of the superior court. *Cobb v. Rhea*, 137 N. C. 298, 49 S. E. 161; *Field v. Wheeler*, 120 N. C. 263, 26 S. E. 812." *Horner v. Oxford Water & Elec. Co. (N. C.)*, 72 S. E. 624.

Amount.—The allowance by the court to the master of fifteen cents per hundred words for taking and reporting the testimony as a part of his fees is not error, even though the testimony was taken down and transcribed by a stenographer employed and paid by one of the parties. *Ward v. Clendenning*, 245 *Ill.* 206, 91 N. E. 1028, 1033; *Hoops v. Fitzgerald*, 204 *Ill.* 325, 68 N. E. 430.

Right of Master to Poundage.—*Harmon v. Boutall*, 1 *Clev. L. Rep.* 33, 4 *Ohio Dec. (Reprint)* 108.

68. *Appeal of St. Joseph's Orphan Asylum*, 38 *Pa.* 535.

69. *U. S.*—Cahn *v.* Qung Wah Lung, 28 *Fed.* 396. *Ga.*—Neisler *v.* Loudon, 83 *Ga.* 196, 9 S. E. 682; Ball *v.* Duncan, 30 *Ga.* 938. *Kan.*—Swartzell *v.* Rogers, 3 *Kan.* 380. *Mo.*—Shed *v.* Kansas, etc. R. Co., 67 *Mo.* 687. *N. Y.* Case *v.* Price, 17 *How. Pr.* 348.

In *Texas* the clerk cannot charge for filing papers issued by him. But as the affidavit of witnesses as to at-

the various jurisdictions.⁷⁰ But it may be stated as a general rule that the clerk cannot charge for services until they have been properly performed,⁷¹ or for performing services that the law does not require him to perform.⁷²

(D.) **SHERIFF'S FEES.**—Sheriff's fees can be taxed as part of the costs in the suit only when authorized by some statute in clear terms. But in most states certain fees are allowed,⁷³ even though not itemized in

tendance cannot be considered as being issued by the clerk, he is entitled to charge for issuing the same. *Texas, etc., R. Co. v. Parker*, 28 Tex. Civ. App. 116, 66 S. W. 583.

Clerk's fee for keeping record, if actually kept. *Stewart v. Crosby*, 15 Tex. 513.

Fees of Clerk for Summoning Venire. The increase in fees by virtue of §215 of the act of 1910, p. 247, to be paid to jurors summoned to serve in a district court, does not thereby authorize the clerk to demand more than \$5.75 for a venire of twelve men. *Shime v. District Court (N. J.)*, 81 Atl. 499.

70. *MacMurphy v. Dobbins*, 53 Ga. 294.

For taking a witness' affidavit of attendance and issuing a certificate to him the clerk may charge only fifty cents, which should be taxed as costs, and the witness not held responsible therefor. *Rev. St., art. 2268; Texas, etc. R. Co. v. Parker*, 28 Tex. Civ. App. 116, 66 S. W. 583.

Charge for endorsing costs upon an alias execution, disallowed in *Rice v. Turner*, 1 Yerg. (Tenn.) 447.

71. *Rowell v. Mulligan*, 4 Strobb. (S. C.) 349.

Not allowed for transcripts improperly made out. See *Code (Tenn.)* §4557; *Bass v. Shurer*, 2 Heisk. (Tenn.) 216; *McGavock v. Puryear*, 6 Coldw. (Tenn.) 34, 45; *State v. White*, 5 Sneed (Tenn.) 620.

The clerk cannot tax a fee for each paper in the transcript. *Shanks v. Pinkston (Okla.)*, 112 Pac. 757.

In Alabama, the appellant cannot object to being taxed for a transcript of the evidence on the ground that it is not properly abridged, where there was no agreement specifying that certain parts be omitted. *Stocks v. Gadsden (Ala.)*, 56 So. 134.

72. *Edmondson v. Mason*, 16 Cal. 386.

Filing Notice After Dismissal.—Caf-

fey v. Mann, 3 Cal. App. 124, 84 Pac. 424.

Return of Citation.—*Texas, etc., R. Co. v. Parker*, 28 Tex. Civ. App. 116, 66 S. W. 583, construing *Tex. Rev. St., art. 2453*.

73. *Colo.*—*First Nat. Bank v. Follett*, 46 Colo. 452, 104 Pac. 954. *Kan.* *Swartzell v. Rogers*, 3 Kan. 380. *Mo.* *Shed v. Kansas, etc. R. Co.*, 67 Mo. 687. *N. H.*—*Kivel v. Murray Cone Shoe Co.*, 73 N. H. 523, 63 Atl. 673, 674. *N. J.*—*Ferguson v. State*, 31 N. J. L. 289. *N. Y.*—*Case v. Price*, 17 How. Pr. 348; *s. c.*, 9 Abb. Pr. 111. *N. C.* *Walton v. Sugg*, 61 N. C. 98; *Biggerstaff v. Cox*, 46 N. C. 536.

"In *Averill v. Mathes*, 55 N. H. 617, 618, 'the charges of the officer for money expended in moving and keeping the property attached' were held to have been properly allowed in the trial court. See, also, *Ballou v. Smith*, 31 N. H. 413; *Bartlett v. Hodgdon*, 44 N. H. 472; *Smith v. Boynton*, 44 N. H. 529; *Ela v. Knox*, 46 N. H. 16, 88 Am. Dec. 179; *Rules of Court*, Nos. 57, 58, 71 N. H. 685." *Kivel v. Murray Cone Shoe Co.*, 73 N. H. 523, 63 Atl. 673.

Poundage only when money received on execution. *Fiedelvey v. Diserens*, 26 Ohio St. 312.

Transportation of Prisoners.—A sheriff is only entitled to be paid once for bringing a prisoner confined in jail into court for trial, and once for returning him. He cannot claim a fee for each time he may conduct a prisoner to and from the jail pending his trial. *Code*, §3696, acts 1880-81, p. 90; *Sapp v. Rozar*, 70 Ga. 722.

Mileage.—While a sheriff is not entitled to charge mileage for serving subpoenas outside his county, still if there is nothing in the record to show any charge for travel outside of it, the sheriff's official certificate will be taken as sufficient *prima facie* proof of services rendered in his county. *Reid*

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the bill of costs, where there is no showing that the item is incorrect.⁷⁴ But no extraordinary trouble will entitle the receiver to receive any greater fees than those allowed by law, either by contract or allowance of court.⁷⁵

Preservation of Property Seized. — Although no fees are fixable for the care of property held by a sheriff under attachment, the officer is nevertheless entitled to reimbursement for his charges therefor, and it is proper to tax these charges as part of the costs.⁷⁶

(E.) **RECEIVER'S FEES.** — The court may in its discretion tax the receiver's fees as part of the costs in the case.⁷⁷ But a court has no

v. Martin, 77 Wis. 142, 45 N. W. 820.

Sheriff's Fees for Serving Citation on Several Defendants.—Under the statute allowing sheriffs a fee for "serving each original citation in a civil suit," and providing that, where there are more defendants than one, he shall deliver to each defendant in person a true copy of the citation, an original citation containing the names of several defendants is served as many times as there are defendants served, and the sheriff is entitled in each instance to the fee allowed for "serving each original citation." *Rev. St.*, arts. 1218, 2460; *Moore v. McClure*, 26 Tex. Civ. App. 459, 64 S. W. 810, *affirmed* in 95 Tex. 682, no opinion.

Commissions for second sale on execution not allowed if sale illegal. *Wright v. Leclair*, 3 Iowa 221.

Summoning Witness. — Where the court allowed, as costs, a fee paid to a witness, it should have allowed the sheriff a fee for summoning the witness (*King v. Allen*, 29 Mont. 5, 73 Pac. 1107); but costs cannot be taxed on account of a sheriff's expense incurred in sending a message to a witness to attend a trial as a witness (*Egan v. Finney*, 42 Ore. 599, 72 Pac. 133).

Utah Comp. Laws 1888, §5433, provides that the sheriff shall be entitled to receive for serving a subpoena, for each witness summoned, twenty-five cents; for traveling, per mile, in serving such subpoena, in going only, twenty-five cents. *Cole v. Ducheneau*, 13 Utah 42, 44 Pac. 92.

⁷⁴ *Theresa Village Mut. Fire Ins. Co. v. Wisconsin Cent. R. Co.*, 144 Wis. 321, 128 N. W. 103, serving summons.

⁷⁵ *Forbes v. Morel*, R. (Ga.) 23.

In Oregon under §2340, if a sheriff renders services a constable could perform, he is entitled to only the fees allowed by constable. *Pugh v. Good*, 23 Pac. 827.

⁷⁶ *Jones v. Thomas*, 1 Sav. tawa Circ. Judge, 54 Minn. W. 53.

Expense incurred in keeping property until the levy is disallowed may be taxed against the plaintiff. *Smith v. Smith*, 37 Ga. 604. The fee can be taxed where the property was returned to the plaintiff to keep. *Cape Iroquois Boat Co. v. Bartholomess*, 6 Ill. 277.

Rent of Room.—*Walker v. Ill.* 277. But the clerk cannot tax expenses until their allowance is determined. *Man & Cashin Merc. Co.*, 15 Wyo. 450, 89 Pac. 745.

⁷⁷ *U. S.*—*Kell v. Trevelyan Timber Co. v. Black*, 570, 48 So. 870. *Cal.*—*Ephraim Bank*, 136 Cal. 646, 68 Mo.—*City of St. Louis v. Gaslight Co.*, 87 Mo. 223, 6 Mo. App. 237. *N. C.*—*Simmons*, 119 N. C. 556, 26 S. 119.

In Illinois it has been held that the receiver's compensation, and of his attorney, are not "costs." So, under the statute, the bill was dismissed by the court as a matter of right. *v. Martin*, 183 Ill. 467, 56 Ill. 362, 90 N. E. 750, 751; *Linchinery Co. v. Hughes*, 195

upon dismissing an action wherein a receiver has been appointed, to tax, as costs against plaintiffs, expenses of running the business placed in the receiver's hands, or for clerk hire, rent, or for any unpaid allowances to the receiver; these items being recoverable if at all, in an action for that purpose.⁷⁸

(F.) **REFEREE'S FEES.**—In some states referee's fees are made taxable by statute.⁷⁹

(IV.) **Jury Fees.**—Jury fees are not taxable as part of the costs,⁸⁰ unless under statutory provision.⁸¹

(V.) **Stenographer's Fees.**—To entitle a party to tax as costs the fees and charges of a stenographer, some statute allowing the same must be pointed out.⁸²

N. E. 186, 59 L. R. A. 673; Highley v. Deane, 168 Ill. 266, 48 N. E. 50.

Creditors of an insolvent corporation who have brought an unsuccessful suit to vacate attachment liens as fraudulent and collusive are properly taxed with the compensation of the receiver appointed in such suit at their instance. *Mallett v. Ft. Worth Pharmacy Co.*, 21 Tex. Civ. App. 267, 270, 51 S. W. 859, affirmed in 93 Tex. 667, no opinion; *Espuella Land, etc. Co. v. Bindle*, 11 Tex. Civ. App. 262, 32 S. W. 582.

78. *Walton v. Williams*, 5 Okla. 642, 49 Pac. 1022.

79. **Ia.**—*Keokuk County v. Howard*, 42 Iowa 29. **Mo.**—*Schowacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935; *Clark v. Hill*, 33 Mo. App. 116. **N. Y.** *Shultz v. Whitney*, 9 Abb. Pr. 71. **N. C.** *Worthy v. Brower*, 93 N. C. 492.

In **New York** upon a reference, provision is made for a referee's fees in the discretion of the court. *Anderson v. De Breakeleer*, 25 Misc. 343, 55 N. Y. Supp. 721.

Often regulated by stipulations which will be reasonably construed according to the intention of the parties. *Mark v. City of Buffalo*, 87 N. Y. 184; *Brick v. Fowler*, 61 How. Pr. (N. Y.) 153; *Bloodgood v. Bloodgood*, 59 How. Pr. (N. Y.) 42; *McDonald v. Bryant*, 73 Wis. 20, 40 N. W. 665; *Malone v. Rohy*, 62 Wis. 459, 22 N. W. 575.

Motion Necessary to Correction. *Dinsmore v. Smith*, 17 Wis. 20, where a judge took fees as referee.

80. *State v. Comrs.*, 6 Ohio Dec. 240, affirmed, 14 Ohio C. C. 26, 7 Ohio Cir. Dec. 351.

The board of a jury cannot be allowed as costs. *Irrgang v. Ott*, 9 Cal. App. 440, 99 Pac. 528.

81. **Ia.**—*State v. Vervayne*, 44 Iowa 621. **Kan.**—*State v. Kingsley*, 98 Pac. 276. **Ohio.**—*Robinson v. Kious*, 4 Ohio St. 594.

Even in case of special or struck juries (*Den v. Stiger*, 4 N. J. L. 360; *Dunn v. N. & C. R. Co.*, 3 Bart. (Tenn.) 415), a plaintiff will not be liable for costs of a special jury asked by defendant where the defendant prevailed on the pleadings (*Wright v. Wilmington R. Co.*, 2 Marv. (Del.) 141, 42 Atl. 440). Of course if the case is not tried by a jury, a jury fee cannot be taxed (*Hoard v. Bulkley*, 8 Ill. 154).

In *Freshour v. Hihn*, 99 Cal. 443, 34 Pac. 87, 89, when the case was set for trial the plaintiff waived a trial by jury, and the defendant stated that, while he did not demand a jury, he would not expressly waive the same. Upon the day fixed for the trial a jury was in attendance, and the bill of exceptions states that "the parties then announced that they had agreed to try the case without a jury; thereupon the court discharged the panel of jurors, and the case was tried by the court without a jury. The plaintiff did not pay any jury fees, nor incur any liability therefor, and he could not recover the jurors' attendance fees as costs."

82. **Idaho.**—*McDonald v. Burke*, 3 Idaho 995, 28 Pac. 440. **Ill.**—*Smyth v. Stoddard*, 203 Ill. 424, 67 N. E. 980. **Mass.**—*Boston Belting Co. v. Boston*, 183 Mass. 254, 67 N. E. 428. **Mo.** *Baldwin v. Boulware*, 82 Mo. App. 321; *Mechanics' & Traders' Bank v. Glaser Bros.*, 40 Mo. App. 371. **N. Y.**—*Anderson v. De Breakeleer*, 25 Misc. 343, 55 N. Y. Supp. 721. **S. C.**—*Hughes v.*

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The parties may make this a taxable item of costs by stipulation, if the law does not so recognize it, and the stipulation is binding on all competent parties who made it.⁸³

The expenses of transcribing stenographer's notes are allowed.⁸⁴ But such fees are properly allowed when the stenographic services are rendered in pursuance of a direction of the court. In some states, the losing party may be compelled to pay the stenographer who takes the testimony on the trial, if taxed with costs.⁸⁵

Edisto Cypress Shingle Co., 51 S. C. 1, 28 S. E. 2. **S. D.**—*Elfring v. New Birdsall Co.*, 17 S. D. 350, 96 N. W. 703. **Wash.**—*Bringgold v. City of Spokane*, 19 Wash. 333, 53 Pac. 368.

For statement of facts stenographer's fees cannot be allowed as costs. *Tingley v. Bellingham Broom Co.*, 5 Wash. 644, 33 Pac. 1055, 32 Pac. 737; *Brown v. Winehill*, 4 Wash. 98, 29 Pac. 927.

The cost of stenographer's minutes only as necessary to be used on the trial can be taxed as disbursements. *Vibbard v. Kinser Const. Co.*, 130 N. Y. Supp. 837. Minutes for use on previous trial are not taxable. *Herrmann v. Herrmann*, 88 App. Div. 76, 84 N. Y. Supp. 736; *Hudson v. Erie R. Co.*, 57 App. Div. 98, 68 N. Y. Supp. 28; *Federal Smelt. Co. v. Security Steel & Iron Co.*, 129 N. Y. Supp. 1121.

Stenographer's fees for copies of the evidence are not taxable as costs in many states. **U. S.**—*Monahan v. Godkin*, 100 Fed. 196; *Roundtree v. Rembert*, 71 Fed. 255; *Atwood v. Jacques*, 63 Fed. 561; *The William Branfoot*, 52 Fed. 390. **Cal.**—*City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585; *Barkly v. Copeland*, 86 Cal. 493, 25 Pac. 3. **Idaho.**—*McDonald v. Burke*, 2 Idaho 995, 28 Pac. 440. **Mich.**—*Thurstin v. Luce*, 61 Mich. 486, 28 N. W. 679; *Detroit, etc. Co. v. Hoyt*, 55 Mich. 347, 21 N. W. 367, 911. **N. M.**—*Price v. Garland*, 4 N. M. 365, 20 Pac. 182. **N. Y.** *Mark v. City of Buffalo*, 87 N. Y. 184; *Cohen v. Weill*, 65 N. Y. Supp. 695; *Hamilton v. Butler*, 4 Robt. 654; *Seasongood v. New York R. Co.*, 18 N. Y. Supp. 775.

Cost of carbon copies of testimony not taxable. *Atwood v. Jaques*, 63 Fed. 561.

83. *Schowacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935. And see *Corp. of St. Anthony v. Houlihan*, 184 Fed.

252, 106 C. C. A. 394; 81 72 Mo. App. 638.

Master's allowance em-
pgrapher's fees, presumptively
absence of stipulation.
Veeder, 9 N. M. 405, 54
lowing Bridges v. Sheldon.

84. **Mich.**—*Cole v. Ing*
Judge, 77 Mich. 619, 48
James v. Emmet Min.
335, 21 N. W. 361; *Bel*
Mich. 640. **Tenn.**—*Railr*
101 Tenn. 1, 46 S. W. 55
Allen v. Hazard, 33 Tex
523, 77 S. W. 268; *affirme*
609. **Utah.**—*Marks v. Cu*
163, 25 Pac. 743. See S
81 Ill. App. 400, decided
ute, and holding the cos
script ordered by the judg
fore the master, might be

Where each party agree
of transcript, such transcr
not be taxed as costs.
Angeles v. Pomeroy, 124
Pac. 585.

In Tennessee, if either
to have the stenographer
scribed, he should be requ
the cost of this transcrip
ville, etc. *R. Co. v. Ray*,
46 S. W. 554.

85. *The E. Luckenba*
847; *Taylor v. McConigle*,
52 Pac. 159 (where it was
cient order for the court
Reporter, transcribe your
proceedings, and file the
clerk").

To warrant the allowa
fee of a stenographer em
the request of a party t
to take down the evidenc
be an order fixing the am
lowing the item as provide
1296 Rev. St. Mansfield v.
Tex. Civ. App. 66, 60 S. V
86. **Ill.**—*Buddy v. McDo*

(VI.) **Fees for Serving Papers.**—The right to tax fees for serving papers varies in the different states.⁸⁷ But in most states if a paper is served by any but an officer, the fee therefor cannot be taxed as costs.⁸⁸

(VII.) **Documentary Evidence.**—(A.) **FEES FOR EXEMPLIFICATIONS AND COPIES OF PAPERS.**—Lawful fees for exemplifications and copies of papers necessarily obtained for use on trials may properly be taxed as part of the costs,⁸⁹ provided there is a statute permitting such an al-

App. 111. **Ore.**—*Heywood Bros. v. Doernbecher Mfg. Co.*, 48 Ore. 359, 87 Pac. 530. **Tex.**—*Baird v. Blair*, 55 Tex. Civ. App. 585, 120 S. W. 1081; *Cox v. Patten* (Tex. Civ. App.), 66 S. W. 64; *Killfoil v. Moore* (Tex. Civ. App.), 45 S. W. 1024.

In **Montana**, legal fees paid to stenographers for *per diem* or for copies, may be taxed in the bill of costs if necessary disbursements. *State v. District Court*, 25 Mont. 1, 63 Pac. 402. This statute applies only to official stenographers appointed by the court under authority of the statute. *Montana Ore Purchasing Co. v. Boston, etc. Min. Co.*, 27 Mont. 288, 70 Pac. 1114.

Folios of copies of the stenographer's notes of the testimony used in the preparation of bills of exceptions are taxable, although they were ordered during the trial and prior to the final decision. *Montana Ore Purchasing Co. v. Boston Min., etc. Co.*, 33 Mont. 400, 84 Pac. 706.

Excessive charge may be reduced. *Montana Ore Purchasing Co. v. Boston Min., etc. Co.*, 33 Mont. 400, 84 Pac. 706.

87. *Theresa Village Mut. Fire Ins. Co. v. Wisconsin Cent. R. Co.*, 144 Wis. 321, 128 N. W. 103.

A fee for serving process at request of adverse party cannot be allowed (*State v. Allen*, 26 N. J. L. 145), nor for service of papers which require no answer (*Erwin v. Martin*, 2 Wend. (N. Y.) 250).

Where service is upon person not required to be served, costs cannot be taxed. *Alexander v. Harrison*, 2 Ind. App. 47, 28 N. E. 119; *Ferguson v. Wooley*, 9 Civ. Proc. (N. Y.) 236.

There being no allowance in the fee bill for serving copies of papers requested to be furnished by adverse party, the prevailing party cannot

charge therefor in his bill of costs. *State v. Allen*, 26 N. J. L. 145.

88. *Alexandria v. Harrison*, 2 Ind. App. 47, 28 N. E. 119; *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56.

In **Iowa** when service of notice of appeal from an award in an *ad quod damnum proceeding* is not served by an officer but by some other person, the charges therefor cannot be taxed as costs. *Conway v. McG. & M. R. Co.*, 43 Iowa 32.

In **Missouri** under statutory provisions, a party is competent to serve his own subpoena, but in the absence of statutory provisions the court is not authorized to tax fees in favor of the party for serving his own subpoena. *Hannibal, etc. Bridge Co. v. Bowling*, 53 Mo. 311.

But in **Pennsylvania** a party who serves his own subpoena is entitled to the same fees for service and mileage as are received by sheriffs. Appeal of *Axtell* (Pa.), 6 Atl. 560; *Peterson v. Williams*, 1 Pa. Co. Ct. 93; *Cody v. Cleam*, 1 Pa. Co. Ct. 8; *Harnish v. Mowrer*, 1 Lane. Law Rev. 17. See also *Lyon v. Marshall*, 1 Pa. Co. Ct. 90, where the court said that custom had fixed this charge as costs, without regard to whether the service is made by an officer, a party to the suit, or by a private person acting as a party's agent.

In **Vermont** an indifferent person serving a subpoena is entitled to full fees therefor. *Smith v. Wilbur*, 35 Vt. 133.

89. **U. S.**—*United States v. Sanborn*, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. ed. 112; *Ford v. Louisville, etc. R. Co.*, 45 Fed. 210. **Mass.**—*Suffolk v. Mill Pond Wharf. Corp.*, 5 Pick. 540. **Minn.**—*Wentworth v. Griggs*, 24 Minn. 450. **Miss.**—*Bell v. Medford*, 57 Miss. 31. **N. H.**—*Ela v. Knox*, 46 N. H. 18.

In an action to quiet title the cost of a transcript in another case which

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lowance.⁹⁰ Such papers, however, must be necessary to the cause.⁹¹

(B.) **PLANS, MAPS AND SURVEYS.**—In the absence of statutory,⁹² the cost of plans, maps, models, and surveys cannot be treated as costs,⁹³ especially where the plans and surveys are necessary

as part of the claim of title may be properly taxed, since the decree alone could not properly be offered without the transcript on which it was based. *Smith v. Hutchinson*, 104 Tenn. 394, 58 S. W. 226.

Expense of abstract of title cannot be included in taxable costs. *Hoyt v. Jones*, 31 Wis. 389.

Certified copies of papers are taxable (*Suffolk v. Mill Pond Wharf Corp.*, 5 Pick. (Mass.) 540; *Jackson v. Mather*, 2 Cow. (N. Y.) 584), but fees for certification not required by law cannot be recovered as costs (*Wooster v. Handy*, 23 Blatchf. 112, 23 Fed. 49; *Edmondson v. Mason*, 16 Cal. 386).

Deeds.—Costs of necessary copies of deeds used in evidence are taxable. *Mass.*—*Suffolk v. Mill Pond Wharf Corp.*, 5 Pick. 540. *N. H.*—*Ela v. Knox*, 46 N. H. 16, 88 Am. Dec. 179. *Tex.* *Gulf, C. & S. F. R. Co. v. Evansich*, 61 Tex. 3.

A copy of the record for the printer is taxable. *Botsford v. Murphy*, 48 Mich. 642. See *s. c.*, 47 Mich. 537.

Costs of copies of indorsements and of foreign documents disallowed in *Hanel v. Baare*, 9 Bosw. (N. Y.) 682; *Abbott v. Johnson*, 47 Wis. 239, 2 N. W. 332.

90. *Caldwell v. Miller*, 46 Pa. 233; *Murphy v. Loyd*, 3 Whart. (Pa.) 356.

91. *Kaempfer v. Taylor*, 78 Fed. 795; *Senior v. Anderson*, 130 Cal. 290, 62 Pac. 563.

“Plaintiff was entitled to tax for draft of each paper and for three copies, viz., one engrossed copy, one to keep, and one to serve. *Duncan v. Erickson*, 82 Wis. 128, 51 N. W. 1140. He was not entitled to make and charge for 33 copies to serve simply because there were 33 defendants.” *Koch v. Peters*, 97 Wis. 492, 73 N. W. 25, 29.

92. *La.*—*Williams v. Close*, 14 La. Ann. 737. *Me.*—*Leighton v. Haynes*, 58 Me. 408. *Mont.*—*King v. Allen*, 29 Mont. 5, 73 Pac. 1107.

93. *U. S.*—*Tuck v. Olds*, 29 Fed. 883; *New Hampshire Land Co. v. Tilton*, 29 Fed. 764. But see *Lillienthal*

v. Southern Cal. R. Co., where it was held that maps is taxable. *Cal.* *Irvine*, 126 Cal. 135, 58 P. 100. *Montana Ore Purchasing Co. v. Elmer*, 27 Mont. 114. *N. H.*—*Ela v. Knox*, 46 N. H. 16. *N. J.*—*Boers v. Hudson County Road Co.*, 70, 14 Atl. 106. *N. Y.* *New York Rubber Co. v. Mark*, 87 N. Y. 100. *Buffalo v. Farrell*, 13 Hun. 1025. *Pa.*—*Caldwell v. Miller*, 46 Pa. 233. *R. I.*—*Hughes v. Phillips*, 2 R. I. 493.

In *New York*, in an action causing death, the cost of the scene of accident trial is not taxable as costs. *City of New York v. City of New York*, 8 C. 2.

Costs in Patent Cases.—In the various circuits as to charge for models, extra patent cases are far from depending on the existence of court or stipulation parties; nor can models “exemplifications” under congress. *Keasbey & Mather v. American Magnesia Co.*, 439. They are not taxable in the southern district of New York (*Handy v. Handy*, 23 Fed. 49), nor in the northern district of Ohio (*Worley v. Bond*, 528, 30 Fed. 17,986; *Kelly v. Springfield*, 183), nor in the western district of Pennsylvania (*Parker v. Parker*, 10,726), but in the circuit court of the district of Massachusetts it was held that the plaintiff’s invention and the defendant were proper costs (*Hathaway v. Roach*, 11 Fed. Cas. No. 63, 11 Fed. Cas. No. 63).

The same reasons which exclude the item for photographic exhibits. *Kelly v. Springfield*, 30 Fed. 17,986; *Hussey v. Blatchf.*, 210, 12 Fed. Cas. 1107. **A map annexed to a bill**

in preparing the case for trial, and not for actual use as exhibits upon the trial.⁹⁴

(VIII.) **Continuance, Term and Trial Fees.**—**Continuance Fees.**—A continuance fee is allowed the prevailing party when the continuance is caused by the fault of opposite counsel.⁹⁵

Term Fees.—The prevailing party is allowed term fees by statute in some states for every term the cause is on the calendar and is not reached or is postponed,⁹⁶ and such right is not affected because the cause through no fault of his is not tried.⁹⁷

The number of fees taxable is usually regulated by statute or rule of court.⁹⁸

Trial Fees.—In some states, trial fees may be taxed against the losing party where there has been a judicial examination of the issues in an action.⁹⁹

the accuracy of which is verified by affidavit and used on an application for an injunction cannot be taxed as an affidavit on the assumption that it represents as many folios of written matter as a skilled person could have written in the number of hours required for making the map. *Booraem v. North Hudson County R. Co.*, 44 N. J. Eq. 70, 14 Atl. 106.

94. *Ela v. Knox*, 46 N. H. 16.

In California cost of maps prepared by experts used in an action to quiet title, not ordered by the court, and used only as exhibits by plaintiff, was disallowed. *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442.

95. *Ford v. Bushor*, 48 Mich. 534, 12 N. W. 690.

96. *Mass.*—*Bliss v. Tripp*, 16 Gray 287. *Mich.*—*How. Ann. St.*, §9004; *Weber v. Mandell*, 162 Mich. 32, 127 N. W. 16; *Martin v. Lillibridge*, 111 Mich. 71, 69 N. W. 75; *Monroe v. Rogers*, 1 Mich. N. P. 241; *Root v. Final*, 1 Mich. N. P. 199. *N. Y.*—*Deyo v. Morse*, 21 Misc. 497, 48 N. Y. Supp. 171, 5 N. Y. Ann. Cas. 44; *Kahn v. Coen*, 31 Abb. N. C. 478, 30 N. Y. Supp. 347; *Benton v. Sheldon*, 1 Code Rep. 134. (In New York not more than five term fees can be taxed). *Wis.*—*Keith Bros. v. Stiles*, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

But where a cause was agreed to be referred before the opening of court, and upon the first day of the term, before the case was called, the order of reference was made, so that the case was not necessarily upon the calendar for trial, term fee was not properly taxed. *Dame v. Maynard*, 139 App. Div. 385, 124 N. Y. Supp. 17, 19. See

also *Bowen v. Sweeny*, 66 Hun 42, 20 N. Y. Supp. 733, 49 N. Y. St. 603; *Notis v. Pollock*, 18 Civ. Proc. 1, 13 N. Y. Supp. 837.

97. *Gay v. Seibold*, 3 N. Y. Civ. Proc. 169 (*citing* *Minturn v. Main*, 3 Sandf. (N. Y.) 737); *Fisher v. Hunter*, 15 How. Pr. (N. Y.) 156; *Williams v. Horgan*, 13 How. Pr. (N. Y.) 138.

98. *Mass.*—*Leonard v. O'Reilley*, 137 Mass. 148, holding that where a statute provides that the successful party in an action in the superior court shall be allowed three term fees in any action, unless allowed by order of the court, and that if the case goes up two additional term fees may be allowed; as many term fees as there are terms may be allowed in the discretion of the court, when the case does not go up. *N. J.*—*Pearman v. Gold* (N. J. Eq.), 8 Atl. 285 (limit is three term fees). *N. Y.*—*Hamilton v. Butler*, 4 Robt. 654; *Benton v. Burgnall*, Code Rep. (N. S.) 229 (limit of five term fees). *Wis.*—*Duncan v. Erickson*, 82 Wis. 128, 51 N. W. 1140, in this state the statute limits the allowance of term fees to three.

99. *Ia.*—*Mathews v. Clayton Co.*, 79 Iowa 510, 44 N. W. 722; *Shaw v. Kendig*, 57 Iowa 390, 10 N. W. 771. *Mich.*—*Beem v. Newaygo Cir. Judge*, 97 Mich. 491, 56 N. W. 760. *N. Y.*—*Cohen v. Cohen*, 72 Hun 393, 25 N. Y. Supp. 387, 55 N. Y. St. 463; *Gownig v. Levy*, 22 Civ. Proc. 10, 17 N. Y. Supp. 771, 43 N. Y. St. 767.

A hearing before a referee, to admeasure dower, under an interlocutory judgment, is not a trial which entitles the successful party to a trial fee, but a trial fee may be taxed on a refer-

A trial fee is allowable for each trial, whether such trial results in a determination of the question, or proves abortive for any cause.¹

Where there is no hearing on the demurrer, but the case is disposed of on motion for judgment on the pleadings, no trial fee will be allowed,² or where there is no issue of law or fact raised by demurrer or plea in the case in which a trial fee is claimed.³

(IX.) **Costs of Proceedings Before and After Notice of Trial.** — In some states costs may be taxed in favor of the prevailing party incurred in proceedings before notice of trial,⁴ or after notice and before trial.⁵

ence to hear and determine. *Price v. Price*, 61 Hun 604, 16 N. Y. Supp. 359, 41 N. Y. St. 399.

But in Wisconsin, the taking of testimony before a referee appointed to take and report the same to the court is a "trial of the cause," within the meaning of the statute. *Hill v. Durand*, 58 Wis. 160, 15 N. W. 390.

Taking evidence by commissions to determine the value of real estate in litigation is not a trial. *In re New York, etc. R. Co.*, 26 Hun (N. Y.) 592, 63 How. Pr. 123.

An application to a judge at chambers for judgment is not a trial. *Marquisee v. Brigham*, 12 How. Pr. (N. Y.) 399.

Discontinuance.—Where a cause is settled or discontinued by plaintiff defendant is not entitled to a trial fee. *Ehlers v. Willis*, 63 How. Pr. (N. Y.) 341. See also *Studwell v. Baxter*, 33 Hun (N. Y.) 331; *Lockwood v. Salmon River Paper Co.*, 20 N. Y. Supp. 967.

But in Wisconsin trial fees are not taxable where suit has been discontinued without trial. *Terry v. Chandler*, 23 Wis. 456.

Agreed Case.—In *Nielson v. Mutual Inc. Co.*, 3 Duer (N. Y.) 683, it is held that a trial fee may be taxed where an agreed case is argued.

1. *Mich.*—*Inkster v. Carver*, 17 Mich. 64. *N. Y.*—*Spring v. Day*, 44 How. Pr. 390; *Mott v. Consumers' Ice Co.*, 8 Daly 244; *Dame v. Maynard*, 139 App. Div. 385, 124 N. Y. Supp. 17, 19 (disagreement of jury or disqualification of judge); *Cregin v. Brooklyn Crosstown R. Co.*, 19 Hun 349. *Vt.* *Pollard v. Wheelock*, 20 Vt. 370; *Walker v. Sargeant*, 13 Vt. 352.

If two cases involve the same issue and are tried as one, the respondent is properly allowed but one trial fee.

Weber v. Mandell, 162 Mich. 32, 127 N. W. 16, 17 Det. Leg. N. 505.

Dismissal on Failure To Appear. Where a complaint was dismissed on failure of the defendant to appear and was subsequently dismissed upon trial, after the default had been opened, two trial fees were allowed. *Hoffman Brew. Co. v. Volpe*, 4 Misc. 260, 23 N. Y. Supp. 812; *Cole v. Lowry*, 23 Civ. Proc. 113, 23 N. Y. Supp. 674.

In case of a mistrial due to the fault of the plaintiff rather than the defendant, the latter may recover a trial fee. *Chism v. Smith*, 130 N. Y. Supp. 881.

2. *Singer Mfg. Co. v. Granite Spring Water Co.*, 67 Misc. 575, 124 N. Y. Supp. 750.

3. *Mathews v. Clayton County*, 79 Iowa 510, 44 N. W. 722; *Cohen v. Cohen*, 72 Hun 393, 25 N. Y. Supp. 387; *Walker v. Porter*, 21 N. Y. Supp. 723.

The fee for filing findings and conclusions should be included in the trial fee. *Fisher v. Emerson*, 15 Utah 517, 50 Pac. 619.

The taxing officer cannot refuse to tax costs for findings when drawn under the direction of the trial judge, though they be voluminous. *Lentz v. Eimermann*, 119 Wis. 492, 97 N. W. 181.

4. See *Terrill v. Grove*, 2 Mich. N. P. 67.

In New York costs before notice of trial are not allowed on an interlocutory judgment on demurrer, though there is authority holding that such costs may be taxed. *Garrett v. Wood*, 23 Misc. 7, 51 N. Y. Supp. 651.

5. *Dewey v. Stewart*, 6 How. Pr. (N. Y.) 465.

In New York only one item for "proceedings after notice of trial and before trial," is properly chargeable. *Hudson v. Erie R. Co.*, 57 App. Div. 98, 68 N. Y. Supp. 28; *Scifter v. Brook-*

(X.) **Surveyor's Fees.** — In the absence of statute, a bill for the services of a surveyor in making plans and surveys even when he is appointed by the court, is not taxable against the losing party as part of the costs of the case.⁶

(XI.) **Fees and Mileage of Witnesses.** — (A.) **DEPENDENT ON STATUTE.** — The right of a witness to mileage and other fees in civil cases is purely and solely of statutory creation. Such fees are chargeable against the losing party by virtue of the statute alone.⁷ But in many states there are statutes allowing the mileage of witnesses, who travel a prescribed distance, to be taxed,⁸ but mileage from and to the residence of the witness

lyn Hts. R. Co., 53 App. Div. 443, 65 N. Y. Supp. 1123; *Chism v. Smith*, 130 N. Y. Supp. 881; *Hakonson v. Metropolitan St. R. Co.*, 40 Misc. 182, 81 N. Y. Supp. 662.

6. **U. S.** — *New Hampshire Land Co. v. Tilton*, 29 Fed. 764 (federal practice); *Whipple v. Cumberland Cotton Mfg. Co.*, 3 Story 84, 29 Fed. Cas. No. 17,515. **N. Y.** — *Low v. Vrooman*, 15 Johns. 238. **Pa.** — *Caldwell v. Miller*, 46 Pa. 233. See, *supra*, Fees for Exemplifications and Copies of Papers.

Taxable in Partition Proceedings. **N. H.** — *Ela v. Knox*, 46 N. H. 16, 88 Am. Dec. 179. **N. Y.** — *Haynes v. Mosher*, 15 How. Pr. 216. **Pa.** — *Caldwell v. Miller*, 46 Pa. 233. **E. I.** — *Hughes v. Providence R. Co.*, 2 R. I. 493. But see: **U. S.** — *Whipple v. Cumberland, etc. Co.*, 3 Story 84, 29 Fed. Cas. No. 17,515. **La.** — *Williams v. Close*, 14 La. Ann. 737. **Mo.** — *Wesley v. Sargent*, 38 Mo. 315. **Md.** — *Andrews v. Scotton*, 2 Bland 629.

While the Wisconsin statute covers the actual and reasonable expense of the survey and doubtless "necessary expenses in addition to the mere *per diem* of the surveyor and assistant, it is limited to the *per diem* and expenses of one 'surveyor and one assistant.' Neither the wages nor the expenses of axemen, chainmen, cooks or flagmen, in addition to the one assistant, are included." *Dunbar v. Montreal River Lumb. Co.*, 127 Wis. 130, 106 N. W. 389.

7. **Cal.** — *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997; *Linforth v. San Francisco Gas, etc. Co.*, 9 Cal. App. 434, 99 Pac. 716. **Mo.** — *State v. Oliver*, 116 Mo. 188, 22 S. W. 637. **S. C.** — *Helams v. Greenville Co.*, 32 S. C. 441. **Wash.** — *Spokane v. Smith*, 37 Wash. 583, 79 Pac. 1125. **Wis.** — *American*

Foundry Co. v. Board of Education, 131 Wis. 220, 110 N. W. 403.

Fees not paid cannot be taxed. *Pearman v. Gould* (N. J.), 8 Atl. 285.

Not in Condemnation Proceedings. *Hester v. Commissioners*, 84 Mich. 450, 47 N. W. 1097; *St. Louis v. Meintz*, 107 Mo. 611, 18 S. W. 30.

Statute allowing costs and disbursements covers witness fees. *American Foundry, etc. v. Board of Education*, 131 Wis. 220, 110 N. W. 403; *Keith Bros. v. Stiles*, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

Strict compliance essential. *Fulks v. State*, 64 Ark. 148, 41 S. W. 54; *Eustace v. Greenville County*, 42 S. C. 190, 20 S. E. 88.

In federal courts the whole subject of fees is regulated by chapter 16, title Judiciary of the Revised Statutes. See §§824-829, 846-850, 855, 983.

8. **U. S.** — *Rev. St.*, §983; *United States v. Sanborn*, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. ed. 112. **Ala.** — *Elliott v. Howison*, 158 Ala. 71, 48 So. 508; *Alabama Midland R. Co. v. Rushing*, 103 Ala. 542, 15 So. 853. **Cal.** — *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997. **Idaho.** — *State v. Baird*, 13 Idaho 126, 89 Pac. 298; *Kapt River Land & Cattle Co. v. Langford*, 6 Idaho 30, 51 Pac. 1027. **Ind. Ter.** — *Whitehead v. Breckenridge*, 5 Ind. Ter. 133, 82 S. W. 698. **N. Y.** — *O'Rourke v. Degnin Realty Co.*, 139 App. Div. 695, 124 N. Y. Supp. 364. **Tex.** — *Anderson v. McKinney*, 22 Tex. 653; *Flores v. Thorn*, 8 Tex. 377; *International, etc. R. Co. v. Richmond*, 28 Tex. Civ. App. 513, 67 S. W. 1029. **Wis.** — *Theresa Village Mut. Fire Ins. Co. v. Wisconsin Cent. R. Co.*, 144 Wis. 321, 128 N. W. 103.

On Discontinuance of Action. — *Ocean City Hotel, etc. Co. v. Sooy* (N. J.), 76 Atl. 446.

Federal Employees.—A person employed by the government receives while absent, as a witness for the government his stipulated salary, and is paid, in that way for his time. But he is allowed his necessary expenses, which being audited, by or under the direction of the court upon which he attends as a witness, he is entitled to have paid to him; and the government, being under an obligation to pay them, is entitled to have the amount so audited included in its bill of costs, and in any judgment rendered in its favor. In other words when the government is successful in a suit the "necessary expenses" of its witnesses of the class described in Rev. Stat. §850, takes the place in its bill of costs, of the *per diem* and mileage which, but for that section, would have been taxed and allowed in its favor. *United States v. Sanborn*, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. ed. 112.

Voluntary Dismissal.—No party in a civil case, save only a plaintiff who voluntarily dismisses his action before trial, can be lawfully made liable for the cost of any witnesses of the adverse party, who was not "subpoenaed, sworn and examined on the trial" of the case. Civil Code §5394. Section 5394 of the Civil Code does not warrant including a judgment "against the party dismissing, being nonsuited, or cast," in a case the fees of any witness for which such party is liable under the provisions of §5392 of the Civil Code. *Hix v. Gully*, 113 Ga. 83, 38 S. E. 399; *Mason v. Dean*, 10 Ga. 443.

Staying over Sunday away from home, entitles a witness to a day's attendance fee. *Schott v. Benson*, 1 Blatchf. 564, 21 Fed. Cas. No. 12,479; *Muscott v. Runge*, 27 How. Pr. (N. Y.) 85.

A mere change of venue does not affect the prevailing party's right to witness fees. *American Foundry Co. v. Board of Education*, 131 Wis. 220, 110 N. W. 403.

Not lost by failure to claim when reporting daily attendance. *Hall v. Northwestern Lumb. Co.*, 61 Wash. 351, 112 Pac. 369; *Kimble v. Kimble*, 14 Wash. 369, 44 Pac. 866.

Voluntary attendance in some states entitles a witness to mileage, and this is probably the better rule. *Dolan v. Cain*, 59 Wash. 259, 109 Pac. 1009.

A foreign witness is not entitled to traveling fees because he cannot be "legally required" to attend the trial. *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997.

In Idaho a party in whose favor a judgment is rendered is entitled to have costs taxed for mileage of material witnesses actually and necessarily traveled within the state. Hence a material witness who resides outside the court's jurisdiction and who is under no necessity of obeying its process, but is a voluntary witness, is entitled to have his expenses charged as a part of the costs of the action for the number of miles necessarily traveled within the state in attending the trial. *State v. Baird*, 13 Idaho 126, 89 Pac. 298; *Anderson v. Ferguson-Boeb Sheep Co.*, 12 Idaho 418, 86 Pac. 41.

Nebraska.—Witnesses in a civil action are not, under our statute, required to attend for examination except in the county of their residence, and the rule should obtain generally that traveling fees should be taxed in their favor for the distance only that a subpoena compels their attendance. *Smith v. Bartlett*, 78 Neb. 359, 110 N. W. 991.

In Washington, witnesses are allowed their mileage within the borders of the state, if they attend the trial for the purpose of testifying in the case. *Carlson Bros. v. Van De Vawter*, 19 Wash. 32, 52 Pac. 323, followed in *State v. Lorenz*, 22 Wash. 289, 60 Pac. 644.

A witness traveling on a free pass is not entitled to mileage. *Valk v. Erie R. Co.*, 128 App. Div. 470, 112 N. Y. Supp. 792.

Rule in Federal Courts.—While the practice in this matter differs, that prevailing in most of the circuits is to restrict the taxation of fees of witnesses for travel to one hundred miles from the place of trial. The principle underlying the rule is that, as the party has the right and opportunity to take the testimony by deposition, and thus save the cost of excessive mileage, he should do so, and thus reduce the cost as much as possible. *Smith v. Chicago, etc. R. Co.*, 38 Fed. 321; *Dreskill v. Parish*, 5 McLean 213, 7 Fed. Cas. No. 4,075.

But in the first circuit the witness is entitled to the whole mileage, with-

only can be collected, regardless of the distance traveled by the witness for the purpose of reaching the place of trial.⁹

out any limit as to one hundred miles, and without regard to his residence within the jurisdiction. *United States v. Sanborn*, 28 Fed. 299; *Whipple v. Cumberland Cotton Mfg. Co.*, 3 Story 84, 29 Fed. Cas. No. 17,515; *Prouty v. Draper*, 2 Story 199, 20 Fed. Cas. No. 11,447; *Hathaway v. Roach*, 2 Woodb. & M. 63, 11 Fed. Cas. No. 6,213.

Second Circuit.—*Wooster v. Hill*, 44 Fed. 819; *The Syracuse*, 36 Fed. 830; *Buffalo Ins. Co. v. Providence, etc. Steamship Co.*, 29 Fed. 237; *The Leo*, 5 Ben. 486, 15 Fed. Cas. No. 8,252; *Beckwith v. Easton*, 4 Ben. 357, 3 Fed. Cas. No. 1,212; *Anonymous*, 5 Blatchf. 134, 1 Fed. Cas. No. 432.

Third Circuit.—*The Progresso*, 43 Fed. 239.

Fourth Circuit.—*Sloss Iron, etc. Co. v. South Carolina, etc. R. Co.*, 75 Fed. 106.

Sixth Circuit.—*Burrow v. Kansas City, etc. R. Co.*, 54 Fed. 278; *The Vernon*, 36 Fed. 113 (a leading case).

Eighth Circuit.—*Pinson v. Atchison, etc. R. Co.*, 54 Fed. 464; *Smith v. Chicago, etc. R. Co.*, 38 Fed. 321.

Ninth Circuit.—*Haines v. McLaughlin*, 29 Fed. 70; *Spaulding v. Tucker*, 2 Sawy. 50, 22 Fed. Cas. No. 13,221.

"The true rule upon this subject, as gleaned from all the authorities, is substantially to the effect that the acts of congress were intended to, and do, allow mileage to witnesses to the full extent of the distance that could be legally reached by subpoena, viz., at any place within the district, or at any point without the district to the extent of 100 miles from the place where the court is held. *Anon.*, 5 Blatchf. 134, Fed. Cas. No. 432; *Beckwith v. Easton*, 4 Ben. 357, Fed. Cas. No. 1,212; *Dreskill v. Parish*, 5 McLean 241, Fed. Cas. No. 4,076; *The Leo*, 5 Ben. 486, Fed. Cas. No. 8,252; *Spaulding v. Tucker*, 2 Sawy. 50, Fed. Cas. No. 13,221; *Buffalo Ins. Co. v. Providence & Stonington S. S. Co.*, 29 Fed. 237; *The Vernon*, 36 Fed. 113; *Eastman v. Sherry*, 37 Fed. 844; *Burrow v. Railroad Co.*, 54 Fed. 278, 282; *Pinson v. Railroad Co.*, Id. 464; *Hunter v. Russell*, 59 Fed. 964, 966." *Hanchett v. Humphrey*, 93 Fed. 895.

In other words, this 100 mile limi-

tation only applies when the witness comes from without the district; within the jurisdiction of the court, so far as determined by territorial boundaries, the witness may be compelled to attend, and his mileage taxed and allowed. *United States v. Small*, 3 Wash. Ter. 478, 17 Pac. 739.

Mileage of Voluntary Witnesses.—And it has been held that traveling fees paid to a witness who attends voluntarily without a subpoena, and merely at the request of a prevailing party, are not taxable. *Woodruff v. Barney*, 1 Bond 528, 30 Fed. Cas. No. 17,986; *Spaulding v. Tucker*, 2 Sawy. 50, 22 Fed. Cas. No. 13,221; *Driskill v. Parish*, 5 McLean 241, 7 Fed. Cas. No. 4,088. But see *Sawyer v. Aultman & T. Mfg. Co.*, 5 Biss. 165, 21 Fed. Cas. No. 12,397.

Foreign Witness.—The prevailing party may tax as a necessary disbursement an attendance fee and mileage for each witness examined on his behalf before a commissioner in a foreign country, not exceeding 100 miles, by analogy to the rule in respect of witnesses attending the trial. *Agius v. Perkins Co.*, 151 Fed. 958.

9. *Marks v. Fields* (Tex. Civ. App.), 29 S. W. 664.

One trip going and coming to any one term of court. *McArthur v. State*, 41 Tex. Crim. 635, 57 S. W. 847. See also *Cole v. Duchenuau*, 13 Utah 42, 44 Pac. 92, construing Comp. Laws, 1883, §5447.

If, however, the case is set for trial for a day certain, and the plaintiff, with his witnesses, attends on that day, and the court is engaged in other business, and the cause is set for another day, and the witnesses go home and return on the adjourned day, double fees for travel are proper. *Koch v. Peters*, 97 Wis. 492, 73 N. W. 25. See *Theresa Village Mut. Fire Ins. Co. v. Wisconsin, Cent. R. Co.*, 144 Wis. 321, 128 N. W. 103.

In Montana the question whether the mileage of witnesses shall be computed from the place of residence depends upon the circumstances of each case. *Lynes v. Northern Pac. R. Co.*, 43 Mont. 317, 117 Pac. 81, explaining *McGlauffin v. Wormser*, 28 Mont. 177, 72 Pac. 428.

(B.) WITNESSES NOT SUBPOENAED. — In some jurisdictions the attendance fees of a witness not legally summoned cannot be taxed in the bill of costs.¹⁰ Fees of witnesses summoned by the officer of his own volition and without authority should not be allowed in the cost bill.¹¹ Nor can the fees of witnesses, attending in response to a subpoena improvidently issued, be taxed against the losing party.¹²

But the prevailing rule is that a witness is entitled to have his fees and mileage taxed as costs, although he attends voluntarily or merely at the request of the party requiring his attendance, and without summons, if he attends in good faith and his testimony is reasonably required.¹³

Pennsylvania.—The general Act of June 1, 1907, P. L. 364, entitled, "An Act to increase the pay of jurors and witnesses in this commonwealth" and providing a witness fee of \$1.50 *per diem*, does not repeal the local Act of February 10, 1865, P. L. 133, applicable to Adams county providing for the payment of a witness fee of \$1.00 *per diem* to witnesses residing beyond one mile of the county seat. *Flemming v. Bush*, 43 Pa. Super. 405.

10. **Id.**—*Fisher v. Burlington*, etc. R. Co., 104 Iowa 588, 73 N. W. 1070; *State v. Willis*, 79 Iowa 326, 44 N. W. 699. **Nev.**—*Meagher v. Van Zandt*, 18 Nev. 230, 2 Pac. 57. **S. C.**—*Atherton v. Atlantic Coast Line R. Co.*, 32 S. C. 474, 64 S. E. 411. **Tenn.**—*Lancaster v. State*, 3 Lea 652; *Douglass v. Blake-more*, 12 Heisk. 564; *Hopkins v. Waterhouse*, 2 Yerg. 230. **Tex.**—*Sapp v. King*, 66 Tex. 570, 1 S. W. 466.

11. *Manuel v. State*, 45 Tex. Crim. 96, 74 S. E. 30.

"But the fact that there is no subpoena on file is not conclusive evidence that the witness has not been summoned. It may have been lost or destroyed after service. A witness may prove his attendance, notwithstanding there may be no subpoena on file with papers in the case. And, after a witness has proved his attendance, it was held by this court, that it will be presumed the record justified it. *Hopkins v. Waterhouse*, 2 Yerg. 233." *Moon v. McLemon*, 2 Shann Cas. (Tenn.) 160, 1 Leg. Rep. 42.

12. *Lucas v. Brown*, 127 Mo. App. 645, 106 S. W. 1089.

13. **U. S.**—*St. Matthew's Sav. Bank v. Fidelity & C. Co.*, 105 Fed. 161; *Hanchett v. Humphrey*, 93 Fed. 895; *Simpkins v. Atchison*, etc. R. Co., 61 Fed. 999; *Pinson v. Atchison*, etc. R.

Co., 61 Fed. 999; *Whipple v. Cumberland Cotton Mfg. Co.*, 3 Story 84, 29 Fed. Cas. No. 17,515; *Hathaway v. Roach*, 2 Woodb. & M. 63, 11 Fed. Cas. No. 6,213. **Cal.**—*Linforth v. San Francisco Gas, etc. Co.*, 9 Cal. App. 434, 99 Pac. 716. **Del.**—*White v. Wilson*, 76 Atl. 225. **Ind.**—*Alexandria v. Harrison*, 2 Ind. App. 47, 28 N. E. 119. **Mass.**—*Farmer v. Storer*, 11 Pick. 241. **Mont.**—*McGlauffin v. Wormser*, 28 Mont. 177, 72 Pac. 428. **N. Y.**—*Vence v. Speir*, 18 How. Pr. 168; *Wheeler v. Lozee*, 12 How. Pr. 446. **Ore.**—*Perham v. Portland Gen. Elec. Co.*, 33 Ore. 451, 53 Pac. 14, 24; *Sugar Pine Lumb. Co. v. Garrett*, 28 Ore. 168, 42 Pac. 129; *Crawford v. Abraham*, 2 Ore. 163. **Pa.**—*Lagrosse v. Curran*, 10 Phila. 140, 31 Leg. Int. 148; *Cody v. Clelam*, 1 Pa. Co. Ct. 8; *Swiler v. Casey*, 1 Pearson 126. **S. C.**—*Cox v. Charleston F. & M. Ins. Co.*, 3 Rich. L. 331, 45 Am. Dec. 771. **Wash.**—*Dolan v. Cain*, 59 Wash. 259, 109 Pac. 1009; *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018.

A witness who attended in the justice's court, and who on appeal being taken was instructed to attend before the county court, may have his fees taxed for such attendance though no process requiring him to attend before the county court was issued. *International & G. N. R. Co. v. Richmond*, 28 Tex. Civ. App. 513, 67 S. W. 1029.

Rule in Federal Courts.—Notwithstanding some conflict in the earlier cases (*Spaulding v. Tucker*, 2 Sawy. 50, 22 Fed. Cas. No. 13,221) the law is now well settled in the federal courts that a witness who in good faith attends the court, whether he comes in obedience to a subpoena or at the mere request of a party, plain-

(C.) WITNESSES LIVING BEYOND RUN OF PROCESS.—In some jurisdictions a witness is entitled to his fees and mileage although he could not, because of his place of residence, be compelled to attend.¹⁴

(D.) WITNESSES SUMMONED BUT NOT CALLED AT THE TRIAL.—Some cases hold that if a witness attend upon the trial of a cause, and is not sworn, the party causing him to be present cannot recover from the adverse party the expense incurred for such witness, unless some sufficient reason exists which would legally excuse his failure to testify. It must be made to appear that his attendance was necessary at the time, but that by reason of some unforeseen event, or other sufficient cause, his testimony became unnecessary,¹⁵ apparently upon the ground

tiff or defendant, is to be considered as attending "pursuant to law" within the meaning of those words as used in the Revised Statutes, and is entitled to his fees and mileage; and the party for whom he attends is entitled to recover costs for the legal amounts paid such witness the same as if he had been legally subpoenaed (*Hanchett v. Humphrey*, 93 Fed. 895; *Sloss Iron, etc. Co. v. South Carolina, etc. R. Co.*, 75 Fed. 106; *Burrow v. Kansas City R. Co.*, 54 Fed. 278; *Eastman v. Sherry*, 37 Fed. 844; *In re Williams*, 37 Fed. 325; *The Syracuse*, 36 Fed. 830; *The Vernon*, 36 Fed. 113; *United States v. Sanborn*, 28 Fed. 299; *Dennis v. Eddy*, 12 Blatchf. 195, 7 Fed. Cas. No. 3,793; *Cummings v. Akron Cement & Plaster Co.*, 6 Blatchf. 509, 6 Fed. Cas. No. 3,473; *Anderson v. Moe*, 1 Abb. 299, 1 Fed. Cas. No. 359).

If evidence is made unnecessary by ruling of court the *per diem* and mileage should be allowed. *Sloss Iron & Steel Co. v. South Carolina & G. R. Co.*, 75 Fed. 106.

14. *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997; *Alexander v. Harrison*, 2 Ind. App. 47, 28 N. E. 119.

But because of peculiar statutory provisions the rule in some states is that a litigant cannot recover the costs of a witness brought from beyond the mandatory limit of a subpoena whether he is used or not. *U. S.*—*Spaulding v. Tucker*, 2 Sawy. 50, 22 Fed. Cas. No. 13,221. *Nev.*—*Meagher v. Van Zandt*, 18 Nev. 230, 2 Pac. 57. *Tex.*—*Sapp v. King*, 66 Tex. 570, 1 S. W. 466.

A witness who voluntarily came from a distance of more than thirty miles to testify for plaintiff places himself "under and subject to the order of the court," and the court may

in its discretion make such *per diem* allowance as the facts warrant, which allowance may be taxed by the successful party. *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997.

Showing Required.—"In *Crawford v. Abraham*, 2 Ore. 163, it has been regarded as settled that, when objection has been made to the taxation of mileage of a witness living beyond the reach of an ordinary subpoena, and the attendance is procured simply by request of the party, the item must be sustained by a showing equivalent to that which is necessary under Hill's Ann. Laws Or. §795, to procure a special subpoena. *Lumber Co. v. Garrett*, 23 Ore. 168, 42 Pac. 129; *Perham v. Electric Co.*, 33 Ore. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; *Burrows v. Balfour*, 39 Ore. 488, 65 Pac. 1062; and *Spencer v. Peterson* (Ore.) 68 Pac. 1108. The showing required by the section referred to is that the testimony of the witness is material, and his oral examination important and desirable." *Luckey v. Lincoln County*, 42 Ore. 331, 70 Pac. 509.

15. *U. S.*—*Simpkins v. Atchison, etc. R. Co.*, 61 Fed. 999. *Ala.*—*Terry v. Montgomery*, 166 Ala. 130, 52 So. 314; *Forcheimer & Co. v. Kaver*, 79 Ala. 285. *Idaho.*—*Griffith v. Montandon*, 4 Idaho 75, 35 Pac. 704. *Nev.*—*State v. Gayhart*, 26 Nev. 278, 66 Pac. 1087, 68 Pac. 113. *Ore.*—*Pugh v. Good*, 19 Ore. 85, 23 Pac. 827.

"When a trial lasts for more than one day, and a witness is subpoenaed to be present at the trial, and makes arrangements to be called when needed, and is not in actual attendance on the trial except on the day he testifies, such witness is entitled to *per diem* compensation for one day only." *Grif-*

COSTS

that he does not come within the legal definition of a witness, the weight of authority is to the effect that in such case it is not allowable,¹⁷ if the witnesses were summoned in good faith for such cause as would justify their attendance at the expense of the other party.¹⁸

(E.) INCOMPETENT WITNESSES, OR WITNESSES TO INCOMPETENT (MATTERS).—The cases are conflicting on the question as to the fees of a witness summoned to prove irrelevant and im-

material. *Smith v. Montandon*, 4 Idaho 75, 35 Pac. 704.

In South Carolina if the witnesses were not sworn, their fee cannot be taxed unless it appears by affidavit "that their attendance was procured in good faith, and if required, it should be made to appear at least *prima facie* that they were material or intended to be so." *Atherton v. Atlantic Coast Line R. Co.*, 82 S. C. 474, 64 S. E. 411; *Winesmith v. Dewberry*, 14 S. C. 554; *Taylor v. McMahan*, 2 Bailey 131; *Farr v. Farr*, 2 Hill 554; *Love v. Ingram*, 2 Speer 87.

16. In Iowa "the statute (Code 1873, §3814) fixes the compensation of witnesses at so much for each day's attendance upon a court of record. Generally speaking, a witness is one who gives evidence in a court. A person who is neither subpoenaed nor called nor used upon a trial is not a witness, even though he be present by request of one of the parties. If one who has not been subpoenaed cannot have mileage taxed, surely such a one, who has neither been called nor sworn, is not entitled to fees for attendance." *Fisher v. Burlington, etc. R. Co.*, 104 Iowa 588, 73 N. W. 1070, 1071.

In North Carolina "where a witness duly subpoenaed is neither examined nor tendered to the opposite party on the trial, his attendance can be taxed only against the party who summoned him." *Loftis v. Raxter*, 66 N. C. 340; *Wooley v. Robinson*, 52 N. C. 30." *Cureton v. Garrison*, 111 N. C. 271, 16 S. E. 338; *Hobbs v. Atlantic Coast Line R. Co.*, 151 N. C. 134, 65 S. E. 755.

17. Idaho.—*Bechtel v. Evans*, 10 Idaho 147, 77 Pac. 212. Ia.—*Parsons Band Cutter & Self-Feeder Co. v. Sciscoe*, 129 Iowa 631, 106 N. W. 164. Minn.—*Schuler v. Minneapolis St. R. Co.*, 76 Minn. 48, 78 N. W. 881. Tex.—*Perry v. Harris*, 1 White & Wills. Civ.

Cas. §478. Va.—*Epstein Munf.* 258. Wash.—*Dola* Wash. 259, 109 Pac. 10. *v. Willis*, 35 Wash. 676, *Ivall v. Willis*, 17 Wash. 467. Wis.—*Charles Baum Gessler*, 82 Wis. 231, 52

Witnesses Not Present

Room.—The presence of witnesses in close proximity room, though that fact closed to the opposing though requested, does not allowance of their fees, ing the fact that they were and that opposing counsel desired to use them if possible. *Parson's Band Cutter & Self-Feeder Co. v. Sciscoe*, 129 Iowa 631, 106 N. W. 164.

18. Idaho.—*Griffith v. 4 Idaho 75, 35 Pac. 704.* *Bert v. Kennedy*, 22 Mich. State v. Gayhart, 26 Nev. 1087, 68 Pac. 113. Ohio.—*Ohio Fire Ins. Co. v. C. C. C. 97, 10 Ohio C. C. 81, 805. reversed in 63 Ohio St. 81, 805. Utah.—Cole v. Du* Utah 42, 44 Pac. 92. Vt.—*Connecticut, etc. R. Co.*,

When the pleadings present a material fact, the issue is the *onus* of proof must be on the witnesses to support the fact, and if such witnesses are sworn because the adverse party admits the fact, the evidence is unnecessary, and if he recovers costs, may tax the fees of such witnesses as disburse their fees. *Pugh v. Good*, 19 Ore. 85, 19

If the failure to call witnesses were not sworn upon the issue, whose fees are charged for their attendance in the bill of costs, is not properly explained, it is not proper to allow such item. *Chism v. N. Y. Supp.* 881.

incompetent matters, or the fees of an incompetent witness may be taxed as costs against the unsuccessful party.¹⁹ But the better rule is that such fees may be taxed against the losing party, although the evidence is immaterial or inadmissible, if he acted in good faith in summoning them, because it often happens that evidence which appears to be material in the preparation of a trial becomes immaterial by reason of a change in the pleadings, or in consequence of some admission of the adverse party.²⁰

(F.) **RULE WHERE PARTIES TESTIFY.**—A party who testifies in his own cause can tax no fees as a witness either for travel or attendance.²¹

19. Some cases hold that the attendance of witnesses summoned to prove matter inadmissible in law as evidence should be taxed to the party calling them. *Ind.*—*Voltz v. Newbert*, 17 Ind. 187. *Me.*—*Grover v. Drummond*, 25 Me. 185. *Tenn.*—*Cantrell v. Ford* (Tenn. Ch. App.), 46 S. W. 581; *Sherman v. Brown*, 4 Yerg. 561.

When a witness is rejected for incompetency, the costs of his attendance can only be collected out of the party at whose instance he was subpoenaed. *Crozier v. Berry*, 27 Ga. 346; *Henn v. Holt*, 15 W. N. C. (Pa.) 403.

In Pennsylvania it seems to be pretty well settled that the fees of witnesses subpoenaed who are wholly incompetent to testify, or whose testimony is wholly irrelevant and immaterial to the issue and for that reason excluded by the court, cannot be taxed against the losing party as costs. *Com. v. Lucas*, 24 Pa. Co. Ct. 126, citing *Eakin v. Fulmer*, 4 Pa. Co. Ct. 319; *Fisher v. Scott*, 15 W. N. C. 126; *Abel v. Fisher*, 3 Northampton (Pa.) 68.

20. *Ia.*—*Hammers v. McClelland*, 74 Iowa 318, 37 N. W. 389. *Minn.*—*Mankato Lime, etc. Co. v. Craig*, 81 Minn. 224, 93 N. W. 983. *Mont.*—*Isman v. Altenbrand*, 42 Mont. 188, 111 Pac. 849. *Tenn.*—*Gray v. Alexander*, 7 Humph. 16.

Testimony Rendered Irrelevant by Theory of Trial.—The fees of certain witnesses who attended the trial of the action to give testimony upon certain issues tendered by the complaint held properly taxed in favor of defendant, even though the theory of the trial eliminated such issues, and rendered the testimony irrelevant and immaterial. *Merriam v. Johnson*, 93 Minn. 316, 101 N. W. 308.

Discretion of Court.—The chancellor may in his discretion tax a party with

costs of witnesses whose testimony is wholly irrelevant to any matter in issue. *Cantrell v. Ford* (Tenn. Ch. App.), 46 S. W. 581; *Savage v. Cantrell* (Tenn. Ch. App.), 46 S. W. 581.

Witnesses to Collateral Issues.—A party is bound to assume that the only issues triable in a cause are made by the pleadings, and if he subpoena witnesses to testify to matters outside of such issues, he does so at his peril. In cases where collateral inquiries are permissible a party may bring witnesses to testify in relation to the same, but, before he can properly charge as disbursements the expense incurred in procuring the same, he must show that the attendance of such witnesses was necessary. *Pugh v. Good*, 19 Ore. 85, 23 Pac. 827, *approving and following Jackson v. Siglin*, 10 Ore. 93.

21. *U. S.*—*Sebring v. Ward*, 4 Wash. 546, 21 Fed. Cas. No. 12,593. *Ind.*—*Goodwin v. Smith*, 68 Ind. 301. *Minn.*—*Barry v. McGrade*, 14 Minn. 286. *N. J.*—*Corle v. Monkhouse*, 61 N. J. L. 535, 43 Atl. 100. *N. Y.*—*Steere v. Miller*, 30 How. Pr. 7; *Case v. Price*, 17 How. Pr. 248; *Logan v. Thomas*, 11 How. Pr. 160. *Pa.*—*Parker v. Martin*, 3 Pittsb. 166. *Tenn.*—*Carter v. Simpson*, 6 Heisk. 92. *Tex.*—*Gause v. Edminston*, 35 Tex. 69; *Texas, etc. R. Co. v. Parker*, 28 Tex. Civ. App. 116, 66 S. W. 583. *Vt.*—*Hale v. Merrill*, 27 Vt. 738. *Wis.*—*Grinnell v. Denison*, 12 Wis. 402.

Representative Capacity.—“A party to a suit in his own right, or in his representative capacity, is not entitled to claim and receive compensation for his attendance and examination as a witness, nor to have taxed to his adversary such costs as have accrued by reason of the issuance and service of subpoena upon him in the cause. The

But where parties are subpoenaed and compelled to attend as witnesses, they are properly allowed fees.²² And the fees of a nominal party having little interest in the result of a suit, may be taxed.²³

(G.) **RULE WHERE ATTORNEYS TESTIFY.**—While there is authority that a member of the bar in actual practice in the court where he is called as a witness, is not entitled to witness fees, yet where a member of the bar devotes a greater portion of his time to another profession there are some exceptions to the rule.²⁴

(H.) **FEES OF EXPERT WITNESSES.**—In the absence of statute authorizing it the compensation of experts beyond the regular witness fees, is not ordinarily a necessary disbursement and cannot be taxed as part of the costs. It is considered as having been incurred for the parties' own benefit, and is no more a disbursement in the cause than the fees paid an attorney.²⁵

(I.) **LIMITATIONS AS TO NUMBER OF WITNESSES.**—In some jurisdictions a limit is placed on the number of witnesses for whose fees costs may

law makes it his duty, and he is conclusively presumed to be present at the taking of the testimony and trial. If he is an administrator or executor, he by accepting such trust, imposes upon himself the duty of looking after and attending to the business, litigated and unlitigated, of his testator or intestate, for all of which he is compensated in an allowance by the proper tribunal." *Carter v. Simpson*, 6 Heisk. (Tenn.) 92.

Wife.—A party to a suit is not entitled to pay for attendance as a witness, nor is his wife, although the suit involves his separate property, since she is interested in the result. *Texas*, etc. *R. Co. v. Parker*, 28 Tex. Civ. App. 116, 66 S. W. 583; *Cole v. Angel* (Tex. Civ. App.), 28 S. W. 93.

Minor children of one of the parties litigant when regularly summoned who are not parties to the action are entitled to witness fees. *Northern Texas Tract. Co. v. Grimes* (Tex. Civ. App.), 134 S. W. 803.

22. *Van Dusen v. Bissell*, 29 How. Pr. (N. Y.) 481; *Fuller Buggy Co. v. Waldrom*, 49 Misc. 278, 97 N. Y. Supp. 730.

Party Called by Adversary.—*Goodwin v. Smith*, 68 Ind. 301; *Hewlett v. Brown*, 1 Bosw. (N. Y.) 655, 7 Abb. Pr. 74.

Consolidation for Convenience of Trial.—Where two cases were consolidated for the purpose of trial before the consolidation a subpoena was issued in one cause for a party in one

cause, and he appeared and was examined, his witness fees should be taxed as part of the costs. *State v. Gayhart*, 26 Nev. 278, 66 Pac. 1087, 68 Pac. 113; *Gray's Harbor Boom Co. v. McAmant*, 21 Wash. 465, 58 Pac. 573.

23. *Keith Bros. v. Stiles*, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

24. *Com. v. Lucas*, 24 Pa. Co. Ct. 126. See *Kennedy v. Jarvis*, 126 App. Div. 551, 110 N. Y. Supp. 894.

Witness fees are not taxable for the testimony of an attorney who testified merely to free himself from an apparent neglect of professional duty. *Pearman v. Gould* (N. J. Eq.), 8 Atl. 285.

25. *Lawson Expert Ev.*, p. 270, and the following cases: *U. S.*—*In re Carolina Cooperage Co.*, 96 Fed. 604; *The William Branfoot*, 52 Fed. 390, 3 C. C. A. 155; *The Vernon*, 36 Fed. 113. *Cal.*—*Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442. *Idaho.*—*McDonald v. Burke*, 2 Idaho 995, 28 Pac. 440. *La.*—*Rathbone v. Neal*, 4 La. Ann. 563. *Tenn.*—*Glasgow v. Hood* (Tenn. Ch. App.), 57 S. W. 162.

A surveyor called to testify on matters that do not involve his skill as a surveyor, is entitled to ordinary fees. *Com. v. Lucas*, 24 Pa. Co. Ct. 126.

The fees of an expert, not called by the court nor by agreement of the parties, is not taxable. *Linforth v. San Francisco Gas, etc. Co.*, 9 Cal. App. 434, 99 Pac. 716.

be taxed,²⁶ but within this limit the matter rests in the sound discretion of the trial court,²⁷ and cannot be controlled by mandamus.²⁸

As a general rule, however, a party may subpoena and call as many witnesses as he may deem necessary to make out his case, or defence, and they are entitled to their fees, and the winning party may tax them as costs unless it be shown that they were subpoenaed in excessive numbers for the purpose of oppression.²⁹

(J.) HOW MANY FEES ALLOWED.—SAME WITNESS SUMMONED BY BOTH PARTIES.—A witness summoned by both parties in the same cause is entitled to but one attendance.³⁰

Witnesses Subpoenaed in Several Different Suits.—But when a witness is subpoenaed in several suits pending at the same time and place, at the instance of the same person, he is entitled to compensation in each case.³¹

(K.) CERTIFICATES AND AFFIDAVITS REQUIRED.—In some jurisdictions certain certificates or affidavits are required as a basis for the taxation of witness' fees. Thus where a witness is not sworn a certificate of attendance is required.³² In others, a certificate that the witness was

26. **U. S.**—Kane v. Luckman, 131 Fed. 609. **Ga.**—Brown v. State, 86 Ga. 375, 12 S. E. 649. **Ill.**—Rork v. Minor, 109 Ill. App. 12. **Mo.**—State v. Oliver, 116 Mo. 188, 22 S. W. 637. **Mont.**—Hoskins v. Northern Pac. R. Co., 39 Mont. 394, 102 Pac. 988. **N. C.**—*Ex parte* Beckwith, 124 N. C. 111, 32 S. E. 393; Cureton v. Garrison, 111 N. C. 271, 16 S. E. 338.

The allowance of fees for more than two witnesses to the same fact is discretionary and irreviewable unless plainly abused. Cox v. Patten (Tex. Civ. App.), 66 S. W. 64.

In North Carolina "not more than two witnesses summoned by the successful party to prove a single fact can be taxed against the party cast. Code, §1370; State v. Massey, 104 N. C. 877, 10 S. E. Rep. 608." Cureton v. Garrison, 111 N. C. 271, 16 S. E. 338.

Under Texas Rev. St., 1895, art. 1427, providing that fees will not be allowed to more than two witnesses to the same fact, only applies to the witnesses called by the successful party which may be taxed and does not relieve a party from the necessity of paying the fees of all the witnesses he subpoenas. Cabell v. Orient Ins. Co., 22 Tex. Civ. App. 635, 55 S. W. 610.

27. Chicago, etc. R. Co. v. Eaton, 136 Ill. 9, 26 N. E. 575; Chicago, etc. R. Co. v. Bowman, 122 Ill. 595, 13 N.

E. 814; Biester v. State, 65 Neb. 276, 91 N. W. 416.

28. State v. Oliver, 116 Mo. 188, 22 S. W. 637.

29. **Cal.**—Randall v. Falkner, 41 Cal. 242. **Mich.**—Gilbert v. Kennedy, 22 Mich. 5. **Pa.**—Com. v. Lucas, 24 Pa. Co. Ct. 126. **Utah.**—Cole v. Ducheneau, 13 Utah 42, 44 Pac. 92.

Character of testimony does not determine necessity. Barnhart v. Kron, 88 Cal. 447, 26 Pac. 210.

30. Renfro v. Kelly, 10 Ala. 338. See also Hopkins v. Waterhouse, 2 Yerg. (Tenn.) 323.

31. **Ga.**—Robinson v. Banks, 17 Ga. 211. **Minn.**—Schuler v. Minneapolis St. R. Co., 76 Minn. 48, 78 N. W. 881. **Tex.**—Flores v. Thorn, 8 Tex. 377; Cabell v. Orient Ins. Co., 22 Tex. Civ. App. 635, 55 S. W. 610. **Utah.**—Smith v. Nelson, 23 Utah 512, 65 Pac. 485.

Where One of Several Cases Continued.—When witnesses are subpoenaed in more than one case and attend and testify in one of the cases, the others being continued, and subsequently all are tried on a statement of facts made out in the case previously tried, witness fees in each case may be taxed under Rev. Stat. 1895, art. 2268, allowing witness fees for each day in court. Cabell v. Orient Ins. Co., 22 Tex. Civ. App. 635, 55 S. W. 610.

32. **Ala.**—Elliott v. Howison, 158 Ala. 71, 48 So. 508. **Mont.**—State v.

a material witness is required in order to warrant the allowance of his fees.³³

(XII.) *Interpreter's Fees.*—The fees of an interpreter, in so far as they are reasonable, are taxable as part of the disbursements.³⁴

(XIII.) *Costs of View or Change of Venue.*—*Costs of View by Jury.*—The costs of a view by the jury must be paid by the party making the application.³⁵

Costs of Change of Venue.—The party moving for a change of venue of a civil case must pay the costs. But the failure to pay such costs does not vacate the order of transfer, nor enable the court in which the action commenced to reassume jurisdiction, unless the statute so provides.³⁶

Ramsey, 11 Mont. 245, 28 Pac. 258. N. Y.—Willink v. Reckle, 19 Wend. 82. S. C.—State v. Bullock, 54 S. C. 300, 32 S. E. 424. Wis.—State v. Greene, 91 Wis. 500, 65 N. W. 181.

The affidavit that unsworn witnesses were called in good faith is presumed true where there is no evidence that such unsworn witnesses were not properly summoned. Jeffrey v. Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7.

Affidavit of Witnesses.—A witness making an affidavit to prove the costs to which he is entitled, must specify the number of days of attendance and the number of miles he has traveled, though the statute does not specify the necessary averments of such affidavit. Gause v. Edminston, 35 Tex. 69. See Hubbard v. Hemphill, 94 Miss. 388, 47 So. 657.

This affidavit cannot be made by counsel, in the absence of any showing as to why the affidavit of the witness could not be obtained. Atherton v. Atlantic Coast Line R. Co., 82 S. C. 474, 48 S. E. 411.

An affidavit made on a motion to retax costs, should state the name and place of residence of the witness, the distance traveled to the place of trial, and the number of days actually in attendance as a witness. Mich.—Jeffrey v. Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7. N. Y.—Ehele v. Bingham, 4 Hill 595. Utah.—Cole v. Ducheneau, 13 Utah 42, 44 Pac. 92.

Sufficiency of Affidavit.—An affidavit that a witness who was not sworn on the trial was a material one, and was in attendance necessarily at the trial, is not sufficient to justify the taxation of fees for such witness. Berryhill v. Carney, 76 Minn. 319, 79 N. W. 170,

citing Osborne v. Gray, 32 Minn. 53, 19 N. W. 81.

33. Eustace v. Greenville County, 42 S. C. 190, 20 S. E. 88.

In Minnesota that the witness was under subpoena and was necessarily in attendance. Berryhill v. Carney, 76 Minn. 319, 79 N. W. 170.

34. Hall v. Northwest Lumb. Co., 61 Wash. 351, 112 Pac. 369; Meyer v. Foster, 16 Wis. 294.

35. Miller v. Reed, 4 N. J. L. 350. Courts of law have power to allow reasonable expenses of views in proper cases, and even of excavations reasonably necessary for the view. Stockbridge Iron Co. v. Cone Iron Wks., 102 Mass. 80.

In federal courts under the conformity act the state practice is followed. Huntress v. Town of Epsom, 15 Fed. 732.

36. Chase v. Superior Court, 154 Cal. 789, 99 Pac. 355.

In some states payment or offer to pay is necessary. Chapin v. Brown, 17 Kan. 142; Oakley v. Dunn, 63 Mich. 494, 30 N. W. 96.

It is only where the application for a change of venue is made after continuance that the court may impose costs upon the applicant therefor. Brothers v. Williams, 65 Wis. 401, 27 N. W. 157.

If the order for a change is made pursuant to a stipulation of the parties, one party is under no greater obligation than the other to pay the costs and procure the transmission of the record. Eldred v. Becker, 60 Wis. 48, 18 N. W. 720.

The party applying for a change of venue can be taxed with no other items of expense than the costs of making

(XIV.) **Incidental Expenses or Disbursements.** — (A.) **IN GENERAL.** — Generally the prevailing party in the action is entitled to tax, as part of his costs, all his necessary disbursements. These are held to include all necessary charges or expenses actually paid by such party in the course of the action,³⁷ and they can be recovered only when costs are recoverable.³⁸ To warrant the allowance of such charges or expendi-

the change, which must be the legal fees of the clerk for certifying and transmitting the papers. It is error to tax other items. *Bantley v. Stowell*, 82 Wis. 244, 52 N. W. 92.

37. Cal.—*Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210. **Kan.**—*Swartzell v. Rogers*, 3 Kan. 380. **N. Y.**—*Finch v. Calvert*, 13 How. Pr. 13; *Levine v. Klein*, 66 Misc. 571, 122 N. Y. Supp. 396; *Hanel v. Baare*, 9 Bosw. 682. **S. C.**—*Cox v. Charleston, etc. Ins. Co.*, 3 Rich. L. 331, 45 Am. Dec. 771. **Wis.**—*Emerick v. Krause*, 52 Wis. 358, 9 N. W. 16.

Expenses paid for room rent, fuel and lights necessary for the purpose of a reference (*Bailey v. Hanford*, 10 Wend. (N. Y.) 622), a fair and necessary disbursement for serving summons and complaint or notice of the object of the action (*Case v. Price*, 17 How. Pr. (N. Y.) 348, 9 Abb. Pr. 111; *Benedict v. Warriner*, 14 How. Pr. 568), a referee's fee, appointed at the plaintiff's instance to take testimony (*Vibbard v. Kinser Const. Co.*, 130 N. Y. Supp. 837), the costs of an exemplification of a foreign judgment (*Keith Bros & Co. v. Stiles*, 92 Wis. 15, 64 N. W. 860), interpreters' fees (*Meyer v. Foster*, 16 Wis. 294), items for express charges on papers and telegraphing and postage (*Chism v. Smith*, 130 N. Y. Supp. 881), and expenses of examining parties before trial (*Arpin v. Bowman*, 83 Wis. 54, 53 N. W. 151), are properly taxable as disbursements.

Traveling expenses cannot generally be taxed as part of the costs or disbursements. **U. S.**—*Michigan Aluminum Foundry Co. v. Aluminum Co.*, 190 Fed. 903. **Cal.**—*Irrgang v. Ott*, 9 Cal. App. 440, 99 Pac. 528. **Ill.**—*Aldrich v. Maher*, 153 Ill. App. 413.

But under Maine Rev. St., §14, ch. 117, the court may direct the number of terms for which travel and attendance are to be taxed; such authority may be exercised by the court, upon application, under the provisions of

§152, ch. 85, Rev. St. to have the costs taxed and passed upon by the court. *Porteous v. Miller*, 107 Me. 155, 77 Atl. 710.

The cost of a copy of the testimony taken before a referee, to be used by counsel in their argument, is not a "necessary disbursement." *Wisconsin Sulphite Fibre Co. v. Jeffris Lumb. Co.*, 132 Wis. 1, 111 N. W. 237.

An item of cost for filing a cost bill will be stricken out. *Linforth v. San Francisco Gas, etc. Co.*, 9 Cal. App. 434, 99 Pac. 716.

Premium on bond paid to a surety company, is not a proper item in a cost bill, because it is not a necessary disbursement. *Williams v. Atchison, etc. R. Co.*, 156 Cal. 140, 103 Pac. 885, a replevin bond. So, *In re Hoyt*, 119 Fed. 987, as to premium paid on a surety bond. To the same effect is: **U. S.**—*Lee Injector Co. v. Pemberthy Co.*, 109 Fed. 969, 48 C. C. A. 760; *The Willowdene*, 97 Fed. 509. **Mich.**—*Sommerville v. Wabash R. Co.*, 111 Mich. 51, 69 N. W. 90. **Minn.**—*Wadleigh v. Duluth St. R. Co.*, 92 Minn. 415, 100 N. W. 104, 362.

See on the contrary *Edison v. American Mutoscope Co.*, 117 Fed. 192, as to an appeal bond and a supersedeas bond.

38. Minn.—*Woolsey v. O'Brien*, 23 Minn. 71. **N. Y.**—*Peet v. Warth*, 1 Bosw. 653. **Ore.**—*Schneider v. Sears*, 13 Ore. 69, 8 Pac. 841. **Wis.**—*Emerick v. Krause*, 52 Wis. 358, 9 N. W. 16.

Charges for revenue stamps required on the writs in a suit (*Ferguson v. State*, 31 N. J. L. 289), the cost of an abstract of title (*Hoyt v. Jones*, 31 Wis. 389), and the expenses of a sheriff in taking care of and preserving property he has seized (*Schneider v. Sears*, 13 Ore. 69, 8 Pac. 841. *Contra*, *Burns v. Rosenstein*, 135 U. S. 449, 10 Sup. Ct. 817, 34 L. ed. 193), and trying the right to it (*Schneider v. Sears, supra*) have all been denied as disbursements.

On Interlocutory Motions.—Neither

tures they must have been actually paid, or liability for their payment incurred.³⁹

But, as has been pointed out, sums paid for plans and measurements and for compensation of experts, beyond their fees as witnesses, are not properly taxable as necessary disbursements.⁴⁰ The expense of office copies of deeds, necessary in a trial, and the expense of taking depositions, if used upon the trial are held to be properly taxable.⁴¹

(B.) **MILEAGE FOR SERVICE.**—Where a certain amount for mileage is allowed by statute, only one charge can be made for serving several summonses by the same travel.⁴²

(C.) **PRINTING COSTS.**—In the absence of statute or rule of court, printing costs cannot be taxed. But in most states such an allowance is made to a limited extent.⁴³

(XV.) **Double or Treble Costs.**—In a few jurisdictions there are statutes, penal in their nature, allowing double and even treble costs in particular kinds of actions and proceedings, and under certain cir-

under the acts of congress nor under Michigan Comp. Laws 1897, §§11, 254, can items of disbursement for witnesses, examiner and marshal's fees be allowed, on a motion to set aside service of process. *Michigan Aluminum Foundry Co. v. Aluminum Co.*, 190 Fed. 903.

39. *Haynes v. Mosher*, 15 How. Pr. (N. Y.) 216.

Generally speaking, no expense incurred by a party in preparing for an action or in ascertaining his rights for his own benefit, is a disbursement in the action. *Whipple v. Cumberland Cotton Mfg. Co.*, 3 Story 54, 29 Fed. Cas. No. 17,515 (the expenses of a survey were ordered by the court to be charged equally to both parties); *Hathaway v. Roach*, 2 Woodb. & M. 63, 11 Fed. Cas. No. 6,213; *Haynes v. Mosher*, 15 How. Pr. (N. Y.) 216.

40. *Mark v. City of Buffalo*, 87 N. Y. 184.

Reasonable expenses for making a map, allowed in *Kelly v. City of Butte* (Mont.), 119 Pac. 171, construing Rev. Codes, §7169.

41. *Lamb v. Stone*, 11 Pick. (Mass.) 527; *Washington Bank v. Boston Manufactory*, 6 Pick. (Mass.) 375; *Inhab. of Suffolk v. Mill Pond, etc. Co.*, 5 Pick. (Mass.) 540; *Gulf, etc. R. Co. v. Evansich*, 61 Tex. 3.

42. *Fensier v. City of Virginia*, 3 Nev. 58.

Under Act, 1836, §52, when four cases are tried at the same time and place, only one mileage will be allowed. *Law v. Cobb*, 1 Luz. Leg. Obs. (Pa.) 3; *Card v. Card*, 1 Luz. Leg. Obs. (Pa.) 3. See *supra*, p. 944.

43. **U. S.**—*Spaulding v. Tucker*, 2 Sawy. 50, 22 Fed. Cas. No. 13,221; *Dennis v. Eddy*, 12 Blatch. 195, 7 Fed. Cas. No. 3,793. **La.**—*Cumming v. Archinard*, 1 La. Ann. 279. **N. J.**—*Northampton Ins. Co. v. Stewart*, 40 N. J. L. 103. **N. Y.**—*Rinaldo v. Cowen*, 122 N. Y. Supp. 1074. **S. C.**—*Scott v. Alexander*, 27 S. C. 15, 2 S. E. 706. See *infra*, p. 978.

Charges for useless and prolix matters in papers is not allowed. *Mich. Wilson v. Pontiac, etc. R. Co.*, 57 Mich. 155, 23 N. W. 627. **N. J.**—*Personette v. Johnson*, 40 N. J. Eq. 532. **N. Y.**—*Crippen v. Brown*, 11 Paige 628; *Rogers v. Rogers*, 2 Paige 458. **W. Va.**—*Spang v. Robinson*, 24 W. Va. 327.

Unnecessary printing will be charged against the party in fault. *Moore v. Dickson*, 121 Wis. 591, 99 N. W. 322.

Draughting or copying endorsements of papers not properly included. *Abbott v. Johnson*, 47 Wis. 239, 2 N. W. 332.

Printing sheriff's advertisement of sales properly charged. *Gardner v. Brown*, 22 Ind. 447. See *Murphy v. Jones*, 7 Mo. App. 570.

cumstances,⁴⁴ upon application therefor by the party entitled.⁴⁵ As such statutes are penal they will be strictly construed.⁴⁶

Manner of Computing.—By the English rule followed in some states double costs are found by adding one-half more to single costs; treble costs, thus: first, common costs; second, half these; third, then half the latter.⁴⁷

The recitation in the judgment that the party entitled recover treble costs only embraces such costs as are contemplated by the statute.⁴⁸

44. Mich.—*People v. Circuit Judge*, 14 Mich. 33. Minn.—*Laws* 1907, ch. 200; *Hooper v. Chicago, etc. R. Co.*, 37 Minn. 52, 33 N. W. 314 (failure of railroad to tender damages in prescribed time). Mo.—*Sidway v. Missouri Land, etc. Co.*, 197 Mo. 359, 94 S. W. 855, where a third pleading is filed and stricken out as insufficient, treble costs are allowed. Pa.—*Prescott v. Otterstatter*, 85 Pa. 534, defendant in replevin may recover.

On Overruling of Frivolous Exceptions.—*Young v. Thurlo*, 34 Me. 594; *Demelman v. Bristoll*, 179 Mass. 163, 60 N. E. 478; *Williams v. Greene*, 2 Cush. (Mass.) 465.

The New York statute applies only to actions at law brought for misfeasance or nonfeasance of a public officer in the performance of his official duties (*Stewart v. Schultz*, 50 Barb. [N. Y.] 192; *Gibbs v. Bull*, 20 Johns. [N. Y.] 212; *People ex rel. Sanders v. Colburne*, 20 How. Pr. [N. Y.] 378), in cases of a verdict for the defendant, upon the plaintiff's becoming non-suit, or suffering a discontinuance (*Wait v. Durand*, 9 Johns. [N. Y.] 254; *Rider v. Hubbell*, 4 Wend. [N. Y.] 201), and it seems that such costs may be awarded in a proceeding upon mandamus, as well as in an action (*People ex rel. Sanders v. Colburne*, 20 How. Pr. [N. Y.] 378).

It does not apply to suits in chancery (*Davis v. Cooper*, 50 Barb. (N. Y.) 376; *Stewart v. Schultz*, 50 Barb. (N. Y.) 192), nor to interlocutory motions and rules (*Rider v. Hubbell*, 4 Wend. (N. Y.) 201), nor to the case of a judgment for the defendant on a demurrer (*Gibbs v. Bull*, 20 Johns. (N. Y.) 212; *Stone v. Woods*, 5 Johns. (N. Y.) 182).

45. *Norris v. Lynch*, 121 Mass. 586; *Stewart v. Schultz*, 33 How. Pr. (N. Y.) 3; *Wheelock v. Hotchkiss*, 18 How. Pr.

(N. Y.) 468; *Mack v. McCulloch*, 2 How. Pr. (N. Y.) 127; *Anonymous*, 4 Wend. (N. Y.) 216.

46. *Prescott v. Otterstatter*, 85 Pa. 534.

47. 2 Tidd's Pr. 988; Bac. Abr. tit. "Costs," c, and the following cases: Mich.—*Gilbert v. Kennedy*, 22 Mich. 5. N. Y.—*Patchin v. Parkhurst*, 9 Wend. 443. S. C.—*Stevens v. Ligon*, Harp. 439. Eng.—*Staniland v. Ludlam*, 4 B. & C. 889, 10 E. C. L. 465.

But it seems to be doubted whether even by the English rule treble costs are not three times single costs. *Abbott's Law Dict.* —; *Wilson v. River Dun Nav. Co.*, 5 M. & W. (Eng.) 89.

In Michigan under Comp. Laws, §3736, double costs means common costs and one-half added thereto. *People v. Circuit Judge*, 14 Mich. 33; *Robeson v. Bingham*, 1 Mich. N. P. 208.

By the Pennsylvania rule single costs are actually doubled and trebled. *Welsh v. Anthony*, 16 Pa. 254; *Shoemaker v. Nesbit*, 2 Rawle (Pa.) 201.

And by the New Jersey and New York rule treble costs are three times the amount of single costs. *Davison v. Schooley*, 10 N. J. L. 145; *Mairs v. Sparks*, 5 N. J. L. 513; *Crane v. Dod*, 2 N. J. L. 340; *Walker v. Burnham*, 7 How. Pr. (N. Y.) 55; *King v. Havens*, 25 Wend. (N. Y.) 420; *Jermain v. Booth*, 1 Denio (N. Y.) 639.

"Double costs" are taxed costs multiplied by two. *Hopper v. Smith*, 72 N. J. L. 164, 60 Atl. 63; *Shields v. Lozeau*, 34 N. J. L. 530.

48. *Sidway v. Missouri, etc. Co.*, 197 Mo. 359, 94 S. W. 855.

Where a judgment is rendered for treble costs, it is sufficient to state the aggregate sum "being treble the costs and charges of the plaintiff," without first stating the amount of the

8. Relief From Taxation of Costs.—a. Motion To Retax.
(1) To Be Made in Same Court.—Where costs have been illegally or erroneously taxed by the clerk, the appropriate remedy is by a motion to retax, made in the court where the alleged mistake occurred.⁴⁰

single costs, and then the treble sum. *Davison v. Schooley*, 10 N. J. L. 145.

But in Michigan double costs are vested in the plaintiff by the judgment, and no special finding or order of the court is necessary to entitle him to have them taxed. *People v. Circuit Judge*, 14 Mich. 33.

49. **U. S.**—*Sully v. American Nat. Bank*, 179 U. S. 68, 21 Sup. Ct. 29, 45 L. ed. 89; *Pennsylvania v. Wheeling, etc. Bridge Co.*, 18 How. 460, 15 L. ed. 449. **Ala.**—Code 1896, §1344; *Noland v. Lock*, 16 Ala. 52. **Cal.**—*Rogers v. Druffel*, 46 Cal. 654; *Petty v. San Joaquin County*, 45 Cal. 245. **Ga.**—*Thornton v. McLendon*, 99 Ga. 590, 27 S. E. 186; *Markham v. Ross*, 73 Ga. 105; *McGuire v. Johnson*, 25 Ga. 604. **Idaho.**—*Berry v. G. V. B. Min. Co.*, 5 Idaho 691, 51 Pac. 746; *McDonald v. Burke*, 2 Idaho 995, 28 Pac. 440. **Ill.**—*Sargent Co. v. Ives*, 156 Ill. App. 446; *Bogar v. Walker*, 89 Ill. App. 457. **Ind.**—*Smawley v. Stark*, 16 Ind. 371. **Ia.**—*Bankers' Iowa State Bank v. Jordan*, 111 Iowa 324, 82 N. W. 779; *McGuffie v. Devine*, 1 G. Gr. 251. **Kan.**—*Linton v. Housh*, 4 Kan. 535. **Ky.**—*McCann v. Gouge*, 9 B. Mon. 56; *Williams v. Jackman*, 2 J. J. Marsh 352. **Mich.**—*Reeves v. Scully*, 1 Walk. 340. **Mo.**—*Stephenson v. Joplin State Bank* (Mo. App.), 141 S. W. 691; *Warrensburg v. Simpson*, 22 Mo. App. 695. **Neb.**—*Citizens' Nat. Bank v. Gregg*, 53 Neb. 760, 74 N. W. 273; *DeWitt v. Mattison*, 26 Neb. 655, 42 N. W. 742. **N. J.**—*Allen v. Hickson*, 6 N. J. L. 409. **N. Y.**—*Dame v. Maynard*, 139 App. Div. 385, 124 N. Y. Supp. 17; *Lower v. New York Taxicab Co.*, 115 N. Y. Supp. 127; *Talcott v. Jonasson*, 87 N. Y. Supp. 521; *Hecla Consol. Gold Min. Co. v. O'Neill*, 22 N. Y. Supp. 130, 51 N. Y. St. 436. **N. C.**—*Cureton v. Garrison*, 111 N. C. 271, 16 S. E. 338; *Walton v. Sugg*, 61 N. C. 98; *Wells v. Goodbread*, 36 N. C. 9. **Ohio.**—*Kellogg v. Graham*, *Wright* 87. **Pa.**—*Corcoran v. Hetzel*, 9 Pa. Co. Ct. 82. **S. C.**—*Crocker v. Collins*, 44 S. C. 500, 22 S. E. 719. **S. D.**—*Sorenson v. Donahoe*, 12 S. D. 204, 80 N. W. 179. **Tenn.**—*State v.*

Goodbar, 8 Lea 451; *Sherman v. Brown*, 4 Yerg. 561. **Tex.**—*Patton v. Cox*, 97 Tex. 253, 77 S. W. 1025, reversing 75 S. W. 871; *Clark v. Adams*, 80 Tex. 674, 16 S. W. 522; *Houston, etc. R. Co. v. Jones*, 46 Tex. 133; *Collins v. Hines* (Tex. Civ. App.), 100 S. W. 359. **Wash.**—*Newberg v. Farmer*, 1 Wash. Ter. 182. **Wis.**—*Pormann v. Frede*, 72 Wis. 226, 39 N. W. 385; *Ross v. Heathcock*, 57 Wis. 89, 15 N. W. 9; *Schauble v. Tietgen*, 31 Wis. 695.

"The motion to retax can be made before the clerk who has made the taxation, whence an appeal lies to the judge at chambers, or it can be made in the first instance before the judge at term time, by virtue of his supervisory power over the action of the clerk. *In re Smith*, 105 N. C. 167, 10 S. E. Rep. 982." *Cureton v. Garrison*, 111 N. C. 271, 16 S. E. 338.

If the clerk has been given authority to tax and has taxed the sum without the previous direction of the court, a motion to retax would be necessary, in order to secure action by the court, from which alone an appeal could be prosecuted. But where the court has acted, no motion to retax is necessary. *Sanitary Dist. of Chicago v. Curran*, 132 Ill. App. 241.

While the award of costs made in a judgment cannot be changed after the term, except for some cause provided by statute for modifying a judgment after the term at which it was entered, this rule does not apply to an application made by a party to retax items of the costs illegally or through mistake taxed against him. *Smith v. Bartlett*, 78 Neb. 359, 110 N. W. 991.

The fact that the unsuccessful parties have satisfied the judgment rendered against them and also the costs which have been taxed by the clerk, does not constitute a bar to a retaxation. *Patton v. Cox*, 97 Tex. 253, 77 S. W. 1025.

Nature of Motion.—A motion to retax the costs of a suit is simply a motion to correct a ministerial act of the clerk or officer whose duty it is

Other remedies cannot ordinarily be used to perform the functions of this motion.⁵⁰ Upon this notion the court is required to retax the

to tax the costs. *Noland v. Lock*, 16 Ala. 52.

Purport and Purpose of Motion.—"It would seem equally proper to allow the successful party to make a motion to retax the cost, if made in a reasonable time, upon any informality, or omission of the clerk, in properly taxing the costs in his favor, against the party cast. The taxation of the costs, and the issuing of the certificate of the witness, are official acts of the clerk, over which the parties to the suit have no absolute control. If he has been applied to properly to perform any such duty, and has failed by mistake, negligence, or omission to perform it correctly, there is no remedy left to the party but to appeal to the court to correct the failure. That is the purport and purpose of a motion to retax the costs." *Houston, etc. R. Co. v. Jones*, 46 Tex. 133, 140.

The question as to whether the fee of a master should be taxed can be raised by a motion to retax. *Prindle v. Curran*, 156 Ill. App. 278.

Attorney's Fee.—An error in fixing the amount of an attorney's fee in a case may be reviewed upon a motion to retax costs. *Rogers v. Crandall*, 143 Iowa 249, 121 N. W. 1092; *Bankers' Iowa State Bk. v. Jordan*, 111 Iowa 324, 82 N. W. 779.

If the question were whether or not any attorney's fee should be taxed, rather than the amount thereof, doubtless the matter could not be reached upon a motion to retax if objection were raised to the method of procedure, for that matter inhered in the judgment and was in no sense a mistake or omission of the clerk. *Rogers v. Crandall*, 143 Iowa 249, 121 N. W. 1092.

A mere discrepancy in two bills of costs accompanying an execution is not sufficient ground to support a motion to retax. *McDonald v. Cox*, 104 Ala. 379, 16 So. 113.

Foreclosure Proceedings.—If excessive costs have been taxed in foreclosure proceedings, the remedy is by motion to retax costs, and not by objection to confirmation of the sale.

Smith v. Foxworthy, 39 Neb. 214, 57 N. W. 994.

Rule To Show Cause.—In some jurisdictions if either party be dissatisfied with the taxation by the clerk, he may apply to the court for a rule to show cause why the clerk should not review the taxation first made by him. *Williams v. Getz*, 17 App. Cas. (D. C.) 388.

A rule to correct the taxation of costs is a mere collateral motion, and does not operate *per se* as a supersedeas. *Miller v. Netherland*, 1 Swan (Tenn.) 66.

Additional Costs on Amended Petition.—Where plaintiff is permitted to file an amended petition upon payment of costs, and pays a large amount of costs and files an amended petition, on which the case is tried and a decree rendered, if more costs are still due, the remedy of the defendant is a motion to retax, and, should additional costs still be due from the plaintiff it would not be cause for reversal of the judgment. *Hoagland v. Van Etten*, 31 Neb. 292, 47 N. W. 920.

Concurrent Cumulative Remedies. The questions to be determined by the court and the relief sought on a motion to retax costs are precisely the same as when the fee bill is replevied and a return thereof made. The remedies therefore are consistent and concurrent and may be elected between. But once the party has made his election as to which remedy to pursue he will be concluded thereby. *Leigh v. Laughlin*, 130 Ill. App. 530.

In Wisconsin, because of the nature of a motion for retaxation of costs, such motion cannot be entertained by the judge at chambers, nor by a court commissioner, or court judge. *Schauble v. Tietgen*, 31 Wis. 695.

50. A motion to set aside the judgment is not a proper remedy. *Pormann v. Frede*, 72 Wis. 226, 39 N. W. 385.

A mistake or error of fact or law in the taxation of costs cannot be corrected by certiorari (*Petty v. County Court of San Joaquin County*, 45 Cal. 245), or mandamus (*State v. Judge of Kenosha Circ. Ct.*, 3 Wis. 809).

costs and performance of this duty cannot be delegated.⁵¹

Any party to the record may file a motion to retax.⁵²

(II.) **Showing Made by Motion.**—The motion to retax must specify with particularity in what respect the taxation is erroneous,⁵³ and if one particular ground of relief is alleged, relief cannot be granted on other and different grounds.⁵⁴

A motion to retax costs should also show the time when the judgment was rendered and when the costs were taxed.⁵⁵ It is not enough that a judgment was rendered for the costs, but it should further appear that the costs complained of have been taxed against the movant,⁵⁶ or where fees have been omitted, that the services for which the fees are claimed were performed.⁵⁷

(III.) **Form.**—The practice in some states is, after written notice

Where judgment has been rendered against a party for costs, and he claims none should have been awarded, his remedy is by a motion to have the judgment itself modified, and not by an appeal from the taxation of costs. *Sorenson v. Donahoe*, 12 S. D. 204, 80 N. W. 179, citing *In re Kirby*, 10 S. D. 414, 73 N. W. 907.

Nor will a motion in arrest of judgment challenge the form of a judgment for costs. *Van Grundy v. Carrigan*, 4 Ind. App. 333, 30 N. E. 933, citing *Douglass v. State*, 72 Ind. 385.

"When items of costs are specifically allowed by the trial court and adjudged against a party, such allowance and judgment cannot be reached by the ordinary motion to retax, which is applicable only to the ministerial taxation of costs by the clerk after entry of judgment. A motion for a new trial within the proper time is the only way for obtaining revision of a specific judgment for costs." *Beecham v. Evans*, 136 Mo. App. 418, 117 S. W. 1190, quoting from *Bosley v. Parle*, 35 Mo. App. 232, and citing *Paul v. Minneapolis Thresh. Mach. Co.*, 87 Mo. App. 647.

Collateral Attack.—The improper taxation of costs is no ground for a collateral attack on the judgment, the remedy being by a motion to retax. *Rogers v. Druffel*, 46 Cal. 654.

51. *Lockart v. Stuckler*, 49 Tex. 765, holding it improper to appoint an auditor to retax.

52. *Calhoun v. Gray*, 150 Mo. App. 591, 131 S. W. 478, surety on cost bond. See *Hoyrardt v. Delaware*, etc. R. Co., 182 Fed. 880.

53. U. S.—*Dedekam v. Vose*, 3 Blatchf. 153, 7 Fed. Cas. No. 3,731. Ga.—*Thornton v. McLendon*, 99 Ga. 590, 27 S. E. 186. Mo.—*Tittman v. Thornton*, 53 Mo. App. 512. N. Y. *Toll v. Thomas*, 15 How. Pr. 315. Pa. *Raisley v. Morgan*, 17 Pa. Co. Ct. 268. S. C.—*Cureton v. Westfield*, 24 S. C. 457. Tenn.—*Arnold v. State*, 96 Tenn. 82, 33 S. W. 723. Wash.—*Bellingham Bay, etc. Co. v. Strand*, 5 Wash. 807, 32 Pac. 782. Wis.—*Turner v. Scheiber*, 89 Wis. 1, 61 N. W. 280.

Application for rule to show cause why costs should not be retaxed should specify with particularity in what respect the taxation is erroneous. *Williams v. Getz*, 17 App. Cas. (D. C.) 388, citing 2 *Tidd's Pr.* (9th ed.) 990. And see *Genesee Sav. Bank v. Arnold*, 54 Mich. 305, 20 N. W. 53, as to the affidavit.

Insufficient Evidence To Justify Retaxation.—Retaxation of costs, so as to embrace omitted fees will not be allowed, unless it appear that the service for which the fees are claimed were performed; merely setting out the items is not sufficient evidence to justify retaxation. *Johnson v. State*, 94 Tenn. 499, 29 S. W. 963.

54. *Elliott v. Howison*, 158 Ala. 71, 48 So. 508.

55. *Gage v. Page*, 10 Tex. 365.

56. *James v. Vickers*, 148 Ala. 528, 40 So. 657; *Miskel v. Stone*, 1 Wash. Ter. 229 (holding that the motion to retax must show taxation by the clerk).

57. *Johnson v. State*, 94 Tenn. 499, 29 S. W. 963.

of motion has been given of intention to strike out or amend or retax a cost bill, to make the motion before the court orally.⁵⁸

Parties.—Only the parties in interest should be joined in the motion to retax.⁵⁹

Imports Verity.—The motion does not import absolute verity in relation to matters on which it is based.⁶⁰

(IV.) Service or Notice of Motion.—Reasonable notice of the motion to retax costs must be given,⁶¹ stating the items objected to, and the nature of the objection.⁶²

(V.) Limitations as to Time.—A motion to retax costs should be made during the term at which the judgment is rendered.⁶³ After there has been a final settlement and satisfaction of a judgment in the trial court, costs cannot be taxed without a showing of equitable grounds for opening the case and setting aside the settlement.⁶⁴ But

58. *Carpy v. Dowell*, 129 Cal. 244, 61 Pac. 1126, *construing* §1033, Code Civ. Proc.

No Affidavit Necessary.—*Lomita Land, etc. Co. v. Robinson*, 154 Cal. 36, 97 Pac. 10; *Senior v. Anderson*, 130 Cal. 290, 62 Pac. 563.

59. **Clerk of Court Not Necessary Party.**—*Lockhart v. Lytle*, 51 Tex. 601.

60. *Goldsmith v. State*, 30 Ohio St. 208.

61. Cal.—*Carpy v. Dowdell*, 129 Cal. 244, 61 Pac. 1126. Ind.—*Crews v. Ross*, 44 Ind. 481. N. J.—*Hayes v. Williams*, 9 N. J. L. 383. Tex.—*Gage v. Page*, 10 Tex. 365.

On a motion to retax costs witness fees, witnesses need not be notified. *Wall v. Melton* (Tex. Civ. App.), 94 S. W. 358.

Waiver.—Where a party received fourteen days' notice of a motion to retax costs while by statute he is entitled to eighteen days' notice, he cannot object if he in fact received notice of the motion and appeared. *Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997.

In Missouri it is held that there is no necessity for the formality of a written notice of a motion to retax costs to be given to the attorneys of plaintiff in the execution, when they had knowledge of the motion, opportunity to defend it, and especially when it is clear that they suffered no prejudice for want of the notice. *State v. Schroeder*, 13 Mo. App. 573.

62. *Hayes v. Williams*, 9 N. J. L. 383.

In California, Code Civ. Proc. §1033, providing for motions for the retaxation of costs by the court, does not specify what the notice shall contain, hence a notice of a motion to retax costs, not accompanied by any affidavit specifying the grounds of objection, but stating that the items mentioned, were not legally chargeable against plaintiff, and were necessary disbursements, is sufficient. *Senior v. Anderson*, 130 Cal. 290, 62 Pac. 563.

63. *Merrill v. Shirk*, 128 Ind. 533, 28 N. E. 95. And see *Clark v. Anderson*, 2 How. (Miss.) 852.

But in *Clark v. Hill*, 33 Mo. App. 116, that may be made at a subsequent term.

64. *Collomb v. Caldwell*, 5 How. Pr. (N. Y.) 336; *Patton v. Cox*, 97 Tex. 253, 75 S. W. 871, *reversed*, 77 S. W. 1025, *citing* *Gaines v. Mensing, etc. Co.*, 64 Tex. 325.

Where a decree as to costs has been rendered in the action, and a motion to retax filed at a subsequent term, the motion is in effect a motion to vacate or modify the decree as to costs, and being filed at a subsequent term the court is without jurisdiction to act thereon. *Olson v. Lamb*, 61 Neb. 484, 85 N. W. 397.

Referee's Fees.—A motion to retax costs at a term after the judgment has become final cannot be properly used to review the amount of a referee's fee allowed at an earlier term, where prevailing parties' payment, being voluntary, was not subject to taxation as costs. *Schawacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935.

in some states a motion to retax costs has been entertained after the close of the term at which the judgment was rendered, where special cause was shown for failing to make it sooner,⁶⁵ or even after an appeal.⁶⁶

(VI.) **Hearing of Motion.**—Since the motion to retax is in the nature of an appeal from the clerk's decision,⁶⁷ the court can only consider such objections and papers as were presented to the clerk.⁶⁸ But if the question is not as to the amount of any particular items, or the propriety of the items themselves, but to the very right of the clerk

65. Ill.—Chicago City R. Co. v. Burke, 102 Ill. App. 661. Mo.—State v. Hannibal, etc. R. Co., 78 Mo. 575. N. C.—*In re* Smith, 105 N. C. 167, 10 S. E. 982.

Laches.—Motion made at second term after judgment held not to show laches (*Fisher v. Burlington, etc. R. Co.*, 104 Iowa 588, 73 N. W. 1070), but where two years have elapsed since a retaxation and one year since payment, a motion to retax will be dismissed (*Hart v. Lindsay*, 1 Walk. Ch. (Mich.) 72).

After two terms have elapsed at which application to retax might have been made, the court will not intervene. *Morris v. Mullett*, 1 Johns. Ch. (N. Y.) 44; *McLean v. Forward*, 1 Cow. (N. Y.) 49.

66. Ill.—Chicago City R. Co. v. Burke, 102 Ill. App. 661. Mo.—*Briscoe v. Kinealy*, 9 Mo. App. 590. Pa. *In re* Barber's Estate, 1 Pa. Dist. 138, 11 Pa. Co. Ct. 242, 29 W. N. C. 552.

In Iowa it is held that when an appeal from a judgment including costs is pending in the higher court, the motion to retax cannot be made. *Levi v. Karriek*, 15 Iowa 444; *McLaughlin v. O'Rourke*, 12 Iowa 459.

After denial of writ of error a motion to retax costs comes too late. *Yeager v. Scott* (Tex. Civ. App.), 138 S. W. 1088. See *Bellingham Bay, etc. Co. v. Strand*, 5 Wash. 807, 32 Pac. 782.

67. *Walton v. Sugg*, 61 N. C. 98; *Schauble v. Tietgen*, 31 Wis. 695.

68. Mich.—*Patterson v. Calhoun* Circ. Judge, 144 Mich. 416, 108 N. W. 351, 13 Det. Leg. N. 269. Mo.—*Baldauf v. Peyton*, 135 Mo. App. 492, 116 S. W. 27. N. Y.—*Levittas v. Hart*, 64 Misc. 36, 117 N. Y. Supp. 1027.

Only such papers as were used before the clerk are proper for consideration at the hearing of the motion, except such as may be necessary to show

his action. *Chism v. Smith*, 130 N. Y. Supp. 881; *Lyman v. Young Men's Cosmopolitan Club*, 38 App. Div. 220, 56 N. Y. Supp. 712; *Evans v. Silbermann*, 7 App. Div. 139, 40 N. Y. Supp. 298; *Thomas v. Int. Silver Co.*, 84 N. Y. Supp. 612.

And only items to which objection was made before the clerk. *Varnum v. Wheeler*, 9 Civ. Proc. (N. Y.) 421; *Comly v. Mayor, etc.*, 1 Civ. Proc. (N. Y.) 306; *Lyman v. Young Men's Cosmopolitan Club*, 38 App. Div. 220, 56 N. Y. Supp. 712; *La Rosa v. Wilner*, 54 Misc. 574, 104 N. Y. Supp. 952.

But on retaxing the fees of witnesses the court may act on its own knowledge whether the witnesses were sworn or not. *Terry v. Montgomery*, 166 Ala. 130, 52 So. 314.

"It does not open objections or an inquiry into the merits of the judgment, which the clerk pursues, as he is bound to do in making the taxation." *Tecumseh Iron Co. v. Mangum*, 67 Ala. 246.

The judge of a trial court may himself examine the reporter's transcript of the evidence for the purpose of determining the number of words contained therein on a motion to retax the costs. *Stewart v. Colfax Coal Co.*, 147 Iowa 548, 126 N. W. 449.

"Where a rule nisi issues on a motion to retax costs, returnable to a stated term of court, requiring the respondent 'to make answer to the same at the hearing,' the respondent may urge at the hearing that under the facts alleged in the motion to retax costs it should be denied, notwithstanding the hearing occurred at a term subsequent to that to which the rule was returnable, and no written demurrer was filed until the hearing." *Walker v. Hillyer*, 130 Ga. 466, 61 S. E. 8.

to tax costs at all, then the right to costs may be determined upon the motion for retaxation, though no objections were made before the clerk.⁶⁹ If the decision of the motion is favorable to the movant, items will be added or struck out as the case may be.⁷⁰ A denial of the motion is an allowance of the item objected to.⁷¹

Evidence.—On a motion to retax costs, the court should hear the evidence,⁷² but will presume that costs as taxed by the clerk are *prima facie* correct.⁷³

Burden of Proof.—It is held that the burden of proving the incorrectness of the items is with the party seeking the retaxation,⁷⁴ though there is authority that the party who obtains a taxation must, upon a retaxation, prove the items objected to.⁷⁵

(VII.) **Operation and Effect of Motion.**—The clerk has no authority to enter the judgment for costs while a motion to retax is pending.⁷⁶

(VIII.) **Awarding Costs on Motion.**—The successful or prevailing party on a motion to retax costs may recover his costs from the unsuccessful party.⁷⁷ But where part of the amount originally taxed

69. *Leyden v. Brooklyn Hts. R. Co.*, 106 N. Y. Supp. 769.

70. The plaintiff having given notice of a motion to retax costs, stating the charges in the taxed bill to which he objects, and the grounds of his objection, pursuant to rule 88, and no proof of the items objected to having been offered, and the record and files not showing that defendant is entitled to charge for the items, they will be stricken out. *Corle v. Monkhouse*, 61 N. J. L. 535, 43 Atl. 100.

But in New York if on a retaxation upon objection made, or upon a review of the taxation or retaxation by the court, items are disallowed, the amounts thereof are credited upon the execution. *La Rosa v. Wilner*, 54 Misc. 574, 104 N. Y. Supp. 952.

71. *Leigh v. Laughlin*, 130 Ill. App. 530.

72. *Stewart v. State*, 38 Tex. Crim. 627, 44 S. W. 505.

73. *Lockhart v. Lytle*, 51 Tex. 601; *Morgan v. North Texas Nat. Bank* (Tex. Civ. App.), 34 S. W. 138.

Docket Fee.—Where a docket fee has been taxed it is presumed to have been taxed legally. *Governor v. Ridgway*, 12 Ill. 14.

74. *State v. McO'Brien*, 27 Mo. 508; *Worley v. Shelton* (Tex. Civ. App.), 86 S. W. 794.

75. *Hays v. Williams*, 9 N. J. L. 383.

76. *Santa Clara Val. Mill Co. v.*

Board of Supervisors, 71 Cal. 268, 12 Pac. 129.

A rule to correct the taxation of costs does not operate *per se* as a supersedeas. *Miller v. Netherland*, 1 Swan (Tenn.) 66.

Though a statute provides that a motion to retax costs must be made in the court in which the action was had, there may be a change of venue on such motion after it is made. *Owen v. Hollenbeck*, 68 Mo. App. 366.

77. *Mass.*—*O'Connell v. Bryant*, 126 Mass. 232. *N. J.*—*State v. Allen*, 26 N. J. L. 145. *N. Y.*—*Jones v. Cook*, 11 Hun 230.

Where the party moving for a retaxation of costs has succeeded to part only of the items as to which taxation was sought, neither party should be awarded costs. *Chism v. Smith*, 130 N. Y. Supp. 881.

If the clerk moves for a retaxation of his own volition, and the judgment allowing his motion is reversed on appeal, the costs of the motion should be adjudged against him. *Gage v. Page*, 10 Tex. 365.

Where a motion to retax is not made until after the decree and costs as first taxed are paid in full, and a receipt, as in complete satisfaction has been given, costs of the motion will be denied. *Pearman v. Gould* (N. J. Eq.), 8 Atl. 285.

The allowance of costs on denial of a motion to retax will not be dis-

against the moving party was due to his own fault, he may be denied costs of motion for retaxation.⁷⁸

b. *Appellate Review.*—(I.) *In General.*—While error does not lie in the first instance to correct a mistake in the taxation of costs by the clerk,⁷⁹ still an appellate court may correct the taxation of costs in the court below, if a proper motion to retax is first made in the latter court and the court has acted on it,⁸⁰ and exceptions are taken to the

turbed on appeal unless there is an abuse of discretion. *Crane v. Odegard*, 12 N. D. 135, 96 N. W. 326.

78. *Hopkins v. Rush River*, 70 Wis. 10, 34 N. W. 909, 35 N. W. 939.

79. Ill.—*Miller v. Adams*, 5 Ill. 195. Ind.—*State v. Dugan*, 1 Smith 346. Mass.—*Day v. Berkshire Woolen Co.*, 1 Gray 420. Pa.—*Litz v. Kauffman*, 4 Pa. Co. Ct. 329.

No appeal will lie from the supreme court to the court of appeals of the District of Columbia to review alleged errors in the taxation of costs. If either party be dissatisfied with the taxation by the court he may apply to the court for a rule to show cause why the clerk should not review the taxation first made by him. *Williams v. Getz*, 17 App. Cas. (D. C.) 388.

80. Ariz.—*Dawson v. Lail*, 1 Ariz. 490, 3 Pac. 399. Cal.—*Dooley v. Norton*, 41 Cal. 439; *Lasky v. Davis*, 33 Cal. 677; *Guy v. Franklin*, 5 Cal. 416. Ill.—*Miller v. Adams*, 5 Ill. 195; *Trogon v. Cleveland Stone Co.*, 53 Ill. App. 206. Ind.—*Hill v. Shannon*, 68 Ind. 470; *Hooker v. Phillippa*, 26 Ind. App. 501, 60 N. E. 167. Ia.—*Snell v. Dubuque*, etc. R. Co., 88 Iowa 442, 53 N. W. 310; *Cox v. Mason City*, etc. R. Co., 77 Iowa 20, 41 N. W. 475. Kan.—*Treats v. Herington Bank*, 59 Kan. 721, 51 Pac. 219; *Linton v. Housh*, 4 Kan. 535. La.—*McMullen v. Jewell*, 3 La. Ann. 139. Me.—*McArthur v. Sterratt*, 43 Me. 345. Mass.—*Jacobs v. Potter*, 8 Cush. 236. Mich.—*Abbott v. Matthews*, 26 Mich. 176. Minn.—*Stevens v. McMillin*, 37 Minn. 509, 35 N. W. 372. Mont.—*Ryan v. Maxey*, 15 Mont. 100, 38 Pac. 228; *Granite Mountain Min. Co. v. Weinstein*, 7 Mont. 346, 17 Pac. 108. Neb.—*Yankton*, etc. R. Co. v. State, 49 Neb. 272, 68 N. W. 487, citing *Real v. Honey*, 39 Neb. 516, 58 N. W. 136. N. Y.—*Low v. Vrooman*, 15 Johns. 238; *Bromaghin v. Gorse*, 1 How. Pr. 53. N. C.—*Morristown Mills Co. v. Lytle*, 118 N. C. 837, 24 S. E. 530. Ore.

Cross v. Chichester, 4 Ore. 114. Pa.—*Raisley v. Morgan*, 17 Pa. Co. Ct. 268. S. C.—*Cooke v. Poole*, 26 S. C. 321, 2 S. E. 609; *Stegall v. Bolt*, 11 S. C. 522; *Bradley v. Rodelsperger*, 6 S. C. 290. S. D.—*American Bkg. Co. v. Lynch*, 13 S. D. 34, 82 N. W. 77. Tenn.—*Troutt v. Alabama*, etc. R. Co., 97 Tenn. 364, 37 S. W. 90; *State v. Goodbar*, 8 Lea 451. Tex.—*Bridge v. Samuelson*, 73 Tex. 522, 11 S. W. 539; *Allen v. Woodson*, 60 Tex. 651. Wis.—*Blomberg v. Stewart*, 67 Wis. 455, 30 N. W. 617. Utah.—*Smith v. Nelson*, 23 Utah 512, 65 Pac. 485. Wash.—*Bringgold v. Spokane*, 19 Wash. 333, 53 Pac. 368.

An erroneous ruling founded upon a lack of power to apportion costs is reviewable. *Horner v. Oxford Water*, etc. Co. (N. C.), 72 S. E. 624.

If a motion for retaxation is denied by the special term the defendants may appeal. *Bowery Nat. Bank v. Hart*, 132 N. Y. Supp. 1119.

An appeal from the taxation of costs by a clerk of court in vacation must be in writing. *Coney v. Maling*, 104 Me. 332, 71 Atl. 887.

Michigan.—“An erroneous judgment that a party recover his costs to be taxed should be reviewed on error, and in no other way, whatever may be the method of reviewing the action of the circuit court in matters arising upon his review of the taxation of costs.” *Schmidt v. Donovan*, 136 Mich. 658, 99 N. W. 877. But see *Stebbins v. Field*, 43 Mich. 333, 5 N. W. 394; *Lorman v. Phoenix Ins. Co.*, 35 Mich. 65; *Abbott v. Matthews*, 26 Mich. 177. Mandamus is proper to review a retaxation of costs in the circuit court. *Schmidt v. Donovan*, 136 Mich. 658, 99 N. W. 877, overruling *People v. Wayne Circuit Judge*, 14 Mich. 33.

In Iowa, the action of the lower court in wrongfully intermeddling in the taxation of costs on appeal may be reviewed by certiorari. *Berkey v.*

ruling,⁸¹ and the record contains a bill of exceptions pointing out the errors complained of.⁸² But the question whether the order of the court itself on the motion to retax is appealable, or whether it can be reviewed only upon appeal from the judgment in the cause depends on the practice in the different jurisdictions.⁸³

Thompson, 126 Iowa 394, 102 N. W. 134.

Wisconsin.—The inclusion of an improper item in a bill of costs will not warrant the reversal of a judgment as it may be stricken out on retaxation unless the party recovering the costs remits such item. *Hoyt v. Jones*, 31 Wis. 389.

The function of the appellate court on appeal from the decision of the taxing officer is simply to review his conclusion and not to try the question *de novo*. *Dunbar v. Montreal River Lumb. Co.*, 127 Wis. 130, 106 N. W. 389; *State v. Wertzel*, 84 Wis. 344, 54 N. W. 579.

Effect of Appeal.—"The right to recover costs is determined by the judgment," and so long as an appeal is pending "has no jurisdiction to modify or correct the same, nor as a general rule has the district court any jurisdiction or authority in an equity case, after an appeal to this court, to pass upon a motion to retax." *Berkey v. Thompson*, 126 Iowa 394, 102 N. W. 134; *Levi v. Kerrick*, 15 Iowa 444.

Constitutionality of Statutes.—Statutory regulations of the right to a review upon appeal or otherwise, as regards costs and security for costs, cannot be condemned as class legislation merely because it is more burdensome for some persons than for others to comply therewith. *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

81. *Collins v. St. Peters*, 65 Vt. 618, 27 Atl. 425; *Ernst v. Steamer Brooklyn*, 24 Wis. 616; *Cord v. Southwell*, 15 Wis. 211.

82. **Cal.**—*Kelly v. McKibben*, 54 Cal. 192. **Ill.**—*Sanitary Dist. v. Curran*, 132 Ill. App. 241. **Ind.**—*Laffel v. Obenchain*, 90 Ind. 50. **Mass.**—*Hubner v. Hoffman*, 106 Mass. 346. **Nev.**—*Howard v. Richards*, 2 Nev. 128, 90 Am. Dec. 520. **Ohio.**—*Goldsmith v. State*, 30 Ohio St. 208. **Tenn.**—*Arnold v. State*, 96 Tenn. 82, 33 S. W. 723. **Wis.**—*Perkins v. Davis*, 16 Wis. 470.

An order striking out a cost bill is

an order made after final judgment, and, if appealed from, should be brought to the appellate court in a statement on appeal containing only so much of the record as is necessary to present the facts. *Linville v. Scheeline*, 30 Nev. 106, 93 Pac. 225.

"In order to have this court revise the action of the lower court in taxing costs, same must be brought up for review by means of a bill of exceptions or case-made." *Bruner v. Kansas Moline Plow Co.*, 24 Okla. 158, 103 Pac. 673.

In Vermont, the costs should be taxed below, and the question decided and certified up as a part of the case. *Bliss v. Little*, 64 Vt. 133, 23 Atl. 725.

83. **In California** an order entered on a motion to retax costs if made before the judgment is rendered may be reached by an appeal from the judgment, but if made after rendition and entry of final judgment it can be reviewed only by a direct appeal therefrom. *Empire Gold Min. Co. v. Bonanza Min. Co.*, 87 Cal. 406, 7 Pac. 810 (reviewing many cases); *Irrgang v. Ott*, 9 Cal. App. 440, 99 Pac. 528.

The rule is well settled now that an order after final judgment retaxing costs may be reviewed. *Elledge v. Superior Court*, 131 Cal. 279, 63 Pac. 360; *Southern Cal. R. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789; *Liaforth v. San Francisco Gas, etc. Co.*, 9 Cal. App. 434, 99 Pac. 716.

In Montana, following *California*, an independent appeal does not lie from the order entered on the motion to retax costs. *Flubacher v. Kelly*, 49 Cal. 116; *Montana Ore Purchasing Co. v. Boston Min. Co.*, 27 Mont. 288, 70 Pac. 1114; *Murray v. Northern Pac. R. Co.*, 26 Mont. 268, 67 Pac. 625; *Orr v. Haskell*, 2 Mont. 350; *Rader v. Nottingham*, 2 Mont. 157.

In Illinois a party can appeal. *Sanitary Dist. of Chicago v. Curran*, 132 Ill. App. 241, citing *Peoria & B. V. R. Co. v. Bryant*, 15 Ill. 438; *Miller v. Adams*, 5 Ill. 195.

And an order denying a motion to

(II.) **Objections to Taxation.**—In order to be heard on appeal, objections to items taxed in the bill of costs must be made before the taxing officer,⁸⁴ and the party objecting is confined to the specific objections raised.⁸⁵ Such objections must be made within the time allowed by law⁸⁶ unless the delay is excusable.⁸⁷

(III.) **Presumptions on Appeal.**—In accordance with the general rule of appellate practice the decision of the lower court on the motion is presumed to be correct, until the contrary is made affirmatively to appear from the record.⁸⁸

tax costs is a final appealable order. *Brueggemann v. Young*, 128 Ill. App. 200.

In **Minnesota** no appeal lies from an order affirming or setting aside the clerk's taxation. *Closen v. Allen*, 29 Minn. 86, 12 N. W. 146; *Felber v. Southern Minn. R. Co.*, 28 Minn. 156, 9 N. W. 635.

In **Missouri** the order taxing costs is a mere incident, and does not warrant a separate appeal. *Manning v. Standard Theatre Co.*, 63 Mo. App. 366. *Compare Calhoun v. Gray*, 150 Mo. App. 591, 131 S. W. 478.

In **North Carolina** an appeal will lie from an order retaxing costs. *Morristown Mills Co. v. Lytle*, 118 N. C. 837, 24 S. E. 530.

But no appeal lies from a judgment for costs after the subject-matter of the action has been disposed of. *Morristown Mills Co. v. Lytle*, 118 N. C. 837, 24 S. E. 530.

In **Pennsylvania** no appeal lies to the supreme court from a taxation of costs by the common pleas. *Appeal of Orbison (Pa.)*, 14 Atl. 326.

In **Wisconsin**, a motion for a retaxation of costs is not a "special proceeding," nor a summary application in the action after judgment, within the meaning of subd. 2, §10, ch. 264, Laws of 1860; nor does it "involve the merits" of the action, within the meaning of subd. 4; and the order made upon such motion is not appealable. *Ernst v. The Steamer "Brooklyn"*, 24 Wis. 616.

In the federal courts a writ of error will lie from a judgment for costs only, except when the awarding of costs between the parties is merely a question of discretion. *Scatcherd v. Love*, 166 Fed. 53, 91 C. C. A. 639.

84. *Davidson v. Lamprey*, 17 Minn. 32; *State v. Wertzel*, 84 Wis. 344, 54 N. W. 579; *Latimer v. Morrain*, 43 Wis.

107; *Hawkins v. Northwestern R. Co.*, 34 Wis. 302.

85. *State v. Allen*, 26 N. J. L. 145; *Cotzhausen v. Johns Mfg. Co.*, 107 Wis. 59, 82 N. W. 716.

A general exception to the dismissal of an appeal from the taxation of costs does not bring up the ruling of the court upon any specific item of costs. *Wirth v. Bartell*, 89 Wis. 594, 62 N. W. 408.

86. *Walker v. Goldsmith*, 16 Ore. 161, 17 Pac. 865.

Objections to items claimed as disbursements must be to each item separately, and the reason clearly and distinctly stated. *Walker v. Goldsmith*, 16 Ore. 161, 17 Pac. 865; *Wilson v. City of Salem*, 3 Ore. 482.

Appeal Must Be Promptly Taken. *Shepherd v. Rand*, 48 Me. 244, 77 Am. Dec. 225.

Under Wisconsin Rev. St., ch. 133, §44, providing for the taxation of disbursements upon application of the prevailing party on two days' notice to the other party, where a party after due notice fails without reasonable excuse, to appear before the taxing officer, he loses all benefit of objection to any item which might under any circumstances be lawfully taxed. *Cord v. Southwell*, 15 Wis. 211.

87. *Weiss v. Meyer*, 24 Ore. 108, 32 Pac. 1025.

Delay of five months is too long unless a sufficient excuse is given for not filing within two days. *Hislop v. Moldenhauer*, 24 Ore. 106, 32 Pac. 1025.

88. **U. S.**—*Corn Products Ref. Co. v. Chicago Real Estate, L., etc. Co.*, 185 Fed. 63. **Ill.**—*Grovener v. Ridgway*, 12 Ill. 14; *Brueggemann v. Young*, 123 Ill. App. 200. **Ind.**—*McCutchen v. McCutchen*, 141 Ind. 967, 41 N. E. 324; *Harter v. Eltzroth*, 111 Ind. 159, 12 N. E. 129; *Hunter v. Thomas*, 37

9. **Evidence of Taxation.**—The taxation of costs may be shown by any relevant competent evidence.⁹⁰

10. **Waiver.**—One entitled to a taxation of costs may waive his right.⁹⁰ If an officer or witness expressly says he makes no charge for services rendered, the successful party cannot tax against the losing party the fees which such persons would have been entitled to if they had charged therefor.⁹¹

H. PAYMENT AND DISCHARGE OF COSTS.—1. Who Entitled To Receive Payment.—The clerk of the court, the sheriff or sergeant are ordinarily empowered to receive and collect the costs for the benefit of those parties to whom the costs are awarded, and an action will lie against such officer collecting costs and failing to pay them over.⁹² But the party in whose favor costs are awarded is only entitled

Ind. 145. **Ia.**—*McNider v. Serrine*, 84 Iowa 58, 50 N. W. 200; *Yeager v. Circle*, 1 Greene 438. **Mass.**—*Southworth v. Packard*, 7 Mass. 95. **Minn.**—*Clague v. Hodgson*, 16 Minn. 329. **Mont.**—*Waite v. Vinson*, 18 Mont. 410, 45 Pac. 522. **Nev.**—*Lapham v. Osborn*, 20 Nev. 168, 18 Pac. 881. **N. C.**—*Tilley v. Rivens*, 110 N. C. 343, 14 S. E. 920. **S. C.**—*Lewis v. Brown*, 18 S. C. 58. **Wis.**—*Leary v. Leary*, 68 Wis. 662, 32 N. W. 623.

Where the record does not disclose what showing was made at the hearing of the motion to retax, it is insufficient to enable the appellate court to determine whether or not there was any error in the ruling of the court, especially where the cost bill does not contain items which under no circumstances can be taxed as costs. In such case the appellate court is bound to presume, in the absence of a record showing the actual circumstances, that sufficient was made to appear to justify the taxation by the court below. *City of Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982.

Where there is no evidence in the record of the truth of the facts alleged in a motion to retax, and it does not appear that any evidence to that effect was adduced in the primary court, an appellate court cannot say that the lower court erred in denying the motion. *Torrey v. Bishop*, 104 Ala. 548, 16 So. 422.

Under the federal practice, an order of the court below awarding costs may be reviewed on appeal, but no reversal can be had unless reviewable error is manifest in the terms or subject-matter of the order.

Corn Product Ref. Co. v. Chicago Real Estate, etc. Co., 185 Fed. 63.

Reporter's Transcript of Evidence. On an appeal from the action of the lower court in overruling a motion for retaxation of costs of the reporter's transcript of the evidence, in the absence of a conclusive showing to the contrary, the appellate court will presume that the lower court made a proper ruling on the motion. *Stewart v. Colfax Consol. Coal Co.*, 147 Iowa 548, 126 N. W. 449.

89. **The clerk's fee book** or even parol evidence may be introduced to show the fact that certain items were taxed. *Reeves v. Mercer*, 155 Ill. App. 57.

90. *Crane v. Gurnee*, 75 N. J. Eq. 104, 71 Atl. 338; *Hinckley v. Boardman*, 3 Caines (N. Y.) 134.

Failure to have costs taxed in the time required by statute after the verdict or finding constitutes a waiver of the right to costs. *Fox River, etc. Co. v. Kelley*, 70 Wis. 305, 35 N. W. 542; *Crocker v. Currier*, 65 Wis. 662, 27 N. W. 825.

Nor does the mere pendency of a motion for a new trial operate to stay proceedings. *Milwaukee, etc. Assn. v. Niezerowski*, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127.

If, however, the original taxation was in time, but the final taxation is postponed by an appeal from the taxation, beyond the prescribed time, the right to costs is not forfeited. *Ritter v. Ritter*, 100 Wis. 468, 76 N. W. 347.

91. *Griffith v. Montandon*, 4 Idaho 75, 35 Pac. 704.

92. *Ind.*—*Hammann v. Mink*, 99

to those costs advanced by him, and the payment to him of costs in full will not release the party against whom costs were awarded from liability to parties properly entitled to costs.⁹³

2. Medium of Payment.—Ordinarily an officer has no right to accept anything but money or actual cash in payment of costs. He cannot accept a note, check or draft.⁹⁴

3. Failure To Pay as Affecting Right To Institute Subsequent Proceedings.—*a. In General.*—It has long been an established rule of practice, with a view to prevent vexatious litigation, that where a former action has been *non prossed*, or nonsuited, or discontinued, by the direction of the plaintiff, a second action for the same cause, can not be prosecuted until the costs of the former action are paid. And for the enforcement of this rule of practice, the court in which the second action is brought will stay proceedings, until the costs of the former action are paid,⁹⁵ unless some sufficient excuse is offered to the

Ind. 279. **Ia.**—Frankel v. Chicago, etc. R. Co., 70 Iowa 424, 30 N. W. 679. **Pa.**—McCain v. Jewell, 2 Pittsb. Leg. J. 185. **Utah.**—Strickland v. Flagstaff S. M. Co., 1 Utah 199.

Payment to one not entitled is no payment. McCain v. Jewell, 2 Pittsb. Leg. J. (Pa.) 185; Carey v. Campbell, 3 Snead (Tenn.) 62.

93. Ia.—McConkey v. Chapman, 58 Iowa 281, 12 N. W. 295. **N. Y.**—Webb v. Crosby, 11 Paige 193; Brown v. Story, 1 Paige 588. **Pa.**—Mayer v. Ofie, 1 Leg. Rec. 359. **S. C.**—Thompson v. Thompson, 6 Rich. L. 279.

A receipt given in full for costs by a judgment creditor, while operating as a discharge of all claims for costs on his part, cannot discharge the liability of the judgment debtor for officers' fees, and the officer may enforce the collection of such fees by execution in the name of the judgment creditor. Dodson v. Born, 7 Kulp (Pa.) 122.

94. George v. Bischoff, 68 Ill. 236; Walker v. Graham, 74 Pa. 35, *citing* Carr v. McGovern, 66 Pa. 457; Ellison v. Buckley, 42 Pa. 281.

As to payment under California act April 27, 1863, see Carpenter v. Ather-ton, 25 Cal. 465.

In actions requiring judgments payable in coin, the judgment for costs must be general, so that the costs may be paid in legal tender notes. **Ohio.** Phillips v. Dugan, 21 Ohio St. 466. **Ore.** Coffin v. Coulson, 2 Ore. 205. **Pa.**—Logen v. Caldwell, 1 Walk. 175.

In Virginia payment in coupons is

not payment. Ellett v. Com., 85 Va. 517, 8 S. E. 246.

95. U. S.—Lowe v. Kansas, 163 U. S. 81, 16 Sup. Ct. 1031, 41 L. ed. 78; Henderson v. Griffin, 5 Pet. 151, 8 L. ed. 79; Kimble v. Western Union Tel. Co., 99 Fed. 892; Buckles v. Chicago, etc. R. Co., 47 Fed. 424; Shaw v. Wallace, 2 Dall. 179, 1 L. ed. 339; Hurst v. Jones, 4 Dall. 353, 1 L. ed. 864, 12 Fed. Cas. No. 6,933. **Ala.**—*Ex parte* Matthews, 145 Ala. 505, 40 So. 78; *Ex parte* Street, 106 Ala. 102, 17 So. 779. **D. C.**—Williams v. Getz, 17 App. Cas. 388. **Ga.**—Hadwin v. Southern R. Co., 45 S. E. 1019; Richie v. Du Bose, 6 Ga. App. 495, 65 S. E. 254. **Ill.**—Hen-nies v. Vogel, 87 Ill. 242. **Ind.**—Car-rothers v. Carrothers, 107 Ind. 530, 8 N. E. 563; State v. Howe, 64 Ind. 18; Hipes v. Griner, 28 Ind. App. 160, 62 N. E. 500. **Ky.**—Hobbs v. Louisville H. & St. L. R. Co., 31 Ky. L. Rep. 452, 102 S. W. 818. **Mich.**—Clark v. Circuit Judge, 154 Mich. 483, 117 N. W. 1051. **Minn.**—Gerrish v. Pratt, 6 Minn. 53. **Mo.**—Hewitt v. Steele, 136 Mo. 327, 38 S. W. 82; Wabash R. Co. v. Sweet, 103 Mo. App. 276, 77 S. W. 123; Jones v. Barnard, 63 Mo. App. 501. **N. J.** Den v. Matlack, 17 N. J. L. 354; Den v. Thompson, 14 N. J. L. 193; Swing v. Upper Alloway Creek, 10 N. J. L. 58; Coxe v. James, 9 N. J. L. 378; Cooper v. Sheppard, 9 N. J. L. 96; Sooy v. McKean, 9 N. J. L. 86; Sears v. Jackson, 11 N. J. Eq. 45. **N. Y.**—Wes-sels v. Boettcher, 142 N. Y. 212, 36 N. E. 883; Weil v. Manheim, 121 N. Y. 1114; Barton v. Speirs, 73 N. Y. 133;

Cuyler v. Vanderwerk, 1 Johns. Cas. 247 (a leading N. Y. case); Perkins v. Hinman, 19 Johns. 237; Youle v. Brotherton, 10 Johns. 364; Richardson v. White, 27 How. Pr. 155; Edwards v. Ninth Ave. R. Co., 22 How. Pr. 444; Muratore v. Pirkil, 109 App. Div. 146, 95 N. Y. Supp. 855; Spaulding v. American Wood Board Co., 58 App. Div. 314, 68 N. Y. Supp. 945; Drake v. New York Iron Mine, 71 Hun 211, 24 N. Y. Supp. 518; Murphy v. Mundorff, 125 N. Y. Supp. 624; Lederer v. Krausz, 90 N. Y. Supp. 402. **Pa.**—Flemming v. Pennsylvania Ins. Co., 4 Pa. 475; Newton v. Bewley, 1 Browne 38. **E. I.** Robinson v. Merchants, etc. Transp. Co., 16 R. I. 217, 14 Atl. 860, in case plaintiff is nonsuited. **Wash.**—Arthur v. Washington Water Power Co., 42 Wash. 431, 85 Pac. 28; Plumley v. Simpson, 31 Wash. 147, 71 Pac. 710; Schwede v. Hemrich, 29 Wash. 124, 69 Pac. 643. **Wis.**—Odegard v. North Wisconsin Lumb. Co., 110 N. W. 809; Felt v. Amidon, 48 Wis. 66, 3 N. W. 825; McIntosh v. Hoben, 11 Wis. 400. **Eng.** Melchart v. Halsey, 2 Wm. Bl. 741, 96 Eng. Reprint 434; 3 Wils. 149, 95 Eng. Reprint 982.

Practice in Georgia.—When the case of a plaintiff has been dismissed, nonsuited, or discontinued, he cannot as plaintiff renew the suit without paying the costs or filing a pauper affidavit as to his inability to do so; but, if he is sued by the opposite party in a matter relating to the controversy in the former suit, he may, as defendant, file any defense which is appropriate to the suit, without reference to whether the costs of the former suit brought by him have been paid. Cicero v. Scaife, 129 Ga. 333, 58 S. E. 850.

New York.—In Wilner v. Independent Order Ahawas Israel, 122 App. Div. 615, 107 N. Y. Supp. 497, Mr. Justice McLaughlin said that where motion costs are directed to be paid, all proceedings on the part of the party required to pay the same—except to review or vacate the order—are stayed without further direction of the court until the payment thereof. Code Civ. Proc., §779. It has been held that the same rule applies to the payment of costs in an action where another action is commenced between the same parties upon the same cause of action. Ingrosso v. Baltimore & Ohio R. Co.,

105 App. Div. 494, 94 N. Y. Supp. 177. This general rule (Cuyler v. Vanderwerk, 1 Johns. Cas. 247; Perkins v. Hinman, 19 Johns. 237; Edwards v. Ninth Ave. R. Co., 22 How. Prac. 444; Richards v. White, 27 How. Prac. 155; Spaulding v. American Wood Board Co., 58 App. Div. 314, 68 N. Y. Supp. 945; Barton v. Speis, 73 N. Y. 133), will be enforced unless special facts are presented which indicate that an exception ought to be made. The reason for this rule has for its basis the fact that, where a party has successfully defended a prior action, he ought not to be put to the trouble and expense of defending another action predicated upon the same cause of action until the costs awarded to him in the action first commenced have been paid. Behrens v. Sturges, 123 N. Y. Supp. 224, 225. The same has been held as to costs of an appeal from an order. "Costs of a motion are stayed until paid." Wasserman v. Benjamin, 91 App. Div. 547, 86 N. Y. Supp. 1022; Hunt v. Sullivan, 79 App. Div. 119, 79 N. Y. Supp. 708. See also Hill v. Grant, 2 Thomp. & C. (N. Y.) 467; Farrell v. Juvenile Asylum, 2 App. Div. 496, 37 N. Y. Supp. 1118; Sprague v. Bartholdi Hotel Co., 68 Hun 555, 22 N. Y. Supp. 1090; Hempsted v. White Sewing Mach. Co., 134 App. Div. 575, 119 N. Y. Supp. 620; Fransioli v. Boorman, 84 N. Y. Supp. 128; Bates v. Dickerson, 12 N. Y. Supp. 773.

"Where the complaint in an action in the city court of the City of New York is dismissed, with costs, solely through the fault of the plaintiff himself, and not through the fault of his attorney, the non-payment of such costs operates as a stay of proceedings in a subsequent action brought by the plaintiff in the Supreme Court to recover upon the same cause of action. Ingrosso v. B. & O. R. R., 105 App. Div. 494, 94 N. Y. Supp. 177." Weil v. Manheim, 121 N. Y. Supp. 1114, 1115.

An injunction will not lie to restrain the proceedings in the second suit. Wabash R. Co. v. Sweet, 103 Mo. App. 276, 77 S. W. 123.

An order staying the proceedings until the costs of the former action are paid is not invalid because no time is fixed in which payment should be made. Arthur v. Washington Water Power Co., 42 Wash. 431, 85 Pac. 28.

court,⁹⁶ although no bill of costs has been filed in the former suit.⁹⁷ Such second action must arise out of the same transaction, and the relief sought must be the same.⁹⁸ The real parties in interest must also be the same in both suits.⁹⁹ This practice has been held specially

In Iowa the status of this rule is in doubt. The court said, without deciding the point: "We do not find that any such rule has been adopted in this state." *Camp v. Chicago Great Western R. Co.*, 124 Iowa 238, 99 N. W. 735.

In Arkansas the power of the court to impose this condition to bringing a new action is seriously doubted. The court seemed to think, however, that if the action was instituted in bad faith and vexatiously, this would be an abuse of process to be corrected by dismissal of the action. *Turrentine v. St. Louis S. W. R. Co.*, 96 Ark. 181, 131 S. W. 337.

96. Ia.—*Camp v. Chicago Gt. Western R. Co.*, 124 Iowa 238, 99 N. W. 735, the object of the rule being to discourage vexatious litigation. Neb. *Union Pac. R. Co. v. Mertes*, 35 Neb. 207, 52 N. W. 1099. N. J.—*Udike v. Bartles*, 13 N. J. Eq. 231.

"The fact that a person is peculiarly unable to pay the costs of the prior action is not an excuse sufficient to bring the case within the exception. *Muratore v. Pirkel*, 109 App. Div. 146, 95 N. Y. Supp. 855; *Wilner v. Independent Order Ahawas Israel*, 122 App. Div. 619, 107 N. Y. Supp. 497; *Sprague v. Bartholdi Hotel Co.*, 68 Hun 555, 22 N. Y. Supp. 1090; *Lincoln v. New York C. & H. R. R. et al.*, 121 N. Y. Supp. 1." *Weil v. Manheim*, 121 N. Y. Supp. 1114, 1115.

97. *Flemming v. The Pennsylvania Ins. Co.*, 4 Pa. 475.

98. Ala.—*Ex Parte Street*, 106 Ala. 102, 17 So. 779; *Ex parte Shear*, 92 Ala. 596, 8 So. 792; *Brown v. Brown*, 81 Ala. 508, 2 So. 95. Ga.—*Moore v. Bower*, 6 Ga. App. 450, 65 S. E. 328; *Bunting v. Hutchinson*, 5 Ga. App. 194, 63 S. E. 49. La.—*Connor v. Poze*, 14 La. 562, 38 So. 454. N. J.—*Anonymous*, 16 N. J. L. 415. N. Y.—*Muratore v. Pirkel*, 109 App. Div. 146, 95 N. Y. Supp. 855; *Morganstern v. Zink*, 6 Misc. 418, 27 N. Y. Supp. 299; *Gardenier v. Oswego Mut. Sav. Assn.*, 17 N. Y. Supp. 394. Ohio.—*State v. Outcalt*, 8 Ohio C. C. 10. Pa.—*Flemming v. The*

Pennsylvania Ins. Co., 4 Pa. 475; *Stiles v. Woodruff*, 1 Phila. 66.

Complete identity of the subject-matter is not essential. *Lass v. Volk Housewrecking Co.*, 129 N. Y. Supp. 150; *Muratore v. Pirkel*, 109 App. Div. 146, 95 N. Y. Supp. 855; *Spaulding v. American Wood Board Co.*, 58 App. Div. 314, 68 N. Y. Supp. 945.

Even though second cause of action embraces a new and additional cause of action, under Rev. St. ch. 82, §101, a plaintiff must pay costs awarded against him in the first action before he can maintain the second. *Morse v. Mayberry*, 48 Me. 161.

A difference in the forms of the actions, as for example, where one is at law and the other in equity, is no ground for denying the motion to stay, certainly in those jurisdictions in which the distinction between actions at law and suits in equity has been abolished. *Behrens v. Sturges*, 138 App. Div. 537, 123 N. Y. Supp. 224, *affirmed*, 142 App. Div. 902, 127 N. Y. Supp. 1111, *explaining* *Maas v. Rosenthal*, 62 Misc. 350, 115 N. Y. Supp. 4; *Skeels v. Bodine*, 68 App. Div. 217, 73 N. Y. Supp. 1093.

The rule does not apply, however, if the first action was in tort and the second upon an independent contract not growing out of or in any wise connected with the supposed tort. *Southern R. Co. v. Raney*, 117 Ala. 270, 23 So. 29.

99. Ala.—*Ex parte Street*, 106 Ala. 102, 17 So. 779. Ga.—*Moore v. Bower*, 6 Ga. App. 450, 65 S. E. 328. Me. *Warren v. Homestead*, 32 Me. 36. N. J. *Sears v. Jackson*, 11 N. J. Eq. 45. N. Y.—*Taylor v. Vandervoort*, 9 Wend. 449; *Bolton v. Corse*, 15 Jones & S. 493. Pa.—*Altman v. Altman*, 12 Pa. 246; *Pusey v. Wickersham*, 1 Chest. Co. 147.

"Formerly the rule was applied only in cases where the plaintiffs or their privies were the same in both suits, but the later authorities hold that the change in the situation of the parties makes no difference." *Ex parte McNulty*, 117 Ala. 327, 23 So. 680.

applicable to actions in equity,¹ and to apply to motion costs,² and appeal costs.³ This was also the practice at common law,⁴ and exists in this country even in the absence of statute, as an orderly rule of procedure evolved from American and English jurisprudence to prevent the vexatious multiplication of suits.⁵ And it has been held in other jurisdictions that to authorize the stay the suit must be vexatious.⁶

In What Proceedings.—The practice of the court to stay proceedings

Thus it was held in *Altman v. Altman*, 12 Pa. 246, that proceedings in ejectment will be stayed until the costs of a former ejectment suit are paid, when the present plaintiff was one of the defendants in the former suit. See also *Flemming v. The Pennsylvania Ins. Co.*, 4 Pa. 475, where it was pointed out that "in *Lamply v. Sands*, 1 Tidd's Practice, 539, the Court of King's Bench stayed proceedings in an action by husband and wife, until payment of costs in a former action for the same demand, at the suit of the husband alone. So also in *Newton, assignee v. Bewly*, 1 P. A. Bro. Rep. 38."

1. "Regardless of the rule as to actions at law, it is well settled in equity that when the complainant has failed in one suit, and brings another against the same party for the same, or what is substantially the same cause of action, the court will stay the proceedings in the second until the costs in the former suit are paid." *Jordan v. Jordan* (Ala.), 57 So. 436, citing *Street's Case*, 106 Ala. 102, 17 So. 779; *Brown v. Brown*, 81 Ala. 508, 2 So. 95.

2. *Wessels v. Boettcher*, 142 N. Y. 212, 36 N. E. 883; *Lyons v. Murat*, 54 How. Pr. (N. Y.) 23; *Randell v. Abrisqueta*, 20 Abb. N. C. 292; *Anonymous*, 4 Abb. N. C. 11; *Hazard v. Wilson*, 3 Abb. N. C. 50; *Van Woert v. Ackley*, 56 Hun 375, 10 N. Y. Supp. 673; *Brown v. Griswold*, 23 Hun 618; *Marsh v. Woolsey*, 14 Hun 1.

3. *Ga.*—*Officers v. Walker*, 21 Ga. 381. *N. Y.*—*Dresser v. Brooks*, 5 How. Pr. 75; *Jackson v. Schaubert*, 4 Wend. 216. *Pa.*—*Flemming v. The Pennsylvania Ins. Co.*, 4 Pa. 475. *Wis.*—*McIntosh v. Hoben*, 11 Wis. 400.

But the court will not stay a second appeal until the costs of a former appeal are paid, unless the appellants in the two appeals are the same. *Ex parte Matthews*, 145 Ala. 505, 40 So.

78, explaining *McIntosh v. Hoben*, 11 Wis. 400. See *Southern R. Co. v. Hansbrough's Admx.*, 107 Va. 733, 60 S. E. 58.

4. *Weston v. Withers*, 2 T. R. 511, 100 Eng. Reprint 275; *Melchart v. Halsey*, 2 W. Bl. 741, 96 Eng. Reprint 434; 3 Wils. 149, 95 Eng. Reprint 982; *Bass v. Firmen*, 1 Ld. Raym. 697, 91 Eng. Reprint 1364; *Lord Biron's Case*, 1 Vent. 100, 86 Eng. Reprint 69.

5. *U. S.*—*Buckles v. Chicago, M. & St. P. R. Co.*, 47 Fed. 424. *N. J.*—*Sooy v. McKean*, 9 N. J. L. 86. *N. Y.*—*Dare v. Murphy*, 12 Civ. Proc. 388. *Pa.*—*Flemming v. The Pennsylvania Ins. Co.*, 4 Pa. 475; *Gerety v. Reading R. Co.*, 9 Phila. 153. *Wash.*—*Schwede v. Hemrich*, 29 Wash. 124, 69 Pac. 643. *Eng.*—*Melchart v. Halsey*, 2 Wm. Bl. 741, 96 Eng. Reprint 434; 3 Wils. 149, 95 Eng. Reprint 982.

6. *Ind.*—*Harless v. Petty*, 98 Ind. 53. *N. Y.*—*Skeels v. Bodine*, 68 App. Div. 217, 73 N. Y. Supp. 1093. *Pa.*—*Helm v. Katerman*, 2 Woodw. 433.

Accordingly if the vexatiousness of the suit is not proven, the right fails. *Hewitt v. Steele*, 136 Mo. 327, 38 S. W. 82.

The rule in *Indiana* is, "that the second action will be deemed to be vexatious until the inference shall be removed by a showing on the part of the plaintiff. *Harless v. Petty*, 98 Ind. 53; *Kitta v. Willson*, 89 Ind. 95; *Eigeman v. Eastin*, 17 Ind. App. 580, 45 N. E. 795; *Sellers v. Myers*, 7 Ind. App. 148, 34 N. E. 496; *Hipes v. Griner*, 28 Ind. App. 160, 62 N. E. 500.

But the slightest countervailing evidence is sufficient to remove the presumption of vexation. *Hipes v. Griner*, 28 Ind. App. 160, 62 N. E. 500, citing *Sellers v. Myers*, 7 Ind. App. 148, 34 N. E. 496.

Maryland.—This is also the rule in *Maryland*. *Brinsfield v. Howeth*, 107 Md. 278, 68 Atl. 566.

in the second action, where the plaintiff has failed in a former action against the same defendant, for the same cause, until the costs of the former action be paid, originated in the action of ejectment; but it was afterwards extended to other forms of action, and the power is now exercised in all cases, and this form of relief is granted, although the former action was not tried upon the merits, but was discontinued, dismissed, or disposed of by judgment of nonsuit, or where there was a judgment on demurrer.⁷

Identity of Courts.—It makes no difference that the former action was pending in another court; the power has been exercised where the former suit was in a court of the United States.⁸

The Doctrine Limited.—In England the rule seems to be that a motion to stay the proceedings until the costs of a former action have been paid will not be granted unless the former action has been tried on the merits, or the court is satisfied the second action is vexatious; and, where the former action has failed on some formal or technical ground, only, such a motion will not be entertained, especially in an action "for the recovery of a debt."⁹

7. **U. S.**—*Buckles v. Chicago, M. & St. P. R. Co.*, 47 Fed. 424, citing 2 Tiff. & S. 412; Tidd Pr. (4th Am. ed.), 537-8. **Ala.**—*Ex parte Matthews*, 145 Ala. 505, 40 So. 78; *Hamilton v. Maxwell*, 119 Ala. 23, 24 So. 769. **N. Y.** *Perkins v. Hinman*, 19 Johns. 237. **Pa.** *Cerety v. Reading R. Co.*, 9 Phila. 153. **Eng.**—*Weston v. Withers*, 2 Durnf. & E. 511.

The statute in South Carolina does not embrace special proceedings, such as a proceeding by rule to show cause why bail should not be forfeited. *State v. Cornell*, 70 S. C. 409, 50 S. E. 42.

8. **U. S.**—*Buckles v. Chicago, M. & St. P. R. Co.*, 47 Fed. 424, citing 2 Tiff. & S. 412. **N. Y.**—*Jackson v. Carpenter*, 3 Cow. 22. **Pa.**—*Flemming v. The Pennsylvania Ins. Co.*, 4 Pa. 475. **Eng.** *Nevitt v. Lade*, 3 Dougl. 396, 99 Eng. Reprint 715.

Where a second action (mixed or personal) is brought, either in the supreme court, or in a court of common pleas, and a trial has been had therein, or the plaintiff has become nonsuited, the court will stay the proceedings, until the costs of the former action for the same cause, are paid. *Perkins v. Hinman*, 19 Johns. (N. Y.) 237, following the English practice.

But a state court will not enforce the collection of fees and the payment of costs in the federal courts by dismissing a subsequent action in the state court involving the same contro-

versy for failure to pay the costs accrued in the federal court. *Webb v. Pacific Mut. Life Ins. Co.*, 138 Mo. App. 518, 119 S. W. 491.

A cause of action dismissed in the United States court may be reviewed in the state court without payment of the costs accrued in the federal court. Civ. Code, 1895, §5043, imposing a penalty upon those who nonsuit or dismiss their cases, is not applicable to cases in the United States court. The words "the plaintiff may recommence his suit" refer to a suit between the identical parties that were involved in a former controversy in a court of the state of Georgia. *Southern R. Co. v. Rowe*, 2 Ga. App. 557, 59 S. E. 462.

9. *Daniels v. Moses*, 12 S. C. 130, citing *Bass v. Firmen*, 1 Ld. Raym. 697; *Pashley v. Poole*, 3 Dowl. & Ry. 53, 16 E. C. L. 134; *Melchart v. Halsey*, 3 Wils. 149, 95 Eng. Reprint 982.

A suit will not be stayed until the costs of a former suit for the same cause of action be paid, where the plaintiff is imprisoned under an execution for such costs. *Wyckhoff v. Eaton*, 4 Wend. (N. Y.) 203.

But where the non-suit of a first action of ejectment was because the plaintiff mistook the form of his action, he will not necessarily be compelled to pay the costs of such action, before bringing another action. *Cochran v. Perry*, 2 Clark (Pa.) 521, 4 Pa. L. J. 319.

Discretion of Court.—After all the question depends largely on the discretion of the trial judge, and a decision thereon is not ordinarily the subject of appeal,¹⁰ unless the court abuses this discretion.¹¹ And of course the motion to stay will be denied where it is conceded that the costs of the former action have been paid.¹²

b. *The Motion.*—A motion to stay proceedings for non-payment of the costs of a former action, should be made before trial in the second suit;¹³ it comes too late after the second action has been called

The second action will be deemed vexatious until this inference shall be removed by a showing on the plaintiff's part. *Harless v. Petty*, 98 Ind. 53.

If the parties to the second suit are not liable for the costs of the first suit, they cannot be made to pay such costs as a condition precedent to prosecuting the second. *Jos. Rosenheim & Sons v. Lacey*, 167 Ala. 585, 52 So. 833.

10. **U. S.**—*Henderson v. Griffin*, 5 Pet. 151, 8 L. ed. 79; *Tugman v. National S. S. Co.*, 30 Fed. 802; *Cocke v. Henson*, Hempst. 187, 5 Fed. Cas. No. 2,929a. **Ill.**—*Hennies v. Vogel*, 87 Ill. 242. **Ind.**—*Harless v. Petty*, 98 Ind. 53; *Kitts v. Willson*, 89 Ind. 95. **Md.** *Brinsfield v. Howeth*, 110 Md. 520, 73 Atl. 289. **Mo.**—*Carrier v. Missouri Pac. R. Co.*, 175 Mo. 470, 74 S. W. 1002; *Fox v. Jacob Gold Packing Co.*, 96 Mo. App. 173, 70 S. W. 164. **N. J.**—*Udike v. Bartles*, 13 N. J. Eq. 231. **N. Y.** *Youle v. Brotherton*, 10 Johns. 363; *McMahon v. Mutual Ben. Life Ins. Co.*, 12 Abb. Pr. 28; *Merchants' Credit Clearing House Assn. v. Dennis*, 143 App. Div. 170, 127 N. Y. Supp. 1014; *Drake v. New York Iron Mine Co.*, 71 Hun 211, 24 N. Y. Supp. 518; *Morganstern v. Zink*, 6 Misc. 418, 27 N. Y. Supp. 299. **Pa.**—*Withers v. Haines*, 2 Pa. 435. **S. C.**—*Daniels v. Moses*, 12 S. C. 130; *Miller v. Grice*, 2 Rich. L. 27, 44 Am. Dec. 271. **Wis.**—*Gierczak v. Northwestern Fuel Co.*, 142 Wis. 207, 125 N. W. 436.

Where the matter of granting a stay rests in the discretion of the court, with without special reasons for interference being shown. *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 465.

such discretion will not be interfered

When in connection with proof that the prosecution of the second action is in good faith and that the failure of

the previous action was not due to infirmity in the cause of action, but to untoward circumstances or excusable mistake, it also appears that the plaintiff is absolutely unable to pay the previous costs on account of poverty and want of credit, a case arises where the court in the exercise of a wise and just discretion may fairly allow the second action to proceed notwithstanding the previous costs are unpaid. *Odegard v. North Wisconsin Lumb. Co.*, 130 Wis. 659, 110 N. W. 809. Compare *Wilner v. Independent Order Ahawas Israel*, 122 App. Div. 615, 107 N. Y. Supp. 497.

In Georgia a pauper affidavit will excuse the plaintiff from payment of costs as a condition to recommencing a second action after dismissing a prior one. *Board of Education v. Kelley*, 126 Ga. 479, 55 S. E. 238.

11. *Hipes v. Griner*, 28 Ind. App. 160, 62 N. E. 500; *Trogdon v. Brinegar*, 26 Ind. App. 441, 59 N. E. 1066; *McMahon v. Mutual Ben. Life Ins. Co.*, 12 Abb. Pr. (N. Y.) 28.

The court has no right to arbitrarily dismiss an action because plaintiff failed to pay the costs in another action dismissed without prejudice. *Wilson v. Sullivan* (Ky.), 112 S. W. 1120, citing *Hobbs v. R. Co.*, 31 Ky. L. Rep. 452, 102 S. W. 818.

12. *City Council v. Shirley*, 159 Ala. 239, 48 So. 679.

13. *Cuyler v. Vanderwerk*, 1 Johns. Cas. (N. Y.) 247.

In New York the motion is in season if made at any time while the latter cause is in the course of litigation, and after verdict in the second cause. *Jackson v. Miller*, 3 Cow. (N. Y.) 57.

But it comes too late after judgment perfected. *Fifield v. Brown*, 2 Cow. (N. Y.) 503.

for trial.¹⁴ Notice of such motion should be served on the opposing party.¹⁵

c. *Effect of Stay.*—The fact that costs of a former action between the same parties and for the same subject-matter have not been paid does not deprive the court of jurisdiction when set in motion by the party resting under the stay. The only effect is to render the proceedings irregular, and when brought to the attention of the court, the party violating the stay will be dealt with as may be proper.¹⁶ Nor is it proper practice to order that the pending suit be dismissed unless the plaintiff forthwith pays the costs of the former action. The court should order a stay only until the costs of a former action are paid.¹⁷

d. *Raising and Waiving Objections.*—The defendant may avail himself of this right by motion or application accompanied by proper and sufficient papers.¹⁸

Waiver.—And the right to this stay may be waived by any conduct of the defendant inconsistent with a recognition of the right.¹⁹

I. COLLECTION AND ENFORCEMENT OF COSTS.—1. By What Methods

14. *Daniels v. Moses*, 12 S. C. 130. "As is well said in *Miller v. Grice* (2 Rich. 36, 37), 'such a motion should be made at as early a period as practicable, to prevent surprise and an unnecessary accumulation of costs.'" *Daniels v. Moses*, 12 S. C. 130. See *Gertler v. Brooklyn, etc. R. Co.*, 128 N. Y. Supp. 618.

15. *Den v. Bacon*, 4 Wash. C. C. 578, 7 Fed. Cas. No. 3,783; *Thalceimer v. Hays*, 6 N. Y. St. 125.

16. *Wessels v. Beottcher*, 142 N. Y. 212, 36 N. E. 883; *Patchen v. President, etc. Canal Co.*, 62 App. Div. 543, 71 N. Y. Supp. 122.

A plaintiff is not in contempt for failing to pay the costs of the former action. *Ex parte Colley*, 140 Ala. 193, 37 So. 232.

17. *Williams v. Getz*, 17 App. Cas. (D. C.) 388.

18. *Faulkner v. Cody*, 28 Misc. 66, 59 N. Y. Supp. 807, holding that the motion will be denied where the defendant has served no answer and there is no affidavit of merits or other affidavit indicating that the defendant has a meritorious defense.

When a party brings a second suit against the same defendant in the same subject-matter and for the same purpose without having paid the costs of the former suit, an order may be obtained, on motion and notice, staying further proceedings until the costs are paid, within a reasonable time, and if

the plaintiff remains in default the cause must be dismissed. *Ex parte Mathews*, 145 Ala. 505, 40 So. 78, citing *Hamilton v. Maxwell*, 119 Ala. 23, 24 So. 769; *Ex parte McAnulty*, 117 Ala. 237, 23 So. 680; *Ex parte Street*, 106 Ala. 102, 17 So. 779; *Ex parte Shear*, 92 Ala. 596, 8 So. 792, 11 L. R. A. 620; *Brown v. Brown*, 81 Ala. 508, 2 So. 95.

A plea in abatement will be regarded as a motion to stay proceedings. *Hipes v. Griner*, 28 Ind. App. 160, 62 N. E. 500.

Where a suit was nonsuited, a renewal thereof before the payment of the costs of the first suit, or the filing of an affidavit stating the inability of the plaintiff to pay such costs, affords good ground for abating the second suit. *Bland v. Bird*, 134 Ga. 74, 67 S. E. 427; *Board of Education v. Kelley*, 126 Ga. 479, 55 S. E. 238; *Wright v. Jett*, 120 Ga. 995, 48 S. E. 345; *Johnson v. Central of Ga. R. Co.*, 119 Ga. 185, 45 S. E. 988.

19. *Moore v. Moore*, 44 App. Div. 253, 60 N. Y. Supp. 653; *Attorney General v. Continental Life Ins. Co.*, 38 Hun (N. Y.) 521.

But a defendant does not waive the stay of plaintiff's proceedings by answering an amended complaint served before the stay begins to operate. *Robinson v. Klein*, 31 Abb. N. C. 481, 30 N. Y. Supp. 262.

Collected. — Statutory Methods. — Since costs as such are allowed only by statute, it follows that they can be collected only by the methods pointed out by the statute.²⁰

2. By Action. — As soon as costs have been properly taxed²¹ an independent action may be maintained for their recovery.²² And the common law remedy for collection of costs by action is not taken away by the statutory remedy through fee bill given to officers, this being merely a cumulative remedy.²³

It is not necessary that the costs of an action, or that the *per diem* compensation of a witness, should be actually paid by the successful party before he can recover the same from the losing party. It is sufficient if they were necessarily incurred, and claimed or demanded by the persons performing the services for which they were incurred.²⁴

3. By Execution. — *a. In General.* — The usual method of enforcing an order or judgment for costs is by execution against the property of the person adjudged liable for them²⁵ And the property

20. *Sellick v. De Carlow*, 95 Cal. 644, 30 Pac. 795; *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409; *Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67; *O'Neill v. Donahue*, 57 Cal. 226; *State v. District Court (Mont.)*, 85 Pac. 367; *Orr v. Haskell*, 2 Mont. 350.

Cumulative or Exclusive Remedies. But a statute by giving a remedy for the enforcement of a liability for costs does not necessarily exclude other remedies, except by express words. *Hiscock v. Tuck*, 106 N. Y. Supp. 700.

21. *Kellog v. Howes*, 93 Cal. 586, 29 Pac. 230; *Barnes v. Parker*, 8 Metc. (Mass.) 134.

22. *Cal.* — *Kellogg v. Howes*, 93 Cal. 586, 29 Pac. 230. *N. Y.* — *Higgins v. Callahan*, 10 Daly 420. *Eng.* — *Hutchinson v. Gillespie*, 11 Exch. 798.

But see *Knight v. Hurley*, 155 Mass. 486, 29 N. E. 1149, citing many English cases.

Witness Fees. — The clerk's certificate, given on the oath of a witness, showing the amount due him for attendance, is not an adjudication, but is *prima facie* evidence of its correctness, and suit may be brought against the party who summoned him, without waiting for the termination of the suit. *Houston, etc. R. Co. v. Jones*, 46 Tex. 133, citing *Flores v. Thorn*, 8 Tex. 377, 381.

On Retaxation. — "Where money has been received by a witness upon a judgment for costs from the hands of the sheriff, and such judgment is set aside on a motion to correct the taxation, an action lies to recover the

money back from the plaintiff in the execution, and not from the witness." *Gray v. Alexander*, 7 Humph. (Tenn.) 16.

23. *Morton v. Bailey*, 2 Ill. 213.

Liability of Real Party in Interest.

At common law and under the statutes, the remedy to enforce the liability of the party beneficially interested for costs, has uniformly been a summary one, and an order to pay enforced by attachment or proceeding for contempt. But if the summary proceeding is not an adequate effective remedy, an action may be maintained. *Hiscock v. Tuck*, 106 N. Y. Supp. 700, following *McDougall v. Richardson*, 3 Hill (N. Y.) 558.

24. *Griffith v. Montandon*, 4 Idaho 75, 35 Pac. 704.

25. *U. S.* — *Pennsylvania v. Wheeling, etc. Bridge Co.*, 18 How. 421, 15 L. ed. 435; *Riddle v. Mandeville*, 6 Cranch 86, 3 L. ed. 161; *Fenwick v. Voss*, 1 Cranch C. C. 106, 4 Fed. Cas. No. 4,736. *Ala.* — *Stephens v. Head*, 138 Ala. 455, 35 So. 565, the statute requires execution to be accompanied with itemized bill of costs. *Ill.* — *Sheldon v. Van Vleck*, 109 Ill. 452; *Neil v. Blanchard*, 32 Ill. 503. *La.* — *Smith v. City of Shreveport*, 10 La. Ann. 582; *Copley v. Edwards*, 5 La. Ann. 647 (requiring as condition to issuance clerk's oath and judge's approval). *Me.* — *Emerson v. Lombard*, 15 Me. 458. *Mich.* — *People v. Wayne Circ. Judge*, 40 Mich. 244. *Mo.* — *Johnson v. Latta*, 84 Mo. 139; *Beedle v. Mead*, 81 Mo.

levied on may thereupon be sold in due course under such execution.²⁶

But as execution for costs is a statutory remedy, the statute authorizing it must be strictly pursued.²⁷ An execution for costs stands upon the same footing as any other execution with respect to the property upon which levy may be made.²⁸ And it is a settled rule of law, that in all cases judgment shall precede execution.²⁹

297. **Neb.**—*State v. Jaynes*, 19 Neb. 697, 28 N. W. 295, judgment for costs in mandamus. **N. J.**—*Hooper v. Smith*, 72 N. J. L. 168, 60 Atl. 63. **N. Y.** *In re Hirsch's Estate*, 185 N. Y. 598, 78 N. E. 294 (decree of surrogate's court for costs); *Smith v. Duffy*, 8 Civ. Proc. 191; *Forstman v. Schulting*, 42 Hun 643; *Bernheimer v. Hartmayer*, 34 Misc. 346, 69 N. Y. Supp. 816. **N. C.** *State v. Wallin*, 89 N. C. 578; Clerk of Davidson County Court *v. Wagoner*, 26 N. C. 131. **Ohio**.—*Eckstein v. Strauss*, 31 Wkly. Law Bul. 70. **Tenn.** *Washington v. Ewing*, 1 Yerg. 45. **Tex.** *Wilson v. Simpson*, 68 Tex. 306, 4 S. W. 839; *Anderson v. McKinney*, 22 Tex. 653; *Criswell v. Ragsdale*, 18 Tex. 443; *Coverdill v. Seymour* (Tex. Civ. App.), 56 S. W. 221, *reversed*, 57 S. W. 37. **Va.**—*Anglea v. Com.*, 10 Gratt. 696. **W. Va.**—*Taney v. Woodmansee*, 23 W. Va. 709. **Wis.**—*Henderson v. Allen*, 56 Wis. 177, 13 N. W. 928.

No demand necessary. *Lucas v. Johnson*, 6 How. Pr. (N. Y.) 121; *Schmidt v. Huff*, 7 Tex. Civ. App. 593, 28 S. W. 1053.

Petition for divorce dismissed. *Howard Bldg. & L. Assn. v. Philadelphia, etc. R. Co.*, 102 Pa. 220; *Bradley v. O'Donnell*, 40 Pa. 479; *Teane v. Hammond*, 24 Pittsb. Leg. J. (Pa.) 368; *South v. South*, 1 Pittsb. (Pa.) 187.

In New Mexico, appellants prevailing in the supreme court are entitled to recover costs against the appellee, and to have execution issue therefor, and no specific order is necessary. *Galup Elec. Light Co. v. Pacific Imp. Co.* (N. M.), 117 Pac. 845.

Mandamus will lie if the clerk refuses to issue execution. *Reg. v. Fletcher*, 2 El. & Bl. 279, 75 E. C. L. 279.

Execution Against Judgment Debtor. The fact that a decree for a specific sum against one person assesses the costs against such person and another jointly, does not warrant a joint execution against the two for the specific

sum and the costs, there being no privacy as to the specific sum. And on motion such execution will be quashed. *Taney v. Woodmansee*, 23 W. Va. 709.

Proceedings Supplementary to Execution.—An order for costs entered in proceedings supplementary to an execution, especially if rendered by a judge sitting at chambers, cannot be enforced by execution but only by attachment for contempt. *Cheatham v. Seawright*, 30 S. C. 101, 8 S. E. 526.

26. *Cox v. Joiner*, 4 Bibb (Ky.) 94; *Griffin v. Hickman*, 92 Miss. 266, 46 So. 73.

In Arkansas land cannot be sold under a fee bill issued by a clerk not based on a judgment or order of the court. *Minton v. Bennight*, 83 Ark. 101, 103 S. W. 168. See *Sheldon v. Van Vleck*, 109 Ill. 452.

Plaintiff in execution is entitled to the whole proceeds of the execution. *De La Garza v. Carolan*, 31 Tex. 387.

27. *Bantz v. Price*, 14 La. Ann. 191; *Davidson County v. Wagoner*, 26 N. C. 131.

An execution on a judgment for costs must be accompanied with a bill of costs informing the party against whom the execution issues of the amount of the costs with which he is charged and the particulars composing it. *Maxwell v. Pounds*, 116 Ala. 551, 23 So. 730.

Thus if the aggregate of the fees of witnesses is stated without the names of the witnesses, the execution is void. *Maxwell v. Pounds*, 116 Ala. 551, 23 So. 730.

28. *Jordan v. Central City Assn.*, 108 Ga. 495, 34 S. E. 132; *Cox v. Joiner*, 4 Bibb (Ky.) 94. See the title "Executions."

29. *Brookfield v. Morse*, 12 N. J. L. 331.

"There can be no rule of law more firmly established, than that the execution must be authorized by, and must conform to, the judgment. If there be no judgment for costs, there

Alias Writs.—Where an execution is returned satisfied, another cannot issue for costs, without some proceeding to determine the costs, and a decree directing their collection.³⁰

b. **Issuance.**—The clerk may generally issue execution against the party liable for costs as soon as the suit is determined,³¹ but where the prevailing party has not paid the costs incurred by him, and they cannot be collected from the adverse party, execution may issue against the former for the costs, if so provided by statute.³²

In Whose Favor Execution May Issue.—An execution for costs is properly issued in the names of the parties to the suit instead of the names of the officers in whose favor the costs were adjudged.³³

can be no execution for them, unless the execution be founded on some positive provision of statute superseding the general rule. But the reverse is the fact in this instance. The statute supports the general rule. The act of 1840, under which this execution issued, in its first section, required the clerk to tax the costs incurred by the successful party, and for which judgment shall be rendered, and issue execution." A sheriff's sale under an execution for costs under the act of 1840, where there was no judgment for costs to support the execution, was held to be null and void. *Criswell v. Ragsdale*, 18 Tex. 443.

30. *Brooks v. Hardwick*, 5 La. Ann. 675. See *Montgomery v. Montgomery*, 20 Ala. 350, where under statute an alias execution was issued against the unsuccessful party in the appellate court.

In Illinois the clerk, in making up costs is required to insert in the writ the costs of all previous writs, and therefore, a variance in the amount of costs between an original *feri facias* and an alias and a *flurics* is not material. *Bryan v. Smith*, 3 Ill. 47.

31. *Castle v. Roach*, 8 Ohio N. P. 212, 11 Ohio Dec. 358; *De La Garza v. Carolan*, 31 Tex. 387; *Anderson v. McKinney*, 22 Tex. 653; *Beaucham v. Withers*, 25 Tex. Civ. App. 575, 62 S. W. 1084.

"The party recovering judgment for costs has a right to expect, as a general rule, that the costs will be collected from the party against whom the judgment is rendered." *Simpson v. Trimble*, 44 Tex. 310, 313.

Time of Issuance.—The *fi. fa.* may issue immediately on expiration of time fixed for payment, on application to

the court. *Wetzel v. Schultz*, 13 How. Pr. (N. Y.) 191; *Lucas v. Johnson*, 6 How. Pr. (N. Y.) 121; *Eckerson v. Spoor*, 4 How. Pr. (N. Y.) 361, 3 Code Rep. 70; *Poillon v. Houghton*, 2 Sandf. (N. Y.) 649.

In Texas, under Rev. St. arts. 1420, 1420a, 1420b, after judgment and filing of a supersedeas appeal bond. *Ex-tence v. Stewart* (Tex. Civ. App.), 23 S. W. 295, 296.

Place of Issuance.—If there be any authority for issuing execution against the successful party for costs, on failure of the adverse party to pay them, an execution issued to a county other than that in which such successful party resides, in the absence of any judgment against him, is a nullity. *Simpson v. Trimble*, 44 Tex. 310. See *Griffin v. Hickman*, 92 Miss. 226, 46 So. 73.

Execution for officers' fees may issue though not formally taxed as costs, if they are noted of record, or on the writ. *Hoysradt v. Delaware, etc. R. Co.*, 182 Fed. 880, citing *Beale v. Com.*, 7 Watts (Pa.) 183; *Becker v. Goldschild*, 9 Pa. Super. 50; *Irwin v. Hanthorn*, 6 Pa. Super. 165.

In Texas a Justice May Issue Execution.—*Roberts v. McCamant*, 70 Tex. 743, 745, 8 S. W. 543.

32. *Jordan v. Central City L. & T. Assn.*, 108 Ga. 495, 34 S. E. 132.

33. *Smith v. Perkins*, 81 Tex. 152, 16 S. W. 805.

Clerk may issue executions in his own favor. *De La Garza v. Carolan*, 31 Tex. 387.

A general and standing order of the court of common pleas, directing the clerk to issue execution for his own benefit, and at the instance of any person entitled to costs, will authorize the

c. *Stay of Execution and Injunction Against Enforcement.*—An appeal or writ of error by one in a suit in which he is taxed with costs, operates as a stay of execution.³⁴

Injunction.—A bill in equity or petition will lie to enjoin an execution on a judgment for costs.³⁵

4. *By Fee Bills.*—In some states fee bills to collect the fees of certain court officers, jurors and witnesses are authorized by statute.³⁶

5. *By Attachment.*—Where there is an order or rule to pay costs, which cannot be enforced by execution, a writ of attachment may issue.³⁷ But where costs are allowed by an order of court, as an incident to a common law judgment, the ordinary process of execution

clerk, without any special order, to issue such execution. *Elliott v. Ellery*, 11 Ohio 306.

And by New York Code Civ. Proc. §779, execution may issue in favor of any person to whom the costs are payable. *Bernheimer v. Hortmayer*, 34 Misc. 346, 69 N. Y. Supp. 816.

The fact that a judgment is in favor of the officers of the court, while the execution is in favor of certain persons who claim witness fees as well as of the officers of the court, does not invalidate it, it being competent for the clerk to tax such fees as costs. *Vining v. Officers of Court*, 86 Ga. 127, 12 S. E. 298.

34. *Copley v. Edwards*, 5 La. Ann. 648; *Jackson v. Smith*, 6 Cow. (N. Y.) 580.

But the fact that a motion to retax costs has not been decided will not operate as a stay (*State v. Lander County Comrs.*, 22 Nev. 71, 35 Pac. 300), nor will an agreement between parties to stay execution prevent the issuance of an execution in behalf of the officers of the court for their costs and fees (*Clegg v. De Bruhl*, 45 Tex. 141).

If an execution includes other costs than those incurred by the defendant in the execution, he may have it superseded. *Extence v. Stewart* (Tex. Civ. App.), 23 S. W. 295.

A petition for rehearing in the appellate court does not prevent the issuance of a *feri facias* for costs. *Willson v. Williams*, 106 Md. 657, 68 Atl. 297, 598.

35. *Anderson v. Mullenix*, 5 Lea (Tenn.) 288; *Griffith v. Missouri*, etc. R. Co. (Tex. Civ. App.), 108 S. W. 756.

Clerk of court is not a proper party to such a suit, and cannot be held for costs of such a suit where a decree is rendered upon a *pro confesso* order. *Wood v. Cooper*, 2 Heisk. (Tenn.) 441; *Montgomery v. Whitworth*, 1 Tenn. Ch. 174. See also *Blanton v. Hall*, 2 Heisk. (Tenn.) 423; *McGavock v. Elliott*, 3 Yerg. (Tenn.) 373.

If an injunction is sought against an execution for further costs by one who had paid all the costs as taxed on the final affirmance of judgment against him, the district court should, on a showing that the costs claimed were properly taxable though not regularly taxed, permit a retaxing and execution in accordance therewith. *Paton v. Cox*, 97 Tex. 253, 77 S. W. 1025, reversing 75 S. W. 871, citing *Seymour v. Hill*, 67 Tex. 385, 3 S. W. 313; *Lockhart v. Stuckler*, 49 Tex. 765; *Witt v. Kaufman*, 25 Tex. Supp. 384; *Willis v. Gordon*, 22 Tex. 241.

36. Ark.—*Buchanan v. Parham*, 95 Ark. 81, 128 S. W. 563; *Minton v. Benight*, 83 Ark. 101, 103 S. W. 168. Ill. *Sheldon v. Van Vleck*, 109 Ill. 452. Ia. *Charles City v. Security Trust*, etc. Bank, 143 Iowa 324, 120 N. W. 114. Mo.—*Decker v. St. Louis & S. W. R. Co.*, 92 Mo. App. 50.

If costs have been taxed prior to issuance of fee bill the remedy to correct is by motion to retax, not by injunction. *Citizens' Nat. Bank v. Gregg*, 53 Neb. 760, 74 N. W. 273.

37. *Craig v. Leitensdorfer*, 127 U. S. 764, 8 Sup. Ct. 1393, 32 L. ed. 322; *Smith v. State*, 31 N. J. L. 216; *Struggle v. Hayne*, 21 N. J. L. 245; *Gilliland v. Rappleyea*, 15 N. J. L. 138.

Not by judgment and execution at the will of the clerk. *Kellogg v. Graham*, *Wright* (Ohio) 87.

must be used for collection.³⁸ An order, to be enforced by attachment, is the regular mode to compel the party obtaining the continuance to pay the costs. Judgment and execution for costs of a continuance are irregular.³⁹

6. By Imprisonment.—Under special statutory provisions in some states, the liability for costs may be enforced by contempt proceedings, in spite of the provisions in the constitutions and statutes abolishing imprisonment for non-payment of costs.⁴⁰ But as a general rule proceedings for contempt cannot be resorted to, as execution is an adequate remedy.⁴¹

III. COSTS IN APPELLATE PROCEEDINGS.—**A. GENERAL RIGHT TO AND LIABILITY FOR COSTS.**—**1. Statement of Rule.**—The right to or liability for costs on appeal depends entirely on statute, or at least rules of court.⁴² And statutes merely regulating costs in civil

38. *State v. Kunkle*, 39 N. J. L. 618.

39. **Ky.**—*Mahony v. Holland*, 2 Bibb 243. **Mich.**—*Barney v. Love*, 101 Mich. 543, 60 N. W. 58; *Henderson v. Wayne Circuit Judge*, 40 Mich. 244. **N. Y.** *Jackson v. Pell*, 19 Johns. 270; *Fulton v. Brunk*, 18 Wend. 509.

But in Pennsylvania it is held that a continuance on condition to pay costs is simply an interlocutory order for the payment of costs which will not be enforced by attachment. *Peterson v. Geary*, 3 Pa. Co. Ct. 49; *McCain v. Jewell*, 24 Pittsb. Leg. J. 185.

40. In the *Matter of Kelly*, 62 N. Y. 198 (attorney in disbarment proceedings); *Tucker v. Gilman*, 14 N. Y. Supp. 392 (liability of party "beneficially interested" for costs under New York statute).

In New York a decree of a surrogate's court for payment of costs cannot be enforced by imprisonment in contempt proceedings. *In re Hirsch's Estate*, 185 N. Y. 598, 78 N. E. 234; *Matter of Hunfreville*, 154 N. Y. 115, 47 N. E. 1086; *In re Grant*, 130 App. Div. 706, 115 N. Y. Supp. 283.

41. *State v. Jaynes*, 19 Neb. 697, 28 N. W. 295.

42. **Minn.**—*Atwater v. Russell*, 49 Minn. 22, 51 N. W. 624. **Mo.**—*Wilson v. Ruthrauff*, 87 Mo. App. 226. **N. M.**—*Price v. Garland*, 5 N. M. 98, 20 Pac. 182. **N. Y.**—*Downing v. Marshall*, 37 N. Y. 387. **S. D.**—*Wold v. South Dakota Cent. R. Co.*, 23 S. D. 521, 122 N. W. 583, proceedings after notice before trial. **Wash.**—*State v. Martin*, 45 Wash. 76, 87 Pac. 1054

(costs in disbarment proceedings); *Clark v. Eltinge*, 83 Pac. 901.

A successful petitioner for an appeal cannot be required to pay the costs, in the absence of statute. *Munger v. Verder*, 59 Vt. 386, 8 Atl. 154.

Increased costs on appeal are dependent on statute. *Scherl v. Flam*, 136 App. Div. 753, 121 N. Y. Supp. 522.

"In a case appealed from a justice of the peace to the circuit court by the party against whom judgment was rendered by the justice, and who has, on the trial in the circuit court, reduced the judgment of the justice more than \$5, but who has not made the tender prescribed by the statute, the circuit court has no power to render a judgment against such appellant in favor of the appellee for costs about the trial in the circuit court, unless it be in a case 'involving the title to specific personal property, or the possession of real estate, the freedom of a person, the validity of a law or an ordinance of any corporation, or the right of any corporation to levy tolls or taxes.'" *West Virginia Cent. Gas Co. v. Holt*, 66 W. Va. 516, 66 S. E. 717.

Compliance With Statute Essential. *Bell v. Superior Ct.*, 150 Cal. 31, 87 Pac. 1031; *Candler v. Washow Lake Reservoir, etc. Co.*, 28 Nev. 422, 82 Pac. 458, modifying 28 Nev. 151, 80 Pac. 751.

Statutes Not Retrospective.—*Arnold v. Bright*, 41 Mich. 416, 50 N. W. 392.

Do not relate to pending cases.

cases do not as a general rule apply to costs in appellate courts.⁴³

2. Parties Who May Recover or Must Pay Costs.—*a. The General Rule.*—The general rule is that the party prevailing in the appellate court shall recover his costs⁴⁴ against the party cast on the appeal.⁴⁵

Pennsylvania Co. v. Wallace, 44 Pa. Super. 64; Miller v. Jackson, 38 Pa. Super. 477; Duff v. Thrall, 39 Pa. Super. 254.

43. Ellis v. Wait, 4 S. D. 504, 57 N. W. 232.

44. U. S.—Pennsylvania v. Wheeling, etc. Bridge Co., 18 How. 460, 15 L. ed. 449. Cal.—Hathaway v. Davis, 33 Cal. 161. La.—Varion v. Debergue, 18 La. 40; Saillard v. Turner, 14 La. 259; Nolte v. Creditors, 3 La. 267. Me. Goodwin v. Boston & Maine R. R., 63 Me. 363. Mass.—Fitch v. Stevens, 2 Met. 506; Gay v. Richardson, 18 Pick. 417. Mo.—Ferguson v. Tiede, 130 Mo. App. 269, 109 S. W. 850. Mont.—State ex rel. Hurley v. District Court, 27 Mont. 40, 69 Pac. 244. N. J.—Sandford v. Clarke, 38 N. J. Eq. 265. N. M. Gallup Elec. Light Co. v. Pacific Imp. Co., 117 Pac. 845; King v. Tabor, 15 N. M. 488, 110 Pac. 601. N. Y.—Ayres v. Western Corp., 49 N. Y. 660; Anonymous, 13 Abb. N. C. 54; Barnard v. Pierce, 28 How. Pr. 232 (appeals from judgment of a justice). N. C.—Dobson v. Southern R. Co., 133 N. C. 624, 45 S. E. 958. Pa.—O'Neal v. McClure, 1 Phila. 102, 7 Leg. Int. 179. S. C. Cunningham v. Cauthen, 47 S. C. 150, 25 S. E. 87; Sullivan v. Latimer, 43 S. C. 262, 21 S. E. 3; Stepp v. National Life Assn., 41 S. C. 206, 19 S. E. 490; Sears v. Dobson, 36 S. C. 554, 15 S. E. 703; Huff v. Watkins, 25 S. C. 243; Cleveland v. Cohrs, 13 S. C. 397. S. D. Kelley v. Oksall, 17 S. D. 392, 97 N. W. 11, judgment modified in 17 S. D. 185, 95 N. W. 913. Tex.—Bridge v. Samuelson, 73 Tex. 522, 11 S. W. 539; Anderson v. Levysen, 1 White & Wills. Civ. Cas. §928. Va.—Code, 1887, §3548; Handly v. Snodgrass, 9 Leigh 484. Wash.—Schmidt v. Olympia Light, etc. Co., 46 Wash. 360, 90 Pac. 212. W. Va.—Code 1899, ch. 138, §11; Frye v. Miley, 54 W. Va. 234, 46 S. E. 135; Darby v. Gilligan, 37 W. Va. 59, 16 S. E. 507; Ferguson v. Millender, 32 W. Va. 30, 9 S. E. 38. Wis.—Fairbank v. Newton, 48 Wis. 384, 4 N. W. 327; Calkins v. Hays, 4 Wis. 200.

The statute in New Mexico (Comp. Laws 1897, §3148), providing that the prevailing party shall recover his costs, applies to the supreme court as well as the district court, at least in so far as actions at law are concerned. King v. Tabor, 15 N. M. 488, 110 Pac. 601; Baca v. Amaya, 14 N. M. 20, 89 Pac. 314.

Judgment Reversed on Technical Error.—A prevailing party is entitled to cost on appeal, although the error for which the judgment below is reversed is merely technical, and his defense seems to be frivolous and merely for delay. Mavrich v. Grier, 3 Nev. 52.

When several defendants severally appeal from a judgment rendered against them, and succeed, there is not necessarily as many prevailing parties as there are individual appellants for the purpose of the taxation of costs in the appellate court, under §2949, Rev. St. 1898. Such of the appellants as are united in interest are to be deemed as constituting but one prevailing party, though they may have separate appeals. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

Appeals From Justices Courts.—The law is settled that the prevailing party is entitled to costs upon an appeal for a new trial in the county court from a judgment rendered in a court of the justice of the peace in case the recovery is greater than the unaccepted offer of judgment and is for \$50 or more. Rose v. Wells, 92 App. Div. 75, 86 N. Y. Supp. 889.

On a motion to dismiss an appeal costs will be awarded to the party who prevails on the motion. Workman v. Doran, 34 W. Va. 604, 12 S. E. 770.

Federal courts follow the state practice. Scatcherd v. Love, 166 Fed. 53, 91 C. C. A. 639.

45. Ga.—Walker v. Hillyer, 130 Ga. 466, 61 S. E. 8. Idaho.—Young v. Extension Ditch Co., 14 Idaho 353, 93 Pac. 772. Va.—Ellzey v. Lane, 2 Hen. & M. 589.

Discretion of Court. — In some jurisdictions, statutes giving costs to the prevailing party on appeal are held to be mandatory, and the court has no discretion in the matter,⁴⁶ even in equity cases.⁴⁷ But in others the appellate court may exercise discretion in awarding costs.⁴⁸

"The general theory of our law and the rules of the court in regard to costs is that the losing party shall pay them; and the prevailing party, on appeal, is entitled to recover the amount paid by him to the reporter for a copy of the evidence whenever that is needed on appeal. *McDonald v. Burke*, 3 Idaho (Hash.) 266, 28 Pac. 440, 35 Am. St. Rep. 276, cited and approved." *Young v. Extension Ditch Co.*, 4 Idaho 353, 93 Pac. 772.

If there are successive appeals the successful party on each appeal recovers costs in the appellate court; the party finally successful recovers the costs below. *McGuire v. Johnson*, 25 Ga. 604.

46. *American Soda Fountain Co. v. Battle*, 85 Ark. 213, 108 S. W. 508, 107 S. W. 672. **Me.**—*Knowlton v. Wing*, 107 Me. 484, 78 Atl. 870; *Alvord v. Stone*, 78 Me. 296, 4 Atl. 697. **Minn.** *Hess v. Great Northern R. Co.*, 98 Minn. 198, 108 N. W. 7, 803. **Tenn.** *Illinois Cent. R. Co. v. Southern Seating, etc. Co.*, 104 Tenn. 568, 58 S. W. 303. **Vt.**—*Bliss v. Little's Est.*, 64 Vt. 133, 23 Atl. 725. **Va.**—Code 1887, par. 3548; *Ashworth v. Trammell*, 102 Va. 852, 47 S. E. 1011; *Allen v. Shriver*, 81 Va. 174; *Bryan v. Salyards*, 3 Gratt. 179. See *Adkins v. Edwards*, 83 Va. 300, 2 S. E. 435. **W. Va.**—*Sprinkle v. Duty*, 54 W. Va. 559, 46 S. E. 557; *Woods v. Stevenson*, 43 W. Va. 149, 27 S. E. 309; *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. 507; *Ferguson v. Milender*, 32 W. Va. 30, 9 S. E. 38; *Anderson v. Snyder*, 21 W. Va. 632. **Wis.** *Dueke v. Janesville*, 28 Wis. 464; *First Nat. Bank v. Prescott*, 27 Wis. 616.

It has been held, however, that the section of a statute providing that the party prevailing in the supreme court on any appeal may have taxed in his favor the costs and disbursements consequent on such appeal is not imperative, but merely establishes a general rule which the court may only depart from in special cases, such as in will contests, and in these the court may direct the costs be paid out of

the estate. *Jackman's Will Case*, 26 Wis. 364.

On reversal of a judgment by the county court on appeal from the justice's court, the former court has no discretion over the costs; they being regulated by statute. *Tichnor Bros. v. Barley*, 72 Misc. 638, 132 N. Y. Supp. 243, citing, *Robischon v. Moore*, 135 App. Div. 699, 119 N. Y. Supp. 252.

Apportionment.—There can be no apportionment of costs on appeal under mandatory statutes providing that the losing party must pay the disbursements necessarily incurred by the prevailing party. *Hess v. Great Northern Pac. R. Co.*, 98 Minn. 198, 108 N. W. 7, 803.

47. *Cauthen v. Cauthen*, 81 S. C. 313, 62 S. E. 319.

"It has been settled by a number of decisions that even in equity cases costs and disbursements in the Supreme Court are taxed in favor of the prevailing party against the losing party on said appeal, and that the circuit judge or chancellor has no power or discretion to make a contrary direction. *Hall v. Hall*, 45 S. C. 4, 22 S. E. 881; *Cunningham v. Cauthen*, 47 S. C. 164, 25 S. E. 87; *Jennings v. Parr*, 63 S. C. 388, 44 S. E. 962." *Cauthen v. Cauthen*, 81 S. C. 313, 62 S. E. 319.

48. **U. S.**—*Rogers v. Durant*, 106 U. S. 644, 646, 1 Sup. Ct. 623, 27 L. ed. 303; *Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. ed. 688, 689. **Ga.** *Lovd v. Hicks*, 32 Ga. 499. **Ia.**—*Campbell v. Moorehouse*, 141 Iowa 568, 120 N. W. 79. **Ky.**—*Samples v. Rogers*, 32 Kv. L. Rep. 784, 107 S. W. 222. **La.** *Williams v. Nona Mills Co.*, 128 La. 811, 55 So. 414, construing La. Act No. 229 of 1910. **Mich.**—*Cook Land, etc. Co. v. McDonald*, 155 Mich. 173, 118 N. W. 959; *Russell v. North American Ben. Assn.*, 116 Mich. 699, 75 N. W. 137. **Pa.**—*Lincoln v. Africa*, 228 Pa. 546, 77 Atl. 918. **Tenn.**—*Gaines v. Fagala* (Tenn. Ch.), 42 S. W. 462. **Tex.**—*Fowler v. Morrill*, 8 Tex. 153.

In some cases each party is decreed to pay one-half the costs,⁴⁹ and in others the court has refused to award costs to either party, but decreed each party to pay his own,⁵⁰ as where both parties have appealed from a decree on grounds which have not been sustained.⁵¹

Parties to the Record.—It is well settled, however, that only parties to the appeal can recover,⁵² or be held liable for costs.⁵³

Wis.—*Ellis v. Barron County*, 111 Wis. 576, 87 N. W. 552.

Generally the reversal carries costs from the first error. But the court has a comprehensive power to apportion the costs equitably. *Indianapolis, etc. Tract. Co. v. Brennan (Ind.)*, 90 N. E. 68, *quoting Elliott's App. Proc.* §575. See also *Louisville, etc. R. Co. v. Perkins (Ala.)*, 56 So. 105; *Bruce v. Knodell (Tex. Civ. App.)*, 103 S. W. 433.

While the new Code (§583, Gen. St. 1909, §6178) leaves the taxation of costs of appeal in the discretion of the supreme court, such costs as a rule follow the judgment and will be taxed to the losing party, subject to the right of the court to direct otherwise, where it appears for any reason that costs should be apportioned between the parties. *Gordon v. Munn*, 83 Kan. 642, 112 Pac. 615.

In equity, costs in the appellate court are discretionary. *Forsyth v. Butler*, 152 Cal. 396, 93 Pac. 90.

The New Jersey chancery act "provides (P. L. 1902, p. 538, §84) that costs in this court shall be discretionary, except where it is otherwise directed by law." *Diocese of Trenton v. Toman (N. J. Eq.)*, 70 Atl. 881.

In Kentucky the matter of costs, on appeal to the circuit court, is left to the discretion of the court, where the amount of the judgment is reduced by the appeal, but no tender has been made by the appellant. *Boggs v. Turner*, 145 Ky. 833, 141 S. W. 420, *citing Gentry v. Doolin*, 1 Bush (Ky.) 1.

In Certiorari Proceedings.—Whether or not costs are to be awarded on appeal in certiorari or special proceedings is discretionary. *Stokes v. Schlatter*, 66 N. J. L. 334, 49 Atl. 588; *In re Protestant Episcopal Public School*, 86 N. Y. 396; *People v. Smith*, 13 Hun (N. Y.) 227.

49. *McComb v. Frink*, 149 U. S. 629, 13 Sup. Ct. 993, 37 L. ed. 876; *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct.

696, 33 L. ed. 110; *The Sterling & The Equator*, 106 U. S. 647, 1 Sup. Ct. 89, 27 L. ed. 98; *Baltimore, etc. R. Co. v. Grant*, 98 U. S. 398, 25 L. ed. 231; *Pearson v. Duane*, 4 Wall. 605, 18 L. ed. 447; *Roberts v. Swagerty (Tenn. Ch.)*, 42 S. W. 169.

50. *The Niagara v. Van Pelt*, 154 U. S. 533, 14 Sup. Ct. 1207, 15 L. ed. 152; *Coggeshall v. Hartshorn*, 154 U. S. 533, 14 Sup. Ct. 1198, 15 L. ed. 261; *Plano Mfg. Co. v. Graham*, 140 U. S. 694, 11 Sup. Ct. 1026, 35 L. ed. 599; *The Sterling and the Equator*, 106 U. S. 647, 1 Sup. Ct. 89, 27 L. ed. 98; *Rogers v. Durant*, 106 U. S. 644, 1 Sup. Ct. 623, 27 L. ed. 303.

51. *The North Star*, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. ed. 91.

In collision cases in admiralty if both vessels are in fault, costs below should be equally apportioned. *The America*, 92 U. S. 432, 23 L. ed. 724, *citing The Maria Martin*, 12 Wall. (U. S.) 31, 43, 20 L. ed. 251; *The Brig Morning Light*, 2 Wall. (U. S.) 550, 557, 17 L. ed. 862; *Rogers v. St. Charles*, 19 How. (U. S.) 108, 15 L. ed. 563; *The Schooner Catharine v. Dickinson*, 17 How. (U. S.) 170, 173, 15 L. ed. 233.

On reversal of a decree dismissing a bill absolutely for failure to join a necessary party, instead of dismissing it without prejudice, each party should pay his own costs in the appellate court. *Galloway v. Hamilton*, 3 T. B. Mon. (Ky.) 270.

On appeal in test cases, taken in good faith, and in which the appellant and appellee co-operate in an effort to settle the law for the public at large, no costs are allowed to either party. *Fraser v. Brown*, 203 N. Y. 136, 96 N. E. 365.

52. **U. S.**—*Pollard v. Reardon*, 65 Fed. 848. **Ky.**—*Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. 138. **Wash.** *Lamey v. Coffman*, 11 Wash. 301, 39 Pac. 682.

53. **U. S.**—*Walden v. Bodley*, 14 Pet. 156, 10 L. ed. 398. **Ala.**—*Fruitt v. Gunn*, 151 Ala. 651, 44 So. 569. **Ark.**

b. *Who Is Prevailing Party.*—The successful party on appeal is the one who succeeds as to any of the questions presented to the appellate court,⁵⁴ though he recovers no more on appeal than was awarded him below.⁵⁵ But in other states it is the party substantially prevailing that is entitled to costs on appeal.⁵⁶ And on ap-

Buchanan v. Parham, 95 Ark. 81, 128 S. W. 563. **Ky.**—*Gleason v. Kentucky Title Co.*, 26 Ky. L. Rep. 147, 80 S. W. 814. **Mich.**—*Smith v. Sherman*, 52 Mich. 637, 18 N. W. 394; *Pool v. Horton*, 45 Mich. 404, 8 N. W. 59. **Wash.**—*Johnson v. Collier*, 54 Wash. 478, 103 Pac. 818.

An appellant or appellee for whose use a suit is brought may be held liable, under the statutes, for the costs of an appeal. *Ruddell v. Green*, 104 Md. 371, 65 Atl. 42.

Liability of Assignee for Costs on Appeal.—Where a judgment is assigned not absolutely, but merely as collateral security for a debt due the judgment creditor's attorney, such creditor still retaining a right to any balance of the proceeds, the assignee will not be required to pay the costs on appeal. The rule is otherwise when the assignment is absolute. *De Witt v. Perkins*, 25 Wis. 438.

Surety on Cost Bond.—In the circuit court for the Eastern District of Pennsylvania the surety on a bond for costs on appeal to the circuit court of appeals is liable for the costs in the court below as well as the costs in the circuit court of appeals. *Expanded Metal Co. v. Bradford*, 177 Fed. 604.

Sureties on appeal bond are liable for costs. *Railroad v. Leabow*, 97 Tenn. 449, 37 S. W. 197.

54. **Mo.**—*Ferguson v. Tiede*, 130 Mo. App. 269, 109 S. W. 850. **S. C.**—*Sullivan v. Latimer*, 43 S. C. 262, 21 S. E. 3. **Tex.**—*St. Louis Southwestern R. Co. v. Bennett* (Tex. Civ. App.), 102 S. W. 137. **Va.**—*Breckenridge v. Auld*, 1 Rob. 148.

An appellant is the prevailing party and entitled to costs against the appellee, where the judgment of the lower court is affirmed upon the appellee's filing a remittitur of a portion of the judgment obtained in the lower court. *King v. Tabor*, 15 N. M. 488, 110 Pac. 601.

An appellee who succeeds in abating an appeal on a plea in abatement is the prevailing party, under a statute

which authorizes the allowance of costs to the prevailing party. *Siak v. Meagher*, 82 Conn. 483, 74 Atl. 880.

55. *Stringham v. Milwaukee B. Co.*, 59 Wis. 364, 18 N. W. 328; *Norwegian Ev. Luth. Church v. Thorson*, 21 Wis. 34; *Smithbeck v. Larson*, 18 Wis. 183.

In Wisconsin a judgment for nominal damages on a trial *de novo* on appeal from a justice's court to the circuit court, entitles the plaintiff to costs, because he is the successful party; though recovering less than he did in the justice's court. *Cronemillar v. Duluth-Superior Mill. Co.*, 134 Wis. 248, 114 N. W. 432; *Smithbeck v. Larson*, 18 Wis. 183.

56. **N. C.**—*Williams v. Dunn*, 151 N. C. 107, 65 S. E. 754. **Ore.**—*Trullinger v. Howe*, 53 Ore. 219, 99 Pac. 880, 97 Pac. 548. **Va.**—*Cunningham v. Patteson*, 3 Rand. 66. **Wash.**—*Wilcox v. Smith*, 38 Wash. 585, 80 Pac. 803. **W. Va.**—*Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135.

Where appellee prevails in relation to the most important matters in controversy, appellant will not be entitled to costs, but each party must pay his own costs. *Northrup v. Phillips*, 99 Ill. 449; *Clarke v. Clay*, 31 N. H. 393; *Wendell v. French*, 19 N. H. 205; *Griswold v. Chandler*, 6 N. H. 61.

Any reduction of the judgment, in some states, entitles the appellant to recover his costs expended on the appeal. *Missouri, etc. R. Co. v. Milliron*, 53 Tex. Civ. App. 325, 115 S. W. 635; *Galveston, etc. R. Co. v. Giles* (Tex. Civ. App.), 126 S. W. 282. *Contra*, *Henning v. Keiper*, 43 Pa. Super. 177; *Kessler & Co. v. Burckell* (Tex. Civ. App.), 99 S. W. 173 (as to one who on appeal from a justice's court recovers less than the judgment in such court).

In Washington, either on appeal from the justice's court to the superior court, or on appeals from the supreme court, the appellant must recover "a more favorable judgment" than he recovered below to be entitled to costs. But this expression does not mean a few dollars

peal until a final judgment is rendered determining all the rights of the parties, one cannot be considered a successful or unsuccessful party in the appellate court.⁵⁷

c. *The Sovereign*.—The sovereign cannot be held liable for costs on appeal in the absence of statute or rule of court.⁵⁸

d. *Parties Guilty of Misconduct or Neglect*.—(I.) *In General*.—A party may by his own acts and omissions deprive himself of the right to costs, or incur liability for them in the appellate court, regardless of the disposition made of the case by the appellate court;⁵⁹ in other

or cents larger or smaller than the judgment appealed from, but one substantially more favorable, which is to be determined by the court in view of the circumstances of each particular case. *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111, 67 Pac. 580; *Baxter v. Scoland*, 2 Wash. Ter. 86, 3 Pac. 638.

57. Where a judgment on a verdict for the plaintiff is reversed and a new venire awarded, and on a second trial a verdict and judgment is again rendered in favor of the plaintiff, and this judgment is affirmed, the defendant is not entitled to recover from the plaintiff the cost of printing his paper books and other costs in the first appeal. *Pennsylvania Co. v. Wallace*, 44 Pa. Super. 64.

58. *City of Muskegon v. S. K. Martin Lumb. Co.*, 86 Mich. 625, 49 N. W. 489, suit in the name of municipality without authority.

Otherwise if the state appeals. *Romine v. State*, 7 Wash. 215, 34 Pac. 924.

And a county may be held liable for the costs of reversing a judgment recovered by it against the appellant, though the original proceeding was instituted by one of its officers. *State v. Lamping*, 31 Wash. 652, 72 Pac. 476.

The United States does not pay costs in any case. Rule 24, §4, 21 How. xiv; *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. ed. 960; *United States v. Boyd*, 5 How. 29, 51, 12 L. ed. 36; *United States v. McLemore*, 4 How. 286, 11 L. ed. 977; *United States v. Ringgold*, 8 Pet. 150, 163, 8 L. ed. 899; *The Antelope*, 12 Wheat. 546, 550, 6 L. ed. 723; *United States v. Barker*, 2 Wheat. 395, 4 L. ed. 271; *United States v. Hooe*, 3 Cranch 73, 91, 92, 2 L. ed. 370.

59. *U. S.—Williams v. Nottawa*, 104 U. S. 209, 26 L. ed. 719 (citing *Gorden v. Longest*, 16 Pet. 97, 10 L. ed. 900);

Eldred v. Michigan Ins. Bank, 17 Wall. 545, 21 L. ed. 685. **Ark.**—*Young v. Boles*, 92 Ark. 242, 122 S. W. 496. **Kan.** *Crane v. Cameron*, 87 Pac. 466. **La.** *Bommarius v. New Orleans R., etc. Co.*, 123 La. 615, 49 So. 213. **Mich.**—*Malone v. Malone*, 151 Mich. 680, 115 N. W. 716. **Minn.**—*Naley v. Maley*, 62 Minn. 372, 64 N. W. 927. **Neb.** *State ex rel. Dobney v. Chicago, etc. R. Co.*, 83 Neb. 518, 120 N. W. 165. **N. Y.** *Equitable Trust Co. v. Nissen*, 129 N. Y. Supp. 41. **Tex.**—*Missouri, etc. R. Co. v. Milliron*, 53 Tex. Civ. App. 325, 115 S. W. 655.

When counsel for both parties set a case down for oral argument in disregard of Rule 15, statutory costs will not be allowed to the prevailing party. *J. Thompson & Sons Mfg. Co. v. Ferch*, 78 Minn. 520, 81 N. W. 520; *Vaule v. Steenerson*, 63 Minn. 110, 65 N. W. 257.

If the appellant violates the rules of court in the preparation of his bill of exceptions, the costs of the appeal may be taxed against him on reversal. *Grasselli Chemical Co. v. Davis*, 166 Ala. 471, 52 So. 35.

And if the prevailing party fails to comply with the rules of court prescribing the time for filing paper books and briefs, he cannot recover statutory costs. *Lehigh Coal, etc. Co. v. Scallen*, 61 Minn. 63, 63 N. W. 245.

If appellants pray an appeal unnecessarily after the subject-matter of the litigation has been fully settled, the appeal may be dismissed at their costs. *Young v. Boles*, 92 Ark. 242, 122 S. W. 496.

If the successful party secures a reversal mainly by inducing the trial court to exclude competent evidence, no costs will be allowed to him. *Sauer v. Flynt*, 61 Minn. 109, 63 N. W. 252.

If the appellant's failure to demur occasions the costs of appeal, the ap-

words, his success or failure on his appeal is not a determining factor,⁶⁰ or according to the practice in some jurisdictions the court may refuse to award costs to either party.⁶¹

If the appellants, by their method of procedure, incur unnecessary costs in preparing the record for the appellate court, such costs should be taxed against them on reversal.⁶²

(II.) **Failure To Raise Objections Below.**—Where the errors in the judgment sought to be reviewed might have been corrected below had the court's attention been called to them, the appellate court is vested with considerable discretion in awarding costs.⁶³ Thus, on reformation and affirmance of a judgment,⁶⁴ or modification and affirm-

pellant on reversal will be required to pay the costs of the appeal. *Bush v. Louisville Trust Co.*, 24 Ky. L. Rep. 2182, 73 S. W. 775, citing *Moore v. Moxey*, 19 Ky. L. Rep. 160, 39 S. W. 420.

Neglect of Attorney.—"Under paragraph 9, rule 27 of the rules of this court (32 Pac. xi) if an attorney refuses to certify a transcript presented to him for certification, and fails to point out in writing any defects in such transcript, the cost of procuring the clerk to certify the same must be taxed to the party whose attorney so neglects or refuses." *West v. Dygert*, 13 Idaho 641, 92 Pac. 753.

60. *Parkers v. Travers*, 74 N. J. Eq. 812, 71 Atl. 612.

61. Where the court has been misled by counsel into rendering a judgment that they might have the satisfaction of reversing it, no costs will be awarded to either party. *Eldred v. Michigan Ins. Bank*, 17 Wall. (U. S.) 545, 21 L. ed. 685.

Where both parties are in fault for arguing an appeal upon a record brought up in an improper condition, the judgment will be reversed without costs to either party. *Smith v. Geiger*, 202 N. Y. 306, 95 N. E. 706.

If an appeal is taken from a judgment entered prematurely, but no application is made by any party to set aside the judgment, no costs of the appeal will be awarded to any party. *Edinger v. McAvoy*, 119 N. Y. Supp. 327, citing *Shaffer v. Martin*, 20, App. Div. 304, 46 N. Y. Supp. 992.

If counsel for appellee file no brief in the appellate court, neither party will recover costs on affirmance. *Sawtells v. Howard*, 104 Mich. 54, 62 N. W. 156.

On remand of a case, because of an

attempt to bring up a non-reviewable decision, such as a *pro forma* judgment, the costs of the appeal may be divided between the parties. *Overman v. Lanier* (N. C.), 72 S. E. 575.

62. *Hammond v. Glos*, 250 Ill. 32, 95 N. E. 39.

63. U. S.—*Spalding v. Mason*, 161 U. S. 375, 16 Sup. Ct. 592, 40 L. ed. 738 (awarding costs against appellant on correction and affirmance); *Eldred v. Michigan Ins. Bank*, 17 Wall. 545, 21 L. ed. 685 (denying plaintiff in error costs on reversal). N. J.—*Nessler v. Industrial Land Development Co.*, 70 N. J. Eq. 804, 64 Atl. 109, reversing judgment without costs. Wash.—*Olympia Brewing Assn. v. Pioneer Mut. Ins. Assn.*, 53 Wash. 16, 101 Pac. 371. W. Va.—*Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135.

But this rule does not apply where the error is one involved in a charge of the court and not merely an act of inadvertence or oversight. *Sullivan v. Fant*, 51 Tex. Civ. App. 6, 110 S. W. 507.

Failure To Make Motion To Correct Judgment.—*Dodge v. Richardson*, 70 Tex. 209, 8 S. W. 30.

If a judgment affirmed on a point not made below by respondent's counsel, such successful party is not entitled to statutory costs on appeal (*Duxbury v. Shanahan*, 84 Minn. 353, 87 N. W. 944), but such costs will not be allowed to either party (*Campbell v. Loeb*, 72 Minn. 76, 74 N. W. 1024).

64. U. S.—*Spalding v. Mason*, 161 U. S. 375, 16 Sup. Ct. 592, 40 L. ed. 738. Ga.—*Thompson v. Mallory*, 115 Ga. 112, 41 S. E. 240. La.—*Bommarsins v. New Orleans R., etc. Co.*, 123 La. 615, 49 So. 213. S. D.—*Mead v. Pettigrew*, 11 S. D. 529, 78 N. W. 945. Tex.—*Helm v. Weaver*, 69 Tex. 143, 6

ance,⁶⁵ or even on reversal⁶⁶ for objections made for the first

S. W. 420; *Davidson v. Wills* (Tex. Civ. App.), 121 S. W. 541; *Blain v. Lowery* (Tex. Civ. App.), 120 S. W. 247; *McCormick v. National Bank* (Tex. Civ. App.), 106 S. W. 747; *McKee v. West*, 55 Tex. Civ. App. 460, 118 S. W. 1135; *White v. Manning*, 46 Tex. Civ. App. 298, 102 S. W. 1160; *Cummings v. Masterson*, 42 Tex. Civ. App. 549, 93 S. W. 500; *Henry v. Benoit* (Tex. Civ. App.), 70 S. W. 359; *Yoe v. Milam County Co-op. Cotton, etc. Alliance* (Tex. Civ. App.), 32 S. W. 162. **Wash.**—*Hopkins v. Crane*, 50 Wash. 636, 97 Pac. 772; *Gaffney v. Megrath*, 11 Wash. 456, 39 Pac. 973. **W. Va.**—*Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135; *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164. **Wis.**—*Menz v. Beebe*, 102 Wis. 342, 78 N. W. 601, 77 N. W. 913 (simply denying appellant his costs); *Windrose v. McKillop*, 98 Wis. 525, 74 N. W. 342.

On affirmance, where the respondent has not appeared in the case by brief or otherwise, he is entitled to no costs on the appeal. *Johnson v. Collier*, 54 Wash. 478, 103 Pac. 818.

On the reformation and affirmance of a judgment, costs of the appeal will be taxed against the appellant, where it appears that the error in the judgment, had the same been called to the attention of the trial court, could have been corrected without the necessity of an appeal, especially where the attention of the court is called to the error for the first time on motion for a rehearing. *Goldman v. Broyles* (Tex. Civ. App.), 141 S. W. 283.

In New York if a judgment could have been corrected on motion at the special term, without the expense of an appeal upon a case and exceptions, it will be modified and affirmed with costs to the respondents. *Levy v. Popper*, 202 N. Y. 552, 95 N. E. 697. See *Abramson v. Brimberg*, 120 N. Y. Supp. 746.

If an informality in a judgment could have been corrected without an appeal by applying to the lower court, the appellant must pay the costs both of the appeal and of the lower court. *Dodge v. Richardson*, 70 Tex. 209, 8 S. W. 30.

⁶⁵ **Cal.**—*Allen v. Globe Grain, etc. Co.*, 156 Cal. 286, 104 Pac. 305. **Wash.**

Olympia Brew. Co. v. Pioneer Mut. Ins. Assn., 53 Wash. 16, 101 Pac. 371; *Gaffney v. Megrath*, 11 Wash. 456, 39 Pac. 973. **W. Va.**—*Newton v. Kemper*, 66 W. Va. 130, 66 S. E. 102. **Wis.**—*Spafford v. McNally*, 130 Wis. 537, 110 N. W. 387.

"An appellant who in the court below induced an error, consisting of failure to insert a saving clause, by introducing in his answer a matter foreign to the bill, and failing to ask for a reservation of his rights, respecting the same, may have the error corrected in the appellate court, but will not be allowed costs for such error alone." *Towner v. Towner*, 65 W. Va. 476, 64 S. E. 732. See *Sprinkle v. Duty*, 54 W. Va. 559, 46 S. E. 557.

In Wisconsin if the judgment is modified on appeal, on a point not made in the court below, costs will not be awarded to either party in the supreme court. *Hersey v. Board of Supervisors*, 16 Wis. 185. See *Reid v. Martin*, 77 Wis. 142, 45 N. W. 820.

⁶⁶ **U. S.**—*Eldred v. Michigan Ins. Bank*, 17 Wall. 545, 21 L. ed. 685. **Mich.** *Snell v. Race*, 78 Mich. 334, 44 N. W. 286, holding that no costs at all will be granted. **N. Y.**—*Hoffman v. Taylor*, 123 N. Y. Supp. 334. **Tex.**—*Gunn v. Miller* (Tex. Civ. App.), 26 S. W. 278.

Where the error assigned as grounds for an appeal is one that would have been corrected by the court below if the appellants had called the court's attention to it, thus avoiding the necessity of an appeal, on reversal they will be taxed with the costs of the appellate court in addition to those of the court below. *Martin v. German American Nat. Bank* (Tex. Civ. App.), 102 S. W. 131.

Where the errors for which the judgment is reversed are technical and would likely have been corrected in the court below had attention been called to them, and the appellant fails in respect to the main matter of contention, costs are decreed to the appellee as the party substantially prevailing. *Conklyn v. Shenandoah Mill Co.*, 68 W. Va. 567, 70 S. E. 274, following *Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135.

The practice of raising objections

time in the appellate court, costs of the appeal will be taxed against the appellant and not against the appellee, or, at least, will be withheld.⁸⁷ But the appellant cannot be taxed with the costs of his appeal on a reversal, if the error complained of is expressly called to the attention of the court below and disregarded.⁸⁸

(III.) *Parties Who File Frivolous or Dilatory Appeals.*—(A.) *DAMAGES.* In order to deter parties from taking appeals merely for delay, and from taking frivolous appeals in bad faith, appellate courts are given the discretionary power to award damages by way of penalty against the appellant on affirmance.⁸⁹ And this penalty may be assessed by

for the first time in the appellate court will not be encouraged by allowing appellant costs on reversal. *Ramsdell v. Ramsdell*, 47 Wash. 444, 92 Pac. 278.

If no motion is made below to vacate a judgment for want of a decision, the appellate court will reverse it without costs to either party. *Kent v. Common Council*, 90 App. Div. 553, 86 N. Y. Supp. 411.

67. *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77.

If the respondent raises an issue in the supreme court by brief, not raised in the court below, and fails in such issue, the costs of prosecuting the same are not chargeable to the opposite party on affirmance of the judgment below. *Jolly v. Woodworth*, 4 Idaho 496, 42 Pac. 512.

68. *National Bank v. Duffy*, 127 Mo. App. 542, 106 S. W. 83.

69. *U. S.*—*Nelson v. Flint*, 166 U. S. 276, 17 Sup. Ct. 576, 41 L. ed. 1002. *Cal.*—*Fox v. Campbell*, 157 Cal. 605, 108 Pac. 680; *McKelvey v. Waggy*, 157 Cal. 406, 108 Pac. 268; *McFadden v. Deitz*, 115 Cal. 697, 47 Pac. 777; *Rountree v. I. X. L. Lime Co.*, 106 Cal. 62, 39 Pac. 16; *Bell v. Camm*, 10 Cal. App. 388, 102 Pac. 225; *Galvin v. Mutual Sav. Bank*, 6 Cal. App. 402, 92 Pac. 322. *Colo.*—*Florence Oil, etc., Co. v. McRae*, 40 Colo. 303, 90 Pac. 507; *Florence Oil, etc. Co. v. First Nat. Bank*, 38 Colo. 119, 88 Pac. 182; *Rohrig v. Pearson*, 15 Colo. 127, 24 Pac. 1083. *Fla.*—*Redmond v. Donaldson*, 35 Fla. 167, 17 So. 70. *Ga.*—*Southern R. Co. v. Lasseter*, 115 Ga. 689, 42 S. E. 41; *Braswell v. Brown*, 112 Ga. 740, 38 S. E. 51; *Collins v. Mobile Fruit, etc. Co.* 108 Ga. 752, 32 S. E. 667; *Bales v. First Nat. Bank* (Ga. App.), 73 S. E. 1076; *Christie v. Shingler* (Ga. App.), 73 S. E. 751; *Roe v. Roe*, 7 Ga. App. 142, 66 S. E. 482. *Ill.*—*Smythe v.*

Parish, 237 Ill. 419, 86 N. E. 754; *Calumet Elec. St. R. Co. v. Lewis*, 168 Ill. 249, 48 N. E. 153; *West Chicago St. R. Co. v. Nash*, 166 Ill. 528, 46 N. E. 1082. *Ind.*—*Kramer v. Warth*, 66 Ind. 548; *U. S. Benev. Soc. v. Watson*, 41 Ind. App. 452, 84 N. E. 29. *Ky.* *Wadsworth Stone, etc. Co. v. Whalin*, 143 Ky. 357, 136 S. W. 624. *La.*—*Ansley v. Stewart*, 126 La. 369, 52 So. 545. *Mass.*—*Demelman v. Bristoll*, 179 Mass. 163, 60 N. E. 478; *Gallagher v. Galletley*, 128 Mass. 367; *Boswell v. Cutter*, 117 Mass. 69. *Mich.*—*Wagar v. Bowley*, 109 Mich. 388, 67 N. W. 512; *Snow v. McCracken*, 107 Mich. 49, 64 N. W. 866; *Foran v. Allen*, 67 Mich. 188, 34 N. W. 548; *Fisher v. Dowling*, 66 Mich. 370, 33 N. W. 521. *Minn.*—*Bardwell v. Brown*, 57 Minn. 140, 58 N. W. 872; *Burr v. Crichton*, 51 Minn. 343, 53 N. W. 645. *Mo.*—*Banister v. Henn*, 45 Mo. 567; *Darby v. Jorndt*, 85 Mo. App. 274; *Utz v. Hoerr*, 20 Mo. App. 36. *Mont.*—*Helena Second Nat. Bank v. Kleinschmidt*, 7 Mont. 146, 14 Pac. 667. *Neb.*—*Paroni v. Simonsen*, 115 Pac. 415. *N. M.*—*Alliance Assur. Co. v. Bartlett*, 9 N. M. 554, 58 Pac. 351; *Shafer v. New Mexico Second Nat. Bank*, 4 N. M. 141, 13 Pac. 179. *N. D.*—*Phoenix Assur. Co. v. McDermont*, 7 N. D. 172, 73 N. W. 91; *Sigmund v. Minto Bank*, 4 N. D. 164, 59 N. W. 966. *Pa.*—*Smead v. Stuart*, 194 Pa. 578, 45 Atl. 343; *Bromley v. Lippincott*, 184 Pa. 462, 39 Atl. 220. *S. D.*—*Black Hills Trust, etc. Co. v. Early Co.*, 26 S. D. 517, 128 N. W. 1126; *Richardson v. Carlis*, 26 S. D. 202, 128 N. W. 168; *Himebaugh v. Crouch*, 3 S. D. 409, 53 N. W. 862. *Tex.*—*Marx v. Brown & Co.*, 42 Tex. 111; *Grier v. Powell*, 14 Tex. 321; *Adams v. Jordan* (Tex. Civ. App.), 136 S. W. 499; *Granberry v. Jackson* (Tex. Civ. App.),

each intermediate appellate court, and by the highest appellate court

136 S. W. 490; *St. Louis, S. W. R. Co. v. Poyner* (Tex. Civ. App.), 109 S. W. 1004; *Lanier v. Schwartz* (Tex. Civ. App.), 46 S. W. 380; *Alamo F. Ins. Co. v. Brooks* (Tex. Civ. App.), 32 S. W. 714; *Casey v. Chaytor*, 5 Tex. Civ. App. 385, 23 S. W. 1114; *Missouri Pac. R. Co. v. Nicholson*, 2 Wills. Civ. Cas. §168. Va.—*Price v. Kyle*, 9 Gratt. 247; *Mulliday v. Machir*, 4 Gratt. 1. Wis. *Perkins v. Jacobs*, 99 Wis. 409, 75 N. W. 76; *Sweet v. Davis*, 90 Wis. 409, 63 N. W. 1047. Wyo.—*Gramm v. Sterling*, 8 Wyo. 527, 59 Pac. 156; *Syndicate Imp. Co. v. Bradley*, 7 Wyo. 228, 51 Pac. 242, 52 Pac. 532.

A motion to award damages on the ground that the case was brought to the supreme court of Georgia for delay only will be denied, where the judgment to which exception was taken was the refusal of an interlocutory injunction, and not a money judgment. Ga. Civ. Code, 1910, §6213; *Pittsburg-Bartow Min., etc. Co. v. Washington Trust Co. (Ga.)*, 73 S. E. 367; *Collins Park, etc. R. Co. v. Short Line Elec. R. Co.*, 95 Ga. 570, 20 S. E. 495; *Brantley v. Bucks*, 62 Ga. 172.

Dismissal of appeal for want of prosecution. *Chicago Federation of Musicians v. American Musicians Union*, 234 Ill. 504, 85 N. E. 244.

"When a writ of error is dismissed in this court, damages for delay are not recoverable." *Jones v. Poole*, 5 Ga. App. 113, 62 S. E. 711.

In Louisiana the Code Prac. Act art. 890, provides that in the event of the neglect of appellee to answer the appeal, he cannot have damages for a frivolous appeal. *Ansley v. Stuart*, 126 La. 369, 52 So. 545.

In Nevada damages in addition to costs may be taxed against an appellant who takes an appeal for the purpose of delay, as where he waits until the last day before taking his appeal, and then make no effort to bring the record to the appellate court and enters no appearance. *Paroni v. Simonsen (Nev.)*, 115 Pac. 415.

Under §764, Ky. Civ. Code, when a judgment for the payment of money, has been superseded, ten per cent. damages on the amount superseded must be awarded against the appellant on affirmance as a matter of right, the

court is given no discretion. The failure of the clerk to enter the judgment for damages, is a clerical error and may be corrected at a subsequent term. *Illinois Cent. R. Co. v. Com.*, 143 Ky. 217, 136 S. W. 222, citing *Nelson County v. Bardstown*, 123 Ky. 836, 97 S. W. 765; *Hall v. Dineen*, 120 Ky. 483, 87 S. W. 275; *Cunningham v. Clay*, 132 Ky. 129, 116 S. W. 299.

And the right to such damages is not affected by reason of the reversal of the judgment on cross appeal. *Comingor v. Louisville Trust Co.*, 32 Ky. L. Rep. 884, 111 S. W. 681.

The fact that a case is appealed to the supreme court of the United States does not affect the right of the highest state court to award damages on affirmance, because the question whether or not these damages should be awarded is not a federal question and cannot be considered by that tribunal. *Illinois Cent. R. Co. v. Com.*, 143 Ky. 217, 136 S. W. 222, following *Bank of Kentucky v. Com.*, 32 Ky. L. Rep. 1087, 107 S. W. 812.

But it is well settled in this jurisdiction that the 10 per cent. damages are only awarded on judgments for the payment of money which may be enforced by execution or similar process. *Ball's Trustee v. Lexington*, 124 Ky. 463, 99 S. W. 344; *Bank of Kentucky v. Com.*, 32 Ky. L. Rep. 1087, 107 S. W. 812; *Com. v. Ryan*, 31 Ky. L. Rep. 1069, 104 S. W. 727.

"An order for the distribution of a fund in court is not an order for the payment of money by the appellant." *J. M. Robinson, Norton & Co. v. Corsicana Cotton Factory*, 124 Ky. 435, 99 S. W. 305, 102 S. W. 869.

Moreover, this statute applies only to appeals of which the court has jurisdiction, and not where the appeal is dismissed for want of jurisdiction. *Nelson County v. Bardstown*, 123 Ky. 836, 97 S. W. 765.

And "unless a supersedeas is issued, damages may not be awarded under Civ. Code Prac. §764, although a supersedeas bond is executed. *Reed v. Lander*, 5 Bush 598; *Jones v. Green*, 12 Bush 127." *Wadsworth Stone & Pav. Co. v. Whalin*, 143 Ky. 357, 136 S. W. 624; *Asher v. Cornett*, 32 Ky. L. Rep. 1173, 108 S. W. 242.

by which the case is finally affirmed.⁷⁰ Thus, where the questions raised by the appellant, on which a reversal is asked, have been previously settled by the courts of the state,⁷¹ or where the plaintiff in error has not filed his brief, perfected his appeal, nor entered an appearance in the appellate court,⁷² or where the points made by the appellant are wholly without merit,⁷³ damages will be awarded for

In **Texas**, if it is apparent from the record that the only object of a writ of error to the court of civil appeals was to delay the collection of the judgment, ten per cent. on the amount thereof will be assessed and adjudged in favor of the defendant in error against the plaintiff in error and the sureties on the appeal bond. *Connellee v. Latham Co.* (Tex. Civ. App.), 140 S. W. 368.

In **Washington**, if the appellant fails to perfect his appeal, the appellee on filing a certified copy of the judgment appealed from, together with a copy of the notice of appeal, etc., may have the same affirmed with ten per cent. interest thereon, and costs. *Hesford v. Daud*, 3 Wash. 430, 28 Pac. 362; *Chehalis Flume, etc. Co. v. Reinhart*, 3 Wash. 428, 28 Pac. 256; *Tinkham v. Kimble*, 2 Wash. 682, 28 Pac. 1038.

Where no question of law is raised, and the evidence on the trial was in conflict, the judgment of the superior court overruling the certiorari will be affirmed with ten per cent. damages on the amount of the judgment obtained in the city court, for delay in suing out and prosecuting the writ of error. *Barwick v. Slaughter* (Ga. App.), 73 S. E. 701.

On Motion to Affirm on Certificate. "Damages for delay could be awarded on a motion to affirm on certificate, but in such case the entire record should be brought up. If a transcript of the entire proceedings is not brought up, the appellate court cannot know that the appeal is taken merely for delay, and in such case could not affirm the judgment of the court below, with damages." *Granberry v. Jackson* (Tex. Civ. App.), 132 S. W. 508.

70. *Light v. Reed*, 234 Ill. 626, 85 N. E. 282.

71. Ill.—*Sheridan v. Peoria R. Co.*, 241 Ill. 469, 89 N. E. 798; *City of Chicago v. Blaine*, 126 Ill. App. 102. Ind.—*Vandalia R. Co. v. Walsh*, 44 Ind. App. 297, 89 N. E. 320. Tex.—*Galveston,*

etc. R. Co. v. Nation's Meat, etc. Co. (Tex. Civ. App.), 136 S. W. 833.

Under Cal. Civ. Code, §767, which provides in terms that a future estate may be limited by the act of the party to commence in possession at a future day, and which had already been pointed out by decisions of the supreme court, it is manifest that an appeal taken on the point that a deed to create such an estate is void as an attempt to create an estate to commence in futuro is frivolous, requiring a penalty against appellants in favor of plaintiffs of \$100 for taking and prosecuting a frivolous appeal. *Barry v. All Persons Claiming, etc.*, 158 Cal. 435, 111 Pac. 249.

72. Cal.—*Chiafullo v. Schwab*, 13 Cal. App. 152, 109 Pac. 36. Ga.—*Belcher v. Massey Bros.*, 8 Ga. App. 34, 68 S. E. 460. Tex.—*Granberry v. Jackson* (Tex. Civ. App.), 136 S. W. 490; *Montgomery v. Buckskin Breeches Co.* (Tex. Civ. App.), 116 S. W. 139.

"On the call of the case, the plaintiff in error failed to prosecute the writ of error. The defendant in error moved to open the record, and insisted on an affirmance of the judgment and award of ten per cent. damages for delay, under rule 22 of this court (57 S. C. xii). The motion of the defendant in error is granted, and the judgment is affirmed, with damages." *Miller v. Morotock Mfg. Co.*, 7 Ga. App. 262, 66 S. E. 628.

73. *Pate-Smith Co. v. Claffin Co.*, 6 Ga. App. 189, 64 S. E. 710.

Where the verdict is fully supported by the evidence and the special assignments of error consist of hypercritical objections to a fair, full and substantially accurate charge and are so wholly without merit as to constrain the conclusion that the writ of error was for delay only, the motion of the defendant in error for ten per cent. damages will be granted. *Atlantic Coast Line R. Co. v. Smith*, 6 Ga. App. 378, 65 S. E. 44.

a frivolous appeal.⁷⁴ These damages may be assessed against all who join in the appeal or accept its benefits.⁷⁵ But there must be clear record evidence of the appellant's misconduct before this penalty can be inflicted.⁷⁶ In other words, a clear and convincing case

74. *Communy v. O'Sullivan*, 129 La. —, 56 So. 617, when prayed for.

75. *Phillips v. Holmes*, 165 Ala. 250, 51 So. 625.

76. Ga.—*Waxelbaum v. Leinberger*, 78 Ga. 43, 3 S. E. 257. Ill.—*Minnesota Mut. Life Ins. Co. v. Link*, 230 Ill. 273, 82 N. E. 637; *Chicago City R. Co. v. Morse*, 197 Ill. 327, 64 N. E. 304, *affirming* 98 Ill. App. 662; *Brockway v. McClun*, 148 Ill. App. 465. La.—*Davis v. Jonti*, 14 La. 95; *Henderson v. Bryan*, 12 La. 10. Mass.—*Tufts v. Waxman*, 181 Mass. 120, 63 N. E. 132. Mich.—*In re Middlings Purifier Co.*, 86 Mich. 149, 48 N. W. 864. Mo.—*Chilton v. St. Joseph*, 143 Mo. 192, 44 S. W. 766; *Fulkerson v. Murdock*, 123 Mo. 292, 27 S. W. 555. N. Y.—*Tisdale v. Delaware, etc. Canal Co.*, 116 N. Y. 416, 22 N. E. 700, 26 N. Y. St. 857. Ore.—*Livesley v. Krebs* (Ore.), 107 Pac. 460; *Morrison v. Hall*, 55 Ore. 243, 104 Pac. 963. Pa.—*Thirteenth Ward Bldg., etc. Assn. v. Coyle*, 19 Pa. Super. 238; *Jacoby v. German American Ins. Co.*, 10 Pa. Super. 193. S. D.—*Hall v. Fisher*, 14 S. D. 321, 85 N. W. 591. Tex.—*Nichols v. Paine*, 52 Tex. Civ. App. 87, 113 S. W. 972. Wash.—*Seattle, etc. R. Co. v. Joergenson*, 3 Wash. 622, 29 Pac. 88. Wis.—*McCormick v. Ketchum*, 51 Wis. 323, 8 N. W. 208.

"The liberal right of appeal given by constitution and statute in this state should not be abused. In case this court is satisfied that the writ of error has been sued out for delay only, it will not hesitate to affirm the judgment with damages. Upon a suggestion that the writ of error has been sued out for the purpose of delay only the court will look to the entire history of the case as presented in the record, and will determine the question upon the facts of each particular case. The filing of a pauper affidavit to escape the payment of costs, while not conclusive, nor even *prima facie* evidence that the writ of error is sued out for delay only, is nevertheless, in an unmeritorious case, a circumstance of some evidentiary value tending to

establish that fact." *Moore & Jester v. H. B. Smith Mach. Co.*, 4 Ga. App. 151, 60 S. E. 1035.

Damages will not be allowed for a frivolous appeal, unless the appeal is clearly of that nature and has caused damage. *Hackley State Bank v. Magee*, 128 La. 1008, 55 So. 656.

"The provision of the statute (Balingier's Ann. Codes & St. §6522 [Pierce's Code, §1070]), authorizing the supreme court to award damages when satisfied by the record that the appeal was taken for delay only, presupposed by its terms that the delay will be manifested by the record itself." *Hallidie Mach. Co. v. Coeur D'Alene Irr. Co.*, 56 Wash. 11, 105 Pac. 140.

The record must disclose something other than lapse of time and the annoyance incident to every appeal. *Hallidie Mach. Co. v. Hayden-Coeur D'Alene Irr. Co.*, 56 Wash. 11, 105 Pac. 140.

A motion by the defendant in error to assess damages for delay on affirmance will be denied, where the verdict is not so manifestly correct as to exclude a bona fide insistence on the part of the plaintiff in error that a new trial should be granted. *Atlantic Coast Line R. Co. v. Locklear* (Ga. App.), 71 S. E. 683.

Cases Settled on Prior Appeals.—If a defendant in a case of great importance to him, takes an appeal in good faith, the penalty for taking the appeal will not be imposed on him, upon an affirmance of judgment below, although the law of the case had been settled on a prior appeal. *Paulsen v. Bettendorf Axle Co.* (Iowa), 133 N. W. 327.

In Washington damages for taking the appeal for delay will not be awarded where there is no showing of any special damages, and the judgment is a money judgment and one on which according to its terms the respondent will obtain interest. *Wheeler v. Commercial Inv. Co.*, 22 Wash. 546, 61 Pac. 715.

of bad faith must be made out.⁷⁷ And because the appellee's cause is meritorious, it does not follow that the appellant's appeal is frivolous.⁷⁸ Accordingly, damages on affirmance as for a vexatious appeal will be denied, where the unsuccessful contentions for a reversal are made in good faith,⁷⁹ as where the questions presented are fairly worthy of consideration,⁸⁰ or where the question involved is a novel, doubtful or difficult one, concerning which eminent counsel may differ,⁸¹ or where the appellee fails to answer the appeal.⁸² Other considerations, too, may influence the court in withholding the penalty, as where the additional burden would fall on an innocent person who has not appealed.⁸³

(B.) DOUBLE COSTS. — Appellate courts in some states may tax double costs against an appellant on affirmance, who has appealed frivolously or for the purpose of delay.⁸⁴

3. On Affirmance. — As a general rule where the court finds no

77. *Morrison v. Hall*, 55 Ore. 243, 104 Pac. 963.

Where a case is brought to the highest state court in good faith to lay the foundation for a review in the federal supreme court, it will not be affirmed as a delay case. *Bonner v. Gorman*, 82 Ark. 423, 101 S. W. 1153.

78. *Chicago v. Saldman*, 129 Ill. App. 232, affirmed, 225 Ill. 625, 80 N. E. 349.

79. Ill.—*Hirsch v. Chicago Consol. Tract. Co.*, 146 Ill. App. 501. Mo.—*Zahn v. Royal Fraternal Union*, 154 Mo. App. 70, 133 S. W. 374; *Union Loan, etc. Co. v. Farbstein* (Mo. App.), 127 S. W. 656. Wash.—*Ferrandini v. Bankers' Life Assn.*, 51 Wash. 442, 99 Pac. 6.

80. *St. Louis S. W. R. Co. v. Cobb*, 89 Ark. 82, 115 S. W. 939; *Chicago Union Tract. Co. v. Mee*, 136 Ill. App. 98.

81. *Livesley v. Krebs Hop Co.*, 57 Ore. 352, 107 Pac. 460; *Sowers v. Yeoman* (Tex. Civ. App.), 129 S. W. 1153.

82. *Ansley v. Stuart*, 126 La. 369, 52 So. 545.

83. *Stephina v. Conklin Lumb. Co.*, 134 Ill. App. 173.

84. Mass.—*Neal v. Scherber*, 207 Mass. 323, 93 N. E. 628; *Porter v. Stuart*, 203 Mass. 46, 89 N. E. 118 (no plausible ground for the appeal). N. J.—*Paulison v. Halsey*, 38 N. J. L. 488. N. Y.—See *Scherl v. Flam*, 136 App. Div. 753, 121 N. Y. Supp. 522. Wis.—*Perkins v. Jacobs*, 99 Wis. 409, 75 N. W. 76.

In Massachusetts, if it appears that

the exceptions are frivolous, immaterial or intended for delay (*Connell v. Morse*, 182 Mass. 439, 65 N. E. 849; *Demelman v. Bristol*, 179 Mass. 163, 60 N. E. 405; *Howland v. Rooke*, 158 Mass. 590, 33 N. E. 652; *Gallagher v. Galletly*, 128 Mass. 367; *Blackington v. Johnson*, 126 Mass. 21; *Mansfield v. Corbin*, 4 Cush. 213), or where the appeal is dismissed for want of prosecution (*Stone v. Kelly*, 8 Mass. 98) double costs may be awarded against the appellant or party taking exceptions from the time the appeal or exceptions were taken.

Interest at the rate of twelve per cent. per annum from the time exceptions were allowed may also be added. *Powers v. Bergman* (Mass.), 96 N. E. 674.

But double costs will be imposed only upon motion. *Norris v. Lynch*, 121 Mass. 586.

And they will not be imposed even upon motion in cases of doubt. *Tufts v. Waxman*, 181 Mass. 120, 63 N. E. 132.

The statute in New Jersey allowing double costs against any person on affirmance who prosecutes a writ of error for reversal of any judgment whatever, applies only to judgments moved after verdict (*Paulison v. Halsey*, 38 N. J. L. 488), and not to judgments based on the finding of a judge (*Shields v. Lozeur*, 34 N. J. L. 530).

And where error is brought upon a judgment by confession and judgment is affirmed, single costs only are recoverable. *Hastings v. Mayberry*, 1 N. J. L. 36.

error in the record, and affirms the judgment below, the costs will be taxed against the appellant or plaintiff in error and in favor of the appellee or respondent,⁸⁵ though the court in remanding the case modifies the original judgment.⁸⁶

But where the costs in an appellate court are discretionary, costs on affirmance may, under circumstances, be denied either party or apportioned.⁸⁷ And the appellant may even recover his costs on affirmance if the appellee was in fault.⁸⁸

85. **U. S.**—*Johnston v. Jones*, 1 Black 209, 17 L. ed. 117; *Montalet v. Murray*, 4 Cranch 46, 2 L. ed. 545. **Ala.**—*Western Union Tel. Co. v. Crowley*, 158 Ala. 583, 48 So. 381. **Ga.**—*Gibson v. Talbotton R. Co.*, 112 Ga. 325, 37 S. E. 365; *Poullain v. Poullain*, 72 Ga. 412; *Smith v. Turnley*, 46 Ga. 454. **Ill.**—*O'Reer v. Strong*, 13 Ill. 688. **Ky.**—*March v. Thompson*, 1 Litt. 310. **La.**—*Treret v. Marigny*, 9 La. 414. **Md.**—*Clark v. Southern Can Co.*, 81 Atl. 271. **Mass.**—*Jarvis v. Blanchard*, 6 Mass. 4. **N. J.**—*Hastings v. Mayberry*, 1 N. J. L. 36; *Goble v. Grant*, 3 N. J. Eq. 629. **N. Y.**—*Shepard v. Campbell*, 51 Misc. 93, 100 N. Y. Supp. 751. **N. C.**—*Green v. Ealman*, 6 N. C. 12. **Ore.**—*Yoran v. Sage*, 54 Ore. 587, 104 Pac. 428. **S. C.**—*Young v. Cohen*, 44 S. C. 376, 22 S. E. 409. **Va.**—*Farley v. Tillar*, 81 Va. 275. **Wash.**—*National Groc. Co. v. Simmons*, 63 Wash. 264, 115 Pac. 306; *Seattle, etc. R. Co. v. Joergenson*, 3 Wash. 622, 29 Pac. 88.

Upon agreement of counsel of plaintiff and defendant in error, the court may affirm the judgment of the court below with costs, including costs of the transcript. *Todd v. Daniel*, 1 How. (U. S.) 289, 11 L. ed. 135.

If so much of the judgment of the court below as affects the appellant is affirmed, costs will be given to the appellee as the party substantially prevailing, although the court reverses so much of the judgment as affects a third party who has not appealed. *Harman v. Odell*, 6 Gratt. (Va.) 207. See *Wiley v. Morrow*, 1 Wash. Ter. 474.

The Texas statutes provides, in effect, that if the party against whom the judgment below is rendered appeals, and on appeal the judgment shall be against him, but for a less amount, he shall recover the costs of the court above. Rev. St. 1895, art. 1436. See also *Jackson v. Phillips* (Tex. Civ. App.), 35 S. W. 745; *Mexican Cent. R. Co. v.*

Charman (Tex. Civ. App.), 24 S. W. 958. "Interest" is not included. *Galveston, etc. R. Co. v. Weimers*, 74 Tex. 564, 12 S. W. 281; *Bailey v. James*, 64 Tex. 546; *Handel v. Kramer*, 1 White & Wills. Civ. Cas., §826.

86. *Railroad v. Southern S. & C. Co.*, 104 Tenn. 568, 58 S. W. 303; *Ami Co. v. Tide Water Lumb. Co.*, 51 Wash. 171, 98 Pac. 380.

87. **U. S.**—*The Miletus*, 5 Blatchf. 335, 17 Fed. Cas. No. 9,545. **Ia.**—*Dorr v. Dudley*, 135 Iowa 20, 112 N. W. 203. **Mass.**—*Dewey v. Humphrey*, 5 Pick. 187; *Shattuck v. Woods*, 3 Pick. 267. **Mich.**—*Cook Land, etc. Co. v. McDonald*, 155 Mich. 175, 118 N. W. 959; *Rose v. French*, 39 Mich. 136; *Whiting v. Butler*, 29 Mich. 122.

Under the municipal court act where both parties have appealed and the order appealed from is affirmed, costs will be awarded to each of them, with a provision for an offset of the costs. *Cochran v. Whitney*, 120 N. Y. Supp. 724; *Martin v. Tarbox*, 23 Misc. 761; 51 N. Y. Supp. 319.

Where all parties are equally at fault the costs will be equally divided. *Kingsbury v. Powers* (Ill.), 20 N. E. 3.

If a defendant in error makes default, he shall not recover costs, though the judgment be affirmed. *Jones v. Todd*, 2 J. J. Marsh. (Ky.) 359; *Lindsay v. Jordan*, Litt. Sel. Cas. (Ky.) 32; *McDowell v. Heath*, 3 A. K. Marsh. 222.

If no brief is filed in the appellate court for the appellee, the affirmance will be without costs. *Hoffman v. Hoffman*, 155 Mich. 328, 118 N. W. 990.

88. *National Groc. Co. v. Simmons*, 63 Wash. 264, 115 Pac. 306; *Lasityr v. Olympia*, 61 Wash. 651, 112 Pac. 752.

But appellees will not incur the costs of an appeal on affirmance if the error attributed to them was due to a mistake of the court. *Snider v. Smith*, 88

Amendment and Affirmance. — In some states, where the judgment of the lower court is amended and then affirmed, costs will be taxed against the defendant in error.⁸⁹

4. On Reversal. — In the absence of statutory authority, no costs can be taxed against the appellee on a reversal of the judgment.⁹⁰ But the practice in most jurisdictions, either by statute or rule of court, is that on a reversal of the judgment below by an appellate court, all costs incurred because of the erroneous action of the lower court which necessitated the appeal, shall be taxed against the appellee.⁹¹ And where the order or judgment appealed from is par-

Ark. 541, 115 S. W. 679.

89. *King v. Westbrooks*, 116 Ga. 753, 42 S. E. 1002; *Maury v. Waxelbaum Co.*, 108 Ga. 14, 33 S. E. 701; *Hardin v. Foster*, 102 Ga. 180, 29 S. E. 174; *Burt v. Lorentz*, 102 Ga. 121, 29 S. E. 137.

Where in a suit for rent due and to become due under a lease which does not authorize such judgment the trial court renders judgment, executory at once, for the whole amount, and defendant appeals, and pending the appeal the whole amount becomes due according to the lease, the error may be said to have corrected itself, but the defendant will be entitled the costs of the appeal. *Shreveport Ice & Brew. Co. v. Mandel Bros.*, 128 La. 314, 54 So. 831.

If the error is a clerical one, the court may correct and affirm the decree at the costs of the appellant. *Bee v. Burdett*, 23 W. Va. 744.

90. *Lehigh Val. R. Co. v. McFarland*, 44 N. J. L. 674; *Price v. Garland*, 5 N. M. 98, 20 Pac. 182.

91. **Ark.**—*American Soda Fountain Co. v. Battle*, 85 Ark. 213, 108 S. W. 508, 107 S. W. 672. **Cal.**—*Dixon v. Plums*, 35 Pac. 1047. **D. C.**—See *Columbia Nat. S. Dredging Co. v. Morton*, 28 App. Cas. 288. **Ga.**—*Pope v. Jones*, 79 Ga. 487, 4 S. E. 860; *Poullain v. Poullain*, 72 Ga. 412; *Gunnels v. Deavours*, 59 Ga. 196; *Turner v. Carroll*, 56 Ga. 456. **Ind.**—*McCole v. Loehr*, 79 Ind. 430; *Minton v. Conner*, 24 Ind. 107. **La.**—*Texas, etc. R. Co. v. Flournoy*, 128 La. 71, 54 So. 475. **Mich.**—*Haak v. Kellogg*, 146 Mich. 541, 109 N. W. 1068; *Smith v. Ross*, 51 Mich. 116, 16 N. W. 253. **Mo.**—*Clifton v. Sparks*, 29 Mo. App. 560. **N. J.**—*Stokes v. Schlacter*, 66 N. J. L. 334, 49 Atl. 588. **N. Y.**—*McMoran v. Lange*, 25 App. Div. 11, 48 N. Y. Supp. 1000. **N. C.**—*J. L. Roper Lumb. Co.*

v. Elizabeth City Lumb. Co., 137 N. C. 431, 49 S. E. 946. **Ore.**—*Maxwell v. Frazier*, 52 Ore. 183, 96 Pac. 548. **Tex.**—*Dupree v. State*, 48 Tex. Civ. App. 272, 107 S. W. 926; *Flores v. McCoy*, 1 White & W. Civ. Cas. §804, citing *Garrett v. McMahan*, 34 Tex. 307. **Wash.**—*In re Westlake Ave.*, 40 Wash. 144, 82 Pac. 279. **W. Va.**—*Bee v. Burdett*, 23 W. Va. 744. **Wis.**—*Calkins v. Hays*, 4 Wis. 200. **Wyo.**—*Clendenning v. Guise*, 8 Wyo. 91, 55 Pac. 447.

Where the plaintiff in error obtained in the court of errors and appeals not only a reversal of the judgment of the supreme court, but also an affirmance of the original judgment of the trial court, thus ending the litigation, he is entitled to costs in that court. *Stokes v. Schlachter*, 66 N. J. L. 334, 49 Atl. 588.

If an order denying a motion for a new trial is reversed, the appellant is entitled to his costs on appeal. *Dixon v. Plums* (Cal.), 35 Pac. 1047.

In New Mexico upon reversal of a judgment the payment of all costs occasioned by the erroneous judgment are imposed on the appellee; this includes the costs accruing in the district court after the rendition of the judgment and also those in the supreme court, including fees for transcript. The costs incurred in the district court prior to the rendition of the judgment from which the appeal was taken will abide the final determination of the suit and may be taxed against the unsuccessful party. *Gallup Elec. Light Co. v. Pacific Imp. Co.* (N. M.), 117 Pac. 845.

Upon remand for trial de novo, the appellee pays costs on appeal, but in the trial court the costs abide the final determination. *Bauer v. Glos*, 244 Ill. 627, 91 N. E. 701, 704. And see *Cal. Gray v. Gray*, 11 Cal. 341. **Mich.**—*Jeffrey v. Hursh*, 58 Mich. 246, 25 N. W.

tially reversed the appellant is the prevailing party within the meaning of that term as used in the statutes.⁹²

If several parties appeal, the one on whose appeal the reversal is had may recover his costs.⁹³ But the rule awarding costs on reversal against the appellee and in favor of the appellant is not without exceptions.⁹⁴ In some jurisdictions it is left to the discretion of the court.⁹⁵

176, 27 N. W. 7; *Crittenden v. Schermerhorn*, 35 Mich. 370; *Lester v. Sutton*, 7 Mich. 329. **Minn.**—*Walker v. Barron*, 6 Minn. 508. **N. J.**—*Stewart v. Johnson*, 18 N. J. L. 87, 101. **N. Y.** *First Nat. Bank v. Fourth Nat. Bank*, 84 N. Y. 469; *Lake v. Ranney*, 33 Barb. 49.

Repeated Reversals.—If a judgment of reversal is finally overturned by another appellate court, the right to costs on reversal will be lost because it is the final disposition of the cause that must be looked to. *Adams v. Massey*, 51 Misc. 230, 100 N. Y. Supp. 836.

92. *Noonan v. Orton*, 31 Wis. 265.

93. *Palmer v. Yager*, 20 Wis. 91.

94. **Minn.**—*Marine Nat. Bk. v. Humphreys*, 62 Minn. 141, 64 N. W. 148. **Pa.**—*Lehman v. Chambersburg, etc. R. Co.*, 224 Pa. 276, 73 Atl. 440. **W. Va.** *Lamb v. Cecil*, 25 W. Va. 288; *Bee v. Burdett*, 23 W. Va. 744.

Where the court below awards substantial damages, and the supreme court, while sustaining the interlocutory decree, reverses the final decree so far as the awarding of damages is concerned, the United States supreme court may remand the case with instructions to allow the defendant a recovery of his costs after the interlocutory decree, and to the plaintiff his costs up to and including the interlocutory decree. *Dobson v. Dornan*, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. ed. 63; *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 5 Sup. Ct. 945, 29 L. ed. 177.

But full costs may be awarded to the plaintiff in the court below, where he was awarded only nominal damages, and the defendant is not entitled to his costs after the interlocutory decree. *DuBois v. Kirk*, 158 U. S. 53, 15 Sup. Ct. 729, 39 L. ed. 895, *distinguishing* *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 5 Sup. Ct. 945, 29 L. ed. 177; *Dobson v. Dornan*, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. ed. 63.

If the appellant is in fault in taking

the appeal (*Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, *following* *Mansfield, etc. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462), or where there is little merit in the cause of action set up in the complaint (*Plano Mfg. Co. v. Hallberg*, 61 Minn. 528, 63 N. W. 1114), he will not be allowed any costs on reversal.

In **West Virginia** "when the amount in controversy is sufficient to give appellate jurisdiction, but the plaintiff in error has been prejudiced in a sum less than the jurisdictional amount, the judgment will be reversed, but the costs in the supreme court will be adjudged to the defendant in error, as the party substantially prevailing." *Wallace v. Leroy*, 57 W. Va. 263, 50 S. E. 243, *following* *Bee v. Burdett*, 23 W. Va. 744.

Where a party brings a suit in equity which cannot be entertained for want of jurisdiction, and permits such a decree to be entered, without objection, as would bar another suit for the same matter, he is not entitled to costs in the appellate court upon a reversal of the decree. In such case, he is not the party substantially prevailing in the true sense of the term. *Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135.

95. **Gen. St. (Kan.)** 1909, §6718; *Gordon v. Munn*, 83 Kan. 642, 112 Pac. 615; *Hoskins v. Morton*, 27 Ky. L. Rep. 529, 85 S. W. 742.

Appellants on reversal cannot be taxed with costs of appeal because the error in the order appealed from afterwards becomes harmless. *Cobb v. Hammock*, 82 Ark. 584, 102 S. W. 382.

The judgment may be reversed without awarding costs at all. *Newcomb v. Burbank*, 181 Fed. 334, 104 C. C. A. 164.

In **Kentucky** the court may award the appellants on reversal only such costs as they seem equitably entitled to (*Samples v. Rogers*, 32 Ky. L. Rep. 784, 107 S. W. 222), and may divide the costs of an unnecessarily volumi-

Although a cause is to be reversed, it sometimes happens that costs are decreed in favor of the appellee. This is the result when the decree is affirmed, the appeal dismissed, or the cause remanded to the lower court after being affirmed.⁹⁶

Cross Appeal.—If the judgment is reversed on cross error or appeal, the plaintiff in error must pay the costs in the appellate court.⁹⁷

For Want of Jurisdiction.—When the appellate court reverses for want of jurisdiction in the lower court, appellate court costs are allowed.⁹⁸

ous record between the appellant and appellee. *Hoskins v. Morton*, 27 Ky. L. Rep. 529, 85 S. W. 742.

In other jurisdictions the appellate court has no discretion in awarding costs on reversing the judgment below. *American Soda Fountain Co. v. Battle*, 85 Ark. 213, 108 S. W. 508, 107 S. W. 672.

Academic Questions.—On reversal no costs will be allowed, where the question presented for review is academic. *Caritey v. Eggers*, 114 App. Div. 907, 100 N. Y. Supp. 603.

96. *Strother v. Hull*, 23 Gratt. (Va.) 652; *Kent v. Matthews*, 12 Leigh (Va.) 573; *Williamson v. Howard*, 2 Rob. (Va.) 39. See *Equitable Trust Co. v. Nissen*, 129 N. Y. Supp. 41.

Where the error would have been corrected if called to the court's attention. *Wetmore v. Woodhouse*, 10 Tex. 33.

Where Appellee Is Insolvent.—In some states the successful appellant may be held liable for costs in case they cannot be collected from the appellee. *State v. Judge* Fourth Dist. Ct., 30 La. Ann. 599; *Lefebvre v. Nashville*, etc. R. Co., 92 Tenn. 164, 20 S. W. 978; *Mathis v. Memphis*, 6 Baxt. (Tenn.) 439. And a return of execution *nulla bona* that has been issued upon the judgment against the appellee, is sufficient evidence that the costs cannot be collected from him. *Lefebvre v. Nashville*, etc. R. Co., 92 Tenn. 164, 20 S. W. 978.

97. *Peters v. Harris*, 245 Ill. 419, 92 N. E. 281.

98. **U. S.**—*Mansfield*, etc. R. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462; *Gates v. Osborn*, 9 Wall. 567, 19 L. ed. 748; *Gaylord v. Kelshaw*, 1 Wall. 81, 17 L. ed. 612; *Montalet v. Murray*, 4 Cranch 46, 2 L. ed. 545. **Ark.**—*Price v. Madison County Bank*, 90 Ark. 195, 118 S. W. 706. **Ga.**—*Pope*

v. Jones, 79 Ga. 487, 4 S. E. 860. **Ohio.** *Moore v. Boyer*, 42 Ohio St. 312. **Tenn.** *Welsh v. Marshall*, 6 Yerg. 455. **W. Va.** *Bice v. Boothsville Tel. Co.*, 62 W. Va. 521, 59 S. E. 501; *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556; *Ferguson v. Millender*, 32 W. Va. 30, 9 S. E. 38.

If appellant was in fault in not raising the question of jurisdiction below, each party may be decreed to pay his own costs in the appellate court. *Columbia, etc. Dredg. Co. v. Morton*, 28 App. Cas. (D. C.) 288.

The supreme court of Arkansas has jurisdiction to render judgment for costs, where the judgment is reversed and dismissed for want of jurisdiction in the court below. *American Soda Fountain Co. v. Battle*, 85 Ark. 213, 108 S. W. 508, 107 S. W. 672.

In the United States supreme court the rule is well settled that where the judgment of the court below is reversed for want of jurisdiction, such reversal will be at the costs of the plaintiff in error, or appellant, both in that court (*Horne v. Hammond Co.*, 155 U. S. 393, 15 Sup. Ct. 167, 39 L. ed. 197; *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. 873, 30 L. ed. 914); and in the court below (*North American Transp. Co. v. Morrison*, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. ed. 1061).

Costs of Both Courts Awarded Against Appellant.—*Mansfield*, etc. R. Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462.

The rule as more properly stated, however, is that the reversal will be at the costs of that party who wrongfully invoked the jurisdiction of the court below, and whose duty it was to make the jurisdiction appear. *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 633, 7 Sup. Ct. 1010, 30 L. ed. 1020; *Everheart v. Huntsville Female College*, 120 U. S. 223, 7 Sup. Ct. 555, 30

Scope and Effect of Reversal.—Where the reversal is on the ground that the appellee had no cause of action whatever against the appellant, then the appellee must pay all the costs in the case, including the costs made in the trial court prior to the appeal. But where the reversal is for some error in the record, and the cause is remanded, the appellee is required to pay, unless otherwise ordered, only the costs in the appellate tribunal.⁹⁹

5. On Dismissal.—Ordinarily, where an appeal is dismissed¹ for want of prosecution,² or for failure of the plaintiff in error to ap-

L. ed. 623; *Peper v. Fordyce*, 119 U. S. 469, 7 Sup. Ct. 287, 30 L. ed. 435; *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. ed. 380.

99. *Bauer v. Glos*, 244 Ill. 627, 91 N. E. 701.

1. U. S.—Rule of Court No. 24, §1, 21 How. xiii. Ill.—*Chicago Portrait Co. v. Chicago Crayon Co.*, 217 Ill. 200, 75 N. E. 473, reversing 118 Ill. App. 98. Me.—*Garner v. Putnam*, 31 Me. 557; *Sweetser v. Kenney*, 31 Me. 288. Mass.—*Dean v. Dean*, 2 Pick. 25. N. Y.—*Abbey v. Wheeler*, 170 N. Y. 122, 62 N. E. 1074. N. D.—*Tracy v. Scott*, 13 N. D. 577, 101 N. W. 905. Tex.—*Hicks v. Gray*, 25 Tex. 83. Wash.—*Grunewald v. West Coast Grocery Co.*, 11 Wash. 478, 39 Pac. 964 (dismissed for failure to file appeal bond).

Where a writ of error is dismissed because the identical question involved has been decided on another writ of error between the same parties involving the same controversy, the costs of the dismissed writ of error are properly taxed against plaintiff in error. *Akerman v. City of Cartersville*, 119 Ga. 27, 45 S. E. 725. But elsewhere the dismissal is without costs to either party. *Washington Market Co. v. District of Columbia*, 137 U. S. 62, 11 Sup. Ct. 4, 34 L. ed. 572.

Where neither party raises the question of the appealability of the order appealed from, a dismissal of the appeal because the order is not appealable will be without costs to either party. *In re Lowenguth's Estate*, 114 App. Div. 754, 100 N. Y. Supp. 422.

If appellant desires to dismiss his appeal and no costs have been incurred by the respondent or appellee, and no rights of his will be affected by the dismissal, the appeal will be dismissed without costs. But if the appellate

court acquires jurisdiction of the appeal, and the appellant does not procure a dismissal at his own expense, the respondent or appellee may have the appeal dismissed and recover his costs as an incident. *In re Seattle*, 40 Wash. 450, 82 Pac. 740.

Liability of Sureties on Appeal Bond. The appeal will be dismissed with costs against the appellant but not against the sureties upon the appeal bond. *Henry v. Great Northern R. Co.*, 16 Wash. 417, 47 Pac. 895; *Bash v. Eisenbeis*, 16 Wash. 700, 47 Pac. 886; *Columbia, etc. R. Co. v. Brailard*, 12 Wash. 22, 40 Pac. 312; *Grunewald v. Grocery Co.*, 11 Wash. 478, 39 Pac. 964.

Death of Judge.—The appellant must pay the costs on dismissing his appeal, even though the dismissal is necessitated by absence of a bill of exceptions which could not be settled because the trial judge had since died. *Oelberman v. Newman*, 83 Wis. 212, 53 N. W. 451.

2. U. S.—*Mayer v. The Venetia*, 131 U. S. (appendix) lxx, 17 How. 77, 15 L. ed. 41; *Montalet v. Murray*, 3 Cranch 249, 2 L. ed. 429. Cal.—*Blair v. Cummings*, 39 Cal. 667. Ill.—*Shepherd v. Rhodes*, 10 Ill. App. 557. Mass.—*Campbell v. Howard*, 5 Mass. 376. N. Y.—*Leftwich v. Clinton*, 4 Lans. 176. Tex.—*Watson v. Boswell* (Tex. Civ. App.), 73 S. W. 985. W. Va.—*Taylor v. Maynor*, 46 W. Va. 588, 33 S. E. 260.

Costs Taxable.—It has not been the practice of the supreme court of Washington, upon dismissal of appeals for want of prosecution, to allow other than the statutory costs, which include an attorney's fees; nor will a special allowance for attendance upon the court be allowed. *Hallidie Mach. Co. v. Hayden-Coenr D'Alene Irr. Co.*, 56 Wash. 11, 105 Pac. 140.

pear,³ costs will be awarded the defendant in error or appellee as the case may be.⁴ But after the appellants move to dismiss their appeal, the appellees cannot prosecute a motion to dismiss and recover the costs in the appellate court upon such dismissal.⁵

For Lack of Jurisdiction.—An appellate court, on dismissing an appeal or writ of error for want of jurisdiction, cannot render a judgment for costs,⁶ especially if such want of jurisdiction is apparent.⁷ But a different rule prevails where the dismissal is for want of jurisdiction in the court below,⁸ or where the original defendant is also

3. *Montalet v. Murray*, 3 Cranch (U. S.) 249, 2 L. ed. 429.

4. A municipal court on appeal from a justice of the peace may tax \$10 costs of the motion to dismiss the appeal. *Treat v. Court* Minnesota No. 17, 109 Minn. 110, 123 N. W. 62.

Only respondents who are necessary parties to the appeal can recover costs on dismissal. *Lamey v. Coffman*, 11 Wash. 301, 39 Pac. 682.

And "the appeal of a party against whom alone the district court had found having been dismissed, the right of the remaining appellant to be relieved of costs is recognized, in view of the fact that appellees have waived the want of a motion for such relief." *Scott v. Cornish*, 44 Neb. 376, 62 N. W. 1065.

5. *Bleakley v. Wilcox*, 49 Wash. 164, 94 Pac. 903.

6. U. S.—*Bradstreet v. Higgins*, 114 U. S. 262, 5 Sup. Ct. 880, 29 L. ed. 177. Ark.—*Love v. McAllister*, 42 Ark. 183; *Derton v. Boyd*, 21 Ark. 264; *McKee v. Murphy*, 1 Ark. 55. Miss.—*Green v. Whiting*, 1 Smed. & M. 579. N. C.—*Chunn v. Jones*, 34 N. C. 251. Ohio.—*Moore v. Boyer*, 42 Ohio St. 312, citing *Norton v. McLeary*, 8 Ohio St. 205.

"Where, pending an appeal from a judgment of interdiction, the appellant interdict dies, the suit abates, and the appeal must be dismissed. In such a case no judgment can be rendered, and each party must pay his own costs." *In re Jones*, 117 La. 106, 41 So. 431.

"When a writ of error involves a contest as to an office, and while it is pending the term of the office ends, the writ of error will be dismissed without decision of the case, and without judgment as to costs." *Elbon v. Hamrick*, 55 W. Va. 236, 46 S. E. 1029, *reaffirmed*, *Hamilton v. Ammons*, 56 W. Va. 190, 49 S. E. 128.

The federal courts uniformly deny power in the court to award costs on dismissing for want of jurisdiction. *Citizens' Bank v. Cannon*, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. ed. 451; *Hornthall v. Keary*, 9 Wall. (U. S.) 560, 19 L. ed. 560; *Nashville v. Cooper*, 6 Wall. (U. S.) 247, 18 L. ed. 851; *Strader v. Graham*, 18 How. (U. S.) 602, 15 L. ed. 464; *McIver v. Wattles*, 9 Wheat. (U. S.) 650, 6 L. ed. 182; *Inglee v. Coolidge*, 2 Wheat. (U. S.) 363, 4 L. ed. 261.

The supreme court of the United States holds that the costs of a motion to dismiss for want of jurisdiction may be allowed, when any expenses incident thereto, such as the printing of the record, and the clerk's fee for supervising have been necessarily incurred for the purposes of the motion, but not costs of the suit, as upon a hearing. *Bradstreet Co. v. Higgins*, 114 U. S. 262, 5 Sup. Ct. 880, 29 L. ed. 176.

"Sometimes an exception to that rule is admitted, as where the defendant in the court below is the defendant in this court, but inasmuch as the costs were improperly awarded in his favor by the Circuit Court, the better opinion is that he is not entitled to the benefit of that exception, as the decree in his favor must be reversed to correct that error. *Winchester v. Jackson*, 3 Cranch 514, 2 L. ed. 516." *Hornthall v. Keary*, 9 Wall. (U. S.) 560, 566, 19 L. ed. 560.

7. *Sisk v. Meagher*, 82 Conn. 483, 74 Atl. 880.

8. In such a case the appellate court has jurisdiction of the appeal for the purpose of reversing the erroneous judgment. *North American Transp., etc. Co. v. Morrison*, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. ed. 1061; *Mansfield, etc. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462;

defendant in error.⁹ But in other states, a judgment for costs will be rendered in favor of the appellee upon dismissing an appeal for want of jurisdiction or for failure of the appellant to perfect his appeal, because he is the prevailing party.¹⁰

6. On Modification.—Under statutes awarding costs to the successful party on appeal, costs will be awarded an appellant who succeeds in having the judgment modified and affirmed on appeal,¹¹ especially if the modification is substantial,¹² unless it appears that the appellee is free from fault.¹³ But in some jurisdictions costs will be taxed against the plaintiff in error where the decree is modified on appeal,¹⁴ or each party may be decreed to pay his own costs, where

Columbia, etc. Dredg. Co. v. Morton, 28 App. Cas. (D. C.) 288.

9. Gaylord v. Kelshaw, 1 Wall. (U. S.) 81, 17 L. ed. 612; Winchester v. Jackson, 3 Cranch (U. S.) 514, 2 L. ed. 516.

10. Cal.—Blair v. Cummings, 39 Cal. 667. **Kan.**—Kent v. Labette County, 42 Kan. 534, 22 Pac. 610. **Me.**—Pomroy v. Cates, 81 Me. 377, 17 Atl. 311. **Mass.**—Elder v. Dwight Mfg. Co., 4 Gray 201. **Tenn.**—Douglas v. Nequelona, 88 Tenn. 769, 14 S. W. 283; Jackson v. Baxter, 5 Lea 344. **Tex.**—Wadsworth v. Chick, 55 Tex. 241; Roeser v. Bellmer, 7 Tex. 1; Llano Imp., etc. Co. v. White, 5 Tex. Civ. App. 109, 23 S. W. 594. **Utah.**—Cereghino v. Third Dist. Court, 8 Utah 455, 32 Pac. 697. **Wis.**—Paine v. Chase, 14 Wis. 653.

Case Prematurely Brought Up. Welsh v. Marshall, 6 Yerg. (Tenn.) 455, 458.

11. U. S.—New England R. Co. v. Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219; Gregory v. Boston Safe Dep., etc. Co., 144 U. S. 665, 12 Sup. Ct. 783, 36 L. ed. 585. **Cal.**—Thrasher v. Moran, 146 Cal. 683, 81 Pac. 32. **Idaho.**—Kelly v. Leachman, 4 Idaho 402, 39 Pac. 1113. **Mass.**—Bruce v. Learned, 4 Mass. 614. **Mich.**—Nester v. Swift, 50 Mich. 42, 14 N. W. 692. **Minn.**—Henry v. Meighen, 46 Minn. 548, 49 N. W. 323; Nelson v. Munch, 30 Minn. 132, 14 N. W. 578. **N. C.**—White Co. v. Carroll, 147 N. C. 330, 61 S. E. 196. **S. C.**—Sullivan v. Latimer, 43 S. C. 262, 21 S. E. 3. **Tex.**—Clark v. Cyclone, etc. Fence Co., 22 Tex. Civ. App. 41, 45, 54 S. W. 392; Missouri, etc. R. Co. v. Willis (Tex. Civ. App.), 52 S. W. 625; Brown v. Montgomery, 19 Tex. Civ. App. 548, 551, 47 S. W. 803, affirmed, 93 Tex. 656, no op. **Wash.**

Spencer v. Commercial Co., 36 Wash. 374, 78 Pac. 914. **Wis.**—Lyttle v. Goldberg, 131 Wis. 613, 111 N. W. 718; Noonan v. Orton, 31 Wis. 265.

12. Draper v. Brown, 153 Mich. 120, 117 N. W. 213.

The appellant will recover his costs of the appeal if, considering the amount involved, he substantially reduces the judgment (Jones v. Kehoe, 61 Wash. 422, 112 Pac. 497), or succeeds in substantially modifying a decree in equity (Salley v. Seaboard Air Line R., 79 S. C. 388, 60 S. E. 938).

In Arkansas on modification and affirmance, if the error is a substantial injury to the rights of the appellants, the appellees will be taxed with the costs of the appeal. Euper v. State, 85 Ark. 223, 107 S. W. 179.

13. Latta v. Coffeen, 140 Iowa 515, 118 N. W. 881.

If the respondent is not instrumental in causing the expense of the appeal, costs will not be taxed against him in favor of the appellant on modification. Vermont Loan, etc. Co. v. Greer, 19 Wash. 611, 53 Pac. 1103.

14. Lockridge v. Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Railroad v. Baldwin, 113 Tenn. 205, 81 S. W. 599. If a modification of a judgment does not affect any substantial rights, the respondents may recover their costs. Haukland v. Minneapolis & St. L. R. Co., 11 S. D. 493, 78 N. W. 958.

If the modification is not the result of error in the judgment but of changed conditions, or arises in consequence of delay caused by the appeal, the plaintiff in error is not entitled to recover his costs in the appellate court, but such costs will be taxed against him. Diefenderfer v. State ex rel. First Nat. Bank, 14 Wyo. 302, 83 Pac. 591.

the decree is reformed in the appellate court, especially where the appellant is at fault.¹⁵

7. Doubtful and Novel Cases.—In doubtful and complicated or novel cases, the court often refuses to grant costs to either party, or divides them equally between the parties on dismissal, affirmance, reversal or modification.¹⁶

8. Where Remittitur Is Filed.—If error is cured in an appellate court by the appellee remitting a part of the verdict, the appellee will be taxed with the costs of the appeal, although the judgment is affirmed. In other words, the party remitting must pay the costs.¹⁷

15. **Md.**—Ringgold v. Ringgold, 1 H. & G. 11, 18 Am. Dec. 250. **Mich.** Grand Union Tea Co. v. Dodd, 164 Mich. 50, 128 N. W. 1090. **Wash.**—Hart v. City of Seattle, 42 Wash. 113, 84 Pac. 640.

If a judgment is modified by an appellate court, and as modified is affirmed, without costs to either party, the plaintiff is not entitled to costs, although they were given him by the original judgment. **Wasey v. Holbrook**, 129 N. Y. Supp. 272.

On an appeal by the county from an order vacating a forfeiture of bail, and directing the county treasurer to pay to the petitioner the sum declared forfeited, if it appears that the part of the order appealed from which vacates the forfeiture of bail was correct and the appellant county has no defense on the merits to the petitioner's claim, such order may be modified by striking out the part thereof which directs the treasurer to pay the money to the petitioner, and as so modified may be affirmed without statutory costs to either party. **Edwards v. Hennepin Co.** (Minn.), 133 N. W. 469.

On reformation and affirmance, the costs may be equally divided between the parties. **Schwartz v. Jones** (Tex. Civ. App.), 122 S. W. 956.

In **South Dakota**, where the judgment below is modified, but the defendant prevails as to the principal issue in both courts, neither party will be given costs or disbursements in either court. **Gibson v. Pekarek** (S. D.), 131 N. W. 728.

16. **U. S.**—**The Scotland**, 105 U. S. 24, 26 L. ed. 1001. **Ala.**—**Maybury v. Grady**, 67 Ala. 147. **Mich.**—**Price v. Price**, 46 Mich. 68, 8 N. W. 724; **Myer v. Hart**, 40 Mich. 517. **Minn.**—**State v. Probate Court**, 28 Minn. 381, 10 N. W. 209. **Wis.**—**Akerly v. Vilas**, 23 Wis. 628.

Where the question presented to the appellate court is a new one, the judgment or decree may be affirmed without costs against the appellants. **Perine v. Applegate**, 14 N. J. Eq. 531.

Where the case is one of a public nature and has arisen from ambiguous legislation, no costs will be awarded on affirmance. **County of Clare v. Auditor General**, 41 Mich. 182, 1 N. W. 926.

Where the questions are novel and difficult, the appellate court often refuses costs to either party, or, where there is a fund in controversy, adjudges the costs against such fund. **Gott v. Hoschna**, 57 Mich. 413, 24 N. W. 123; **Appeal of Kempf**, 53 Mich. 352, 19 N. W. 31.

17. **U. S.**—**Washington, etc. R. Co. v. Harmon's Admr.**, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. ed. 284; **Fury v. Stone**, 2 Dall. 184, 1 L. ed. 341. **Cal.** **Eames v. Haver**, 111 Cal. 401, 43 Pac. 1120. **Colo.**—**Consolidated Grocery Co. v. Rauber**, 1 Colo. 511. **Ill.**—**Firemen's Fund Ins. Co. v. Western Refrigerating Co.**, 162 Ill. 322, 44 N. E. 746; **Elgin City R. Co. v. Salisbury**, 162 Ill. 187, 44 N. E. 407; **Snell v. Warner**, 91 Ill. 472; **Lowman v. Aubery**, 72 Ill. 619. **Ind.**—**H. G. Olds Wagon Wks. v. Coombs**, 124 Ind. 62, 24 N. E. 589; **Cummings v. Girtton**, 19 Ind. App. 248, 49 N. E. 360. **Ia.**—**Keyser v. Kansas City, etc. R. Co.**, 56 Iowa 440, 9 N. W. 338; **Payne v. Billingham**, 10 Iowa 360; **Thompson v. Purnell**, 10 Iowa 205. **La.**—**City of New Orleans v. Jeter**, 13 La. Ann. 509; **Rhodes v. Skolfield**, 10 Rob. 131. **Mo.**—**Higgs v. Hunt**, 75 Mo. 106; **Clark v. Bullock**, 65 Mo. 535; **Trustees of Christian Univ. v. Hoffman**, 95 Mo. App. 488, 69 S. W. 474. **N. C.**—**Harper v. Davis**, 31 N. C. 44, following **Williamson v. Canaday**, 25 N. C. 349. **Ohio.**—**Doty v. Rigour**, 9 Ohio St. 519. **Ore.**—**Gardner v. Kin-**

But this is not a hard and fast rule that may not be varied as justice may require.¹⁸

If judgment is affirmed on condition that *remittitur* is filed, this amounts to an affirmance upon a compliance with such condition.¹⁹ If the judgment is allowed to be reversed by failure to file the *remittitur*, the plaintiff in error will recover his costs in the appellate court.²⁰

But in a few states the courts adhere to the rule that on affirmance costs must be taxed against the plaintiff in error.²¹

9. Reversal in Part and Affirmance in Part.—In some jurisdictions, where there is an affirmance in part and reversal in part, the costs will be apportioned between the parties in such manner as seems equitable.²² In some cases costs have been denied both par-

ney, 117 Pac. 971. **Tex.**—*McIntyre v. Emerson* (Tex. Civ. App.), 132 S. W. 947; *Weatherford, etc. R. Co. v. White*, 55 Tex. Civ. App. 32, 118 S. W. 799; *Houston, etc. R. Co. v. Craig*, 42 Tex. Civ. App. 486, 92 S. W. 1033; *Barns v. Darby*, 18 Tex. Civ. App. 468, 44 S. W. 1029, *affirmed*, 93 Tex. 679, no op.; *Travis County v. Trogdon* (Tex. Civ. App.), 29 S. W. 46; *Petri v. Neimeyer* (Tex. Civ. App.), 26 S. W. 266. **Wis.**—*McHugh v. Chicago, etc. R. Co.*, 41 Wis. 75; *Bigelow v. Doolittle*, 36 Wis. 115; *Kavanaugh v. Janesville*, 24 Wis. 618; *Wright v. Roberts*, 22 Wis. 161; *Dunbar v. Bittle*, 7 Wis. 143.

If the court below inadvertently renders an excessive judgment against a trustee, and the plaintiff files a *remittitur* of the excess in the appellate court, on modification and affirmance of the judgment, less the amount remitted, the trustee is entitled to his costs in the appellate court. *Davis v. Goulette*, 81 Vt. 255, 69 Atl. 827, *citing* *Crampton v. Valido Marble Co.*, 60 Vt. 291, 15 Atl. 153, 1 L. R. A. 120.

18. *Hartford Life Ins. Co. v. Hope*, 40 Ind. App. 354, 81 N. E. 595, 1088.

If the appellee attempts in good faith to remit the excess below, the appellate court on affirmance will not tax any of the costs of the appeal against the appellee, although he inadvertently fails to remit the whole excess. *Freeman v. Fuller* (Tex. Civ. App.), 127 S. W. 1194.

19. *Henderson v. Coleman* (Wyo.), 115 Pac. 439. And see *Bank of Com. v. Ashley*, 2 Pet. (U. S.) 327, 7 L. ed. 440.

Where the judgment of the appellate court is that the judgment of the lower

court will be affirmed if the plaintiff remits a part of the recovery, otherwise it will be reversed, the defendant will recover his costs in the appellate court in any event, having been put to the trouble and expense of an appeal. *Gardner v. Kinney* (Ore.), 117 Pac. 971.

The rulings in Missouri have not been uniform. *Johnston v. Morrow*, 60 Mo. 339; *Atwood v. Gillespie*, 4 Mo. 423.

But the more recent cases hold that where an excessive verdict is corrected by *remittitur* in the appellate court, the costs of appeal should be taxed against the respondent. *Peck v. Childers*, 73 Mo. 484; *Clark v. Bullock*, 65 Mo. 535; *Trustees of Christian University v. Hoffman*, 95 Mo. App. 488, 69 S. W. 474.

20. *Henderson v. Coleman* (Wyo.), 115 Pac. 439.

21. *Smith v. Turnley*, 46 Ga. 454; *Hall v. Concordia Fire Ins. Co.*, 90 Mich. 403, 51 N. W. 524.

In South Carolina the respondent in such case is entitled to his costs on affirmance, because he is the prevailing party. *Young v. Cohen*, 44 S. C. 376, 22 S. E. 409, *following* *Loeb v. Mann*, 41 S. C. 206; 19 S. E. 490. See *Salley v. Seaboard Air Line R.*, 79 S. C. 388, 60 S. E. 938.

22. *D. C.*—*Consaul v. Cummings*, 30 App. Cas. 540. **Ky.**—*Beckham v. Slayden*, 32 Ky. L. Rep. 944, 107 S. W. 324. **Md.**—*Griffith v. Dale*, 109 Md. 697, 72 Atl. 471. **Wash.**—*Michaelson v. Seattle*, 63 Wash. 230, 115 Pac. 167. **Wis.**—*Sherry v. Schraage*, 48 Wis. 93, 4 N. W. 117; *Kreuger v. Zirbel*, 2 Wis. 233. **Wyo.**—*Henderson v. Coleman*, 115

ties,²³ and in still others the costs have been equally divided between the parties,²⁴ or the appellant has even been adjudged to pay the costs.²⁵ Where there are several plaintiffs in error or defendants in error and judgment is affirmed as to some and reversed as to others, then the appellants as to whom judgment is affirmed or the appellee as to whom judgment is reversed must pay costs to be recovered ratably by the others.²⁶

B. ITEMS TAXABLE.—1. Statutory Authority and Compliance

Pac. 439; *Rock Springs Nat. Bank v. Luman*, 47 Pac. 73.

When Appellant Entitled.—In the absence of a special or equitable ground upon which there should be an apportionment of costs, an appellant who is successful in part may have all his costs taxed against the appellee, especially where the suit has been stubbornly contested by the appellee. *Atterberry v. Burnett* (Tex. Civ. App.), 130 S. W. 1028.

Where a plaintiff in error brings up for review a judgment which includes an amount about which there is no controversy, and the part complained of is found to be erroneous so that the judgment is reversed in part and affirmed in part, he is entitled to recover all of his costs which accrued in the appellate court. *Heithecker v. Fitzhugh*, 41 Kan. 54, 21 Pac. 782.

By express statute in some jurisdictions costs on appeal are in the discretion of the court, when a judgment is affirmed in part and reversed in part. **Kan.**—*Gordon v. Munn*, 83 Kan. 642, 112 Pac. 615. **N. C.**—*Rayburn v. Penn Casualty Co.*, 142 N. C. 376, 55 S. E. 296. **S. D.**—*American Bkg. Co. v. Lynch*, 13 S. D. 34, 82 N. W. 77; *Sorenson v. Donahoe*, 12 S. D. 204, 80 N. W. 179. **Wis.**—*Hurley v. Water*, 129 Wis. 508, 109 N. W. 558; *Sherry v. Schraage*, 48 Wis. 93, 4 N. W. 117.

23. Ill.—*Graham v. People*, 111 Ill. 253. **Ky.**—*Marshall v. Anderson*, 1 B. Mon. 198; *Veech v. Pennebaker*, 2 Bibb 326; *Flood v. Wall*, 10 Ky. L. Rep. 948, 11 S. W. 7. **Minn.**—*Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77. **N. Y.** *Williams v. Sherman*, 15 Johns. 195; *Smith v. Jansen*, 8 Johns. 111; *Pickett v. Barron*, 29 Barb. 505; *Bird v. Wesels*, 119 N. Y. Supp. 329; *Bowen v. Holdredge*, 134 App. Div. 855, 119 N. Y. Supp. 199. **S. D.**—*Goldberg v. Sisseton Loan & Title Co.*, 24 S. D. 49, 123 N. W. 266. **Wis.**—*Duncan v. Erickson*, 82 Wis. 128, 51 N. W. 1140; *S. L.*

Sheldon Co. v. Mayers, 81 Wis. 627, 51 N. W. 1082; *Reid v. Martin*, 77 Wis. 142, 45 N. W. 820; *Kreuger v. Zirbel*, 2 Wis. 233.

Where the judgment is reversed in part and affirmed in part, and the defendants all appeared by a joint answer and took a joint appeal, no costs will be allowed to either party. *Goldberg v. Sisseton Loan & Title Co.*, 24 S. D. 49, 123 N. W. 266.

24. U. S.—*New York, etc. R. Co. v. Estill*, 147 U. S. 591, 593, 13 Sup. Ct. 444, 37 L. ed. 292. **Ky.**—*Beckham v. Slayden*, 32 Ky. L. Rep. 944, 107 S. W. 324. **Ohio.**—*Sidner v. Alexander*, 31 Ohio St. 433. **Tex.**—*Cannon v. Hemphill*, 7 Tex. 184, 209.

25. Cole v. Swanson, 1 Cal. 51. See *Michaelson v. Seattle*, 63 Wash. 230, 115 Pac. 167.

If it does not appear that the appellee has been in any way prejudiced by the appeal from that part of the judgment which is affirmed, the court in the exercise of its discretion may award costs to the appellant. *Sherry v. Schraage*, 48 Wis. 93, 4 N. W. 117.

26. Ala.—*Tyus v. De Jarnette*, 26 Ala. 280. **Mich.**—*Davis v. Filer*, 40 Mich. 210. **Minn.**—*Atwater v. Russell*, 49 Minn. 57, 51 N. W. 629, 52 N. W. 26; *Nelson v. Munch*, 30 Minn. 132, 14 N. W. 578. **Tex.**—*Hopson v. Murphy*, 4 Tex. 248. **Wash.**—*Lamey v. Coffman*, 11 Wash. 301, 39 Pac. 682; *Willey v. Morrow*, 1 Wash. Ter. 474. **Wis.**—*Power v. Kindschi*, 58 Wis. 539, 17 N. W. 689.

“Where several plaintiffs or defendants bring an appeal from a judgment, and it is modified as to some of the appellants and affirmed as to the others, the respondent is entitled to costs and disbursements against those as to whom it is affirmed, and those as to whom it is modified are entitled to costs and disbursements against the respondent.” *Nelson v. Munch*, 30 Minn. 132, 14 N. W. 578.

Therewith.—The question as to what items may be taxed against an unsuccessful party in an appellate court, depends on statutes or rules of court in the various jurisdictions. Therefore, when a claim to any given item is asserted, the party desiring to tax such item must not only be able to point to the statute providing for the allowance of the item.²⁷

27. **U. S.**—*Jennings v. Brig Perseverance*, 3 Dall. 336, 1 L. ed. 625. **Mo.** *Wilson v. Ruthrauff*, 87 Mo. App. 226. **Nev.**—*Candler v. Washoe Lake Reservoir etc. Co.*, 28 Nev. 422, 82 Pac. 458. **N. M.**—*Price v. Garland*, 5 N. M. 98, 20 Pac. 182. **S. C.**—*Finley v. Cudd*, 44 S. C. 87, 22 S. E. 753; *Scott v. Alexander*, 27 S. C. 15, 2 S. E. 706. **S. D.**—*Wold v. South Dakota Cent. R. Co.*, 23 S. D. 521, 122 N. W. 583. **Wash.** *Soules v. McLean*, 7 Wash. 451, 35 Pac. 364, 1082; *Brown v. Winehill*, 4 Wash. 98, 29 Pac. 927.

"Only necessary costs and disbursements can be recovered. The general rule is that the party who wins on appeal is entitled to recover his necessary costs and disbursements on such appeal, although the case finally goes against him." *Young v. Extension Ditch Co.*, 14 Idaho 126, 93 Pac. 772.

Moreover, he will only be allowed what he actually disburses. *Kelly v. Oksall*, 17 S. D. 392, 97 N. W. 11; *Nelson v. McLellan*, 34 Wash. 181, 75 Pac. 635.

In **Florida** "in proceedings on appeal, in the Supreme Court, the cost of the transcript of the record required by section 1275 of the Revised Statutes of 1892, the costs incurred in the progress of the cause in the circuit court after the entry of the appeal, which are properly a part of the appellate proceedings therein, and the fees of the clerk of the Supreme Court, are proper items to be taxed as costs." *McGourin v. Town of De Funiak Springs (Fla.)*, 42 So. 187.

In **California** the costs upon appeal are properly the costs in the appellate court, and the costs of making up the appeal in the court below, including the cost of making out the transcript. *Gray v. Gray*, 11 Cal. 341.

In the federal courts an item of costs for printing evidence and an abstract of the record is not taxable under the equity practice in the absence of any rule of court, of any special

order of the court, or any agreement between the parties that the same should be printed and charged as costs in the case. *Kelly v. Springfield R. Co.*, 83 Fed. 183; *Atwood v. Jaques*, 63 Fed. 561.

Appearance Fee.—In Montana, the successful defendant cannot include in his memorandum of costs, an appearance in the supreme court. *State v. District Court*, 25 Mont. 1, 63 Pac. 402.

Argument Fee.—*Hill v. Muller*, 53 Misc. 262, 103 N. Y. Supp. 96; *Huston v. Benjamin*, 21 S. D. 446, 113 N. W. 459.

And the statutes allowing argument fees in the appellate court to the prevailing party have been construed to allow the same amount for the argument on a rehearing as is allowed for the original argument. **N. Y.**—*Sweet v. Chapman*, 53 How. Pr. 253; *Guckenheimer v. Angevine*, 16 Hun 453. **N. D.** *Crane v. Odegard*, 12 N. D. 135, 93 N. W. 326. **S. D.**—*Brown v. Edmonds*, 8 S. D. 271, 66 N. W. 310, 59 Am. St. Rep. 762; *Kirby v. Western Union Tel. Co.*, 8 S. D. 54, 65 N. W. 482.

On reargument of an appeal at the appellate term, the reargument fee may be taxed regardless of whether the appeal was argued orally or the argument made by briefs. *Schwartz v. Ribaud*, 63 Misc. 64, 116 N. Y. Supp. 585.

Repeated Reversals.—Where on appeal the case is reversed and the cause remanded a second time for a new trial, the unsuccessful respondent must pay the costs preparatory to and upon the appeal from the judgment rendered on the first trial, including motions for a new trial and in arrest of judgment, affidavit for appeal, order granting appeal, filing appeal bond, and costs of transcript. *Buckman v. Missouri, etc. R. Co.*, 121 Mo. App. 299, 98 S. W. 820, following *Clifton v. Sparks*, 29 Mo. App. 560; *Jennings v. St. Louis, etc. R. Co.*, 59 Mo. App. 530.

He must also comply with the requirements of the statute or rule of court.²⁸

2. Incidental Expense.—Expenses incident to an appeal,²⁹ such as express charges on papers sent to the appellate court,³⁰ and costs incurred for translations,³¹ and items for making and serving a case on appeal,³² or bill of exceptions,³³ are generally taxable as part of the costs of an appeal.³⁴

3. Items for Printing.—a. *In General.*—The cost of printing the record or other papers necessary on appeal can be taxed against the unsuccessful party only when authorized by statute or rule of

28. *Cooper v. Stinson*, 5 Minn. 522, denying an item for preparing paper books not printed but written.

29. **Maps.**—"Under paragraph 6 of rule 27 (32 Pac. xi), maps used on the hearing and necessary to be examined on the appeal form a part of the transcript, and copies thereof must be attached thereto, and the necessary expense of making the same may be taxed as costs on the appeal." *Young v. Extension Ditch Co.*, 14 Idaho 126, 93 Pac. 772.

"Under the provisions of rule 19 (32 Pac. ix), the judge may order the transmission of maps and other original papers to the Supreme Court for its inspection, and that method of presenting maps ought to be pursued whenever practicable, and thus save costs." *Young v. Extension Ditch Co.*, 14 Idaho 126, 93 Pac. 772.

30. An item for express charges in sending a return to a writ of certiorari and a map to the clerk of the supreme court, is properly charged in the memorandum of costs, but not express on briefs. *State v. District Court*, 25 Mont. 1, 63 Pac. 402.

In Washington items for expressage contained in a cost bill on appeal will be disallowed, because there is no provision, either in the statutes, or rules, for the recovery of such charges. *Clark v. Eltinge* (Wash.), 83 Pac. 901.

31. **The expense of procuring a translation** of the shorthand reporter's notes may ordinarily be taxed in the appellate court. *Berkey v. Thompson*, 126 Iowa 394, 102 N. W. 134; *Palmer v. Palmer*, 97 Iowa 454, 66 N. W. 734. And see *State v. District Court*, 25 Mont. 1, 63 Pac. 402.

32. *First Nat. Bank v. North*, 6 Dak. 136, 50 N. W. 621, 41 N. W. 736.

Not In Absence of Statute.—*Finley v. Cudd*, 44 S. C. 87, 22 S. E. 753.

Nor if None Was Made or Served. *Sorenson v. Donahoe*, 12 S. D. 204, 80 N. W. 179; *Treat v. Hiles*, 76 Wis. 367, 45 N. W. 221.

33. *Dralle v. Town of Reedsburg*, 140 Wis. 319, 122 N. W. 771; *Schwalbach v. Chicago, etc. R. Co.*, 73 Wis. 137, 40 N. W. 579.

Not so in other states. *Rock Springs Nat. Bank v. Luman* (Wyo.), 47 Pac. 73.

When a transcript of the testimony has been filed in the lower court the preparation of the bill of exceptions is a necessary incident to the allowance of the appeal and the clerical expense incident thereto will not be allowed as part of the disbursements on appeal. *De Vall v. De Vall*, 57 Ore. 128, 110 Pac. 705, 109 Pac. 755; *Allen v. Standard Box & Lumb. Co.*, 53 Ore. 10, 96 Pac. 1109, 97 Pac. 555, 98 Pac. 509; *Ferguson v. Byers*, 40 Ore. 468, 477, 67 Pac. 1115, 69 Pac. 32.

34. Premiums paid to a surety company for an appeal or supersedeas bond may be allowed as disbursements in some jurisdictions. *Jones v. Smith Co.*, 183 Fed. 990; *Wadleigh v. Duluth St. R. Co.*, 92 Minn. 415, 100 N. W. 362. See *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 108 Pac. 596, 109 Pac. 113.

But under §2789 of the Gen. St., 1906, the reasonable premium paid for a supersedeas bond may be taxed as costs only when such bond is given by a fiduciary. *Hull v. Burr* (Fla.), 57 So. 616.

Cost of Settling Judgment.—If a plaintiff's judgment is reversed on appeal and he is required to pay the costs to the plaintiff in error because the court would not direct that they abide the event of a new trial, but on a second trial he prevails, he cannot tax as a disbursement the sum he paid in settlement of the judgment for costs of the first appeal. *Jennings v. Burton*, 177 Fed. 603.

court.³⁵ But in many jurisdictions such statutes or rules of court exist.³⁶ And if he uses typewritten papers under proper authority, instead of printed matter, he is entitled to tax as a necessary disbursement the cost of the typewritten copies.³⁷ But that the party may recover printing costs, these statutes or rules of court must be complied with.³⁸

35. *Indiana, etc. R. Co. v. Vance*, 96 U. S. 594, 24 L. ed. 825; *Jennings v. The Brig Perseverance*, 3 Dall. 336, 1 L. ed. 625 (costs of a printed statement of the case for the use of the judge); *Price v. Garland*, 5 N. M. 98, 20 Pac. 182.

36. U. S.—*Phelps v. Elliott*, 141 U. S. 694, 11 Sup. Ct. 1026, 35 L. ed. 745; *Indianapolis, etc. R. Co. v. Vance*, 96 U. S. 594, 24 L. ed. 825. D. C. *Zeust v. Staffan*, 13 App. Cas. 388. Mich.—*Botsford v. Murphy*, 48 Mich. 642. Minn.—*Hart v. Marshall*, 4 Minn. 552. Mo.—*Ray County Savings Bank v. Hutton*, 226 Mo. 713, 127 S. W. 59. N. M.—*Givens v. Veeder*, 9 N. M. 405, 54 Pac. 879. Pa.—*Pennsylvania Co. v. Wallace*, 44 Pa. Super. 64, cost of printing paper books. Tex.—*O'Connell v. State*, 18 Tex. 343.

"Under paragraph 3 of Rule 8 (32 Pac. viii), the expense of printing the transcript on appeal in civil cases must be allowed as costs." *Young v. Extension Ditch Co.*, 14 Idaho 126, 93 Pac. 772.

An item of expense for blue prints for an appeal book, are printing disbursements and taxable as such. *Chism v. Smith*, 130 N. Y. Supp. 881. But see *Curry v. Sandusky F. Co.*, 88 Minn. 485, 93 N. W. 896.

Printing Case on Appeal.—*Chism v. Smith*, 130 N. Y. Supp. 881.

The fact that appellant, in making up his printed cases, used parts of printed cases prepared on a former appeal, but for the printing of which he had never before recovered any costs, will not prevent his recovering for the printing of the whole case as used in the present appeal. *Akerly v. Vilas*, 23 Wis. 628.

In the federal courts the cost of printing the record may be divided between the parties. *Mellen v. Buchner*, 139 U. S. 388, 11 Sup. Ct. 598, 35 L. ed. 199; *Clay v. Field*, 138 U. S. 464, 11 Sup. Ct. 419, 34 L. ed. 1044; *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. ed. 110; *Union Trust*

Co. v. Illinois Midland R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963.

Cost of Printing Appeal Book. Where the court below in an action of trespass trebles the damages awarded by the jury, and the appellate court reverses the judgment and directs judgment in favor of the plaintiff for the amount of the verdict, and it appears that the only assignment which the defendant was able to sustain was that relating to the damages, the plaintiff is not liable for the cost of printing the defendant's paper-book on the appeal. *Henning v. Keiper*, 43 Pa. Super. 177.

Affidavits tending to show that the charge for printing the record is too high and counter affidavits, cannot be noticed on a motion to retax, if the appellate court is not empowered to review questions of fact. *Arnold v. Bright*, 41 Mich. 416, 50 N. W. 392.

But on appeal from a clerk's taxation of costs an objection that a greater sum was paid for printing a paper book than was necessary cannot be considered in the absence of any affidavit showing that the charge is excessive. *Hefferen v. Northern Pac. R. Co.*, 45 Minn. 471, 48 N. W. 526.

37. *Finley v. Cudd*, 45 S. C. 87, 22 S. E. 753.

Briefs.—*Brandon v. West*, 28 Nev. 500, 83 Pac. 327.

38. Ia.—*Huntley v. Chicago, etc. R. Co.*, 142 Iowa 697, 121 N. W. 377. Kan.—*McAfee v. Walker*, 82 Kan. 355, 108 Pac. 79. Minn.—*Hart v. Marshall*, 4 Minn. 552. Tex.—*Chaison v. McFadden* (Tex. Civ. App.), 132 S. W. 524. Wis.—*Peck v. City of Baraboo*, 141 Wis. 48, 122 N. W. 740; *Gessner v. Roeming*, 135 Wis. 535, 116 N. W. 171.

Costs as of right for printing are limited to such as are reasonably necessary or permitted under the rules. *Cook v. Minneapolis, etc. R. Co.*, 98 Wis. 624, 74 N. W. 561.

The cost of printing a case on appeal

In the federal courts it seems that printing done under a general rule or special order of the court may be taxed as a necessary disbursement.³⁹

b. *Unnecessary Printing.*—Printing costs unnecessarily incurred,⁴⁰ as for example, the printing of unnecessary matter in briefs and abstracts,⁴¹ or a supplemental case will not be taxed against the un-

which violates the rule requiring it to contain only an abridgment of the record cannot be taxed. *Meyst v. Frederickson*, 146 Wis. 85, 130 N. W. 960; *Buehler v. Slaubenmayer*, 146 Wis. 25, 130 N. W. 955; *Gerbig v. Bell*, 143 Wis. 157, 126 N. W. 871; *Roach v. Sanborn Land Co.*, 140 Wis. 435, 122 N. W. 1020; *Herring v. E. L. Dupont De Nemours Powder Co.*, 139 Wis. 412, 121 N. W. 170; *Steinberg v. Salzeman*, 139 Wis. 118, 120 N. W. 1005; *Sparks v. Wisconsin Cent. R. Co.*, 139 Wis. 108, 120 N. W. 858; *Johanson v. Webster Mfg. Co.*, 139 Wis. 181, 120 N. W. 832; *Swanke v. Herdeman*, 138 Wis. 654, 120 N. W. 414.

In original proceedings in the supreme court of Oregon, presented upon a typewritten complaint or petition, the successful party is not entitled to recover seventy-five cents per page allowed by the rules of that court for printing transcripts, as it is the duty of the plaintiff in such proceedings to present his complaint or petition in some proper or legible form, and the rule in regard to printing the transcript does not apply in such cases. *Cronan v. District Court*, 15 Idaho 462, 98 Pac. 614.

39. *Simpson v. One Hundred and Ten Sticks of Hewn Timber*, 7 Fed. 243; *The Alice Tainter*, 14 Blatchf. 225, 1 Fed. Cas. No. 196.

40. *Ia.*—*Collins v. Collins*, 139 Iowa 703, 117 N. W. 1089. *Mich.*—*Ruttle v. What Cheer Coal Min. Co.*, 161 Mich. 150, 125 N. W. 787; *Hilliker v. Coleman*, 73 Mich. 170, 41 N. W. 219. *Minn.*—*Hart v. Marshall*, 4 Minn. 552. *N. Y.*—*Sullivan v. McCann*, 124 App. Div. 126, 108 N. Y. Supp. 909. *Ore.*—*Litherland v. S. Morton Cohn Real Estate Co.*, 54 Ore. 71, 100 Pac. 1, 102 Pac. 303; *Young v. Hughes*, 39 Ore. 586, 66 Pac. 272, 65 Pac. 987. *Wis.*—*Gerbig v. Bell*, 143 Wis. 157, 126 N. W. 871; *Hamann v. Milwaukee Bridge Co.*, 136 Wis. 39, 116 N. W. 854 (printing supplemental case); *Treat v. Hiles*, 76 Wis. 367, 45 N. W. 221.

Transcript Of The Record.—U. S.

Hussey v. Bradley, 5 Blatchf. 210, 12 Fed. Cas. No. 6,946a. *Cal.*—See *In re Bell's Estate*, 157 Cal. 528, 108 Pac. 497. *Mich.*—*Wilson v. Pontiac, etc. R. Co.*, 57 Mich. 155, 23 N. W. 627. *N. J.*—*Personette v. Johnson*, 40 N. J. Eq. 532. *N. M.*—*Givens v. Veeder*, 9 N. M. 405, 54 Pac. 879. *N. Y.*—*Crippen v. Brown*, 11 Paige 628. *W. Va.*—*Spang v. Robinson*, 24 W. Va. 327.

Copying and printing unnecessary parts of the record, especially when done over the objections of his adversary. *Brazille v. Carolina Barytes Co. (N. C.)*, 73 S. E. 215; *Overman v. Lanier (N. C.)*, 73 S. E. 192; *Land Co. v. Jennett*, 128 N. C. 3, 37 S. E. 954.

The cost of unnecessarily incorporating a bill of exceptions in the record and printing the same will be taxed to the plaintiff in error on reversal. *Dickinson v. Simms*, 128 Ill. App. 18.

Matter irrelevant to any issues involved in the appeal. *Henry v. Meighen*, 46 Minn. 548, 49 N. W. 646.

Additional expense for printing extra copies of record, in anticipation of a possible appeal to the court of appeals. *In re Bateau Sales Co.*, 129 N. Y. Supp. 445, following *Potter v. Carpenter*, 56 How. Pr. (N. Y.) 89, and construing N. Y. Code Civ. Proc. §3267.

Long duplicate arguments have been disallowed under a statute allowing disbursements for printing "papers on appeal." *Hart v. Marshall*, 4 Minn. 552.

Costs of an extremely excessive record were taxed by the appellant on reversal, where counsel for the other side consented, and the trial judge certified that such course was necessary to a full understanding of the questions presented. *Fruit Dispatch Co. v. Le Seno*, 147 Mich. 149, 110 N. W. 526.

41. *Ia.*—*Steele v. Crabtree*, 130 Iowa 313, 106 N. W. 753. *Minn.*—*Hart v. Marshall*, 4 Minn. 552. *Mont.*—*Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123. *S. D.*—*Kirby v. Western Union*

successful party,⁴² but may be charged against the party causing the unnecessary matter to be printed,⁴³ or, at least, will be reduced to such a sum as is reasonable.⁴⁴

In like manner, the cost of printing papers that form no part of the record, but are included in the transcript at the request of the successful party, must be borne by the party at fault.⁴⁵

But a clear showing must be made to justify the court in taxing a successful party on appeal with the costs of alleged unnecessary printing.⁴⁶

c. *Printing Briefs*.—The expense of printing briefs for an appellate court is not a proper item of costs, where there is no statute or rule of court making this expense a proper charge against the unsuccessful litigant.⁴⁷ But in some jurisdictions such statutes or rules exist, and they will be strictly construed. A failure to comply therewith will deprive the successful party of the right to tax such costs.⁴⁸

Tel. Co., 8 S. D. 54, 65 N. W. 482. Wash.—Deering v. Holcomb, 26 Wash. 588, 67 Pac. 561; State v. Friedrich, 3 Wash. 418, 28 Pac. 747.

If the abstract and brief contain an original answer which has been rendered nugatory by an amended pleading, the expense for the publication thereof is not a taxable disbursement. Hammer v. Downing, 99 Ore. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30.

An appellee cannot recover the cost of printing in his brief matter that has already been printed in the appellant's brief. Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240, 561.

In Bauer v. Glos, 244 Ill. 627, 91 N. E. 701, on reversal, the appellant was taxed with two-thirds the cost of the abstract, which was unnecessarily lengthened by speeches of appellant's counsel made in objecting to evidence.

42. Hankwitz v. Barrett, 143 Wis. 639, 128 N. W. 430.

43. Ball, etc. Fastener Co. v. Kraetzer, 150 U. S. 111, 14 Sup. Ct. 48, 37 L. ed. 1019; De Groot v. United States, 5 Wall. (U. S.) 419, 18 L. ed. 700.

44. Hawk v. Day, 148 Iowa 47, 126 N. W. 955.

45. Estep v. Tuck, 109 Md. 528, 72 Atl. 459.

46. Hart v. Marshall, 4 Minn. 552; Ashville Supply, etc. Co. v. Machin, 150 N. C. 738, 64 S. E. 887.

47. U. S.—*Ex parte* Hughes, 114 U. S. 548, 5 Sup. Ct. 1008, 29 L. ed. 281; The Perseverance, 3 Dall. 336, 1 L. ed. 625; Neff v. Pennoyer, 3 Sawy. 335, 17 Fed. Cas. No. 10,084. See In-

jector Mfg. Co. v. Penberthy Injector Co., 109 Fed. 964, 48 C. C. A. 760; Kursheedt Mfg. Co. v. Naday, 108 Fed. 918, 48 C. C. A. 140. La.—Cline v. Crescent City R. Co., 42 La. Ann. 35, 7 So. 66; Cline v. Crescent City R. Co., 41 La. Ann. 1031, 6 So. 851. Mass. Bowditch Mut. Ins. Co. v. Winslow, 3 Gray 415. Mo.—Wilson v. Ruthorff, 87 Mo. App. 226. N. M.—Price v. Garland, 5 N. M. 98, 20 Pac. 182. N. Y. Mayer v. Friedman, 30 Misc. 364, 30 Civ. Proc. 221, 62 N. Y. Supp. 452. Okla.—Combs v. Miller, 25 Okla. 1, 105 Pac. 322.

48. Ark.—Brinkley Car Wks. Mfg. Co. v. Cooper, 70 Ark. 331, 67 S. W. 752; Baker v. Allen, 66 Ark. 271, 50 S. W. 511. Ia.—Moyers v. Fogarty, 140 Iowa 701, 119 N. W. 159. Ore.—Sommer v. Compton, 53 Ore. 341, 100 Pac. 289; Rule No. 25 of Supreme Court of Oregon, 50 Ore. 583, 91 Pac. xi; Young v. Hughes, 39 Ore. 586, 66 Pac. 272, 65 Pac. 987. S. D.—Clark v. Else, 21 S. D. 217, 111 N. W. 543. Wash. Clark v. Eltinge, 39 Wash. 696, 83 Pac. 901; Stowe v. La Conner Trading & Transp. Co., 39 Wash. 28, 81 Pac. 97, 80 Pac. 856. Wis.—Peck v. Baraboo, 141 Wis. 48, 122 N. W. 740; Kuenster v. Woodhouse, 101 Wis. 216, 77 N. W. 165; Milwaukee Cold Storage Co. v. Dexter, 99 Wis. 214, 74 N. W. 976.

Brief assigning cross-errors. McKnight v. Drake, 143 Ill. App. 10.

Reply Brief.—Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 108 N. Y. Supp. 830.

The appellant on reversal cannot recover costs of a reply brief struck out

These statutes or rules usually provide that the actual expense not to exceed a specified sum per page may be taxed.⁴⁹ And, as it is only the amount actually and necessarily incurred for printing that the prevailing party can tax, if he obtains his printing at a lower rate than that allowed, the clerk must award only so much as was actually paid or contracted to be paid, and must not allow more than the printing is reasonably worth, regardless of what was paid or contracted to be paid for it.⁵⁰ But the fact that by leave of court briefs have been served and filed out of time does not defeat the right of the prevailing party to have the costs of printing them taxed as part of his costs and disbursements.⁵¹

Scandalous and Impertinent Matter.—Where counsel for the appellants insert scandalous and impertinent matter in their briefs, the briefs will be stricken from the files and disbursements for printing them will not be allowed on reversal.⁵²

on the appellee's motion because improperly filed. *In re Wetmore*, 6 Wash. 271, 33 Pac. 615.

The cost of printing an additional brief (*Emery v. Raleigh*, 105 N. C. 44, 11 S. E. 162), or even a brief not printed until argument has commenced in the appellate court (*Sackett v. Smith*, 46 Fed. 39), may be allowed if the amount paid is not unreasonable (*State v. Friedrich*, 3 Wash. 418, 28 Pac. 747).

In Montana a charge for printing briefs filed in the supreme court is taxable. *State v. District Court*, 25 Mont. 1, 63 Pac. 402; *Waite v. Vinson*, 18 Mont. 410, 45 Pac. 552; *Ryan v. Maxey*, 17 Mont. 164, 42 Pac. 760.

Original Proceedings.—It has been the custom in the supreme court of Oregon to receive typewritten briefs in all original proceedings. Therefore in such case it is not necessary to have the brief printed, and the cost of such brief is not a necessary disbursement, and therefore cannot be taxed as a part of the costs in the case. *Cronan v. District Court*, 15 Idaho 462, 98 Pac. 614.

Effect of Violation of Rule.—Where Rule 6 (108 N. W. vi) requiring that printed cases shall contain an abridgment of the record so far as necessary to present the question for decision, and that the evidence must be so abridged in narrative form, is violated by appellants in filing their briefs, they thereby forfeit their right to recover costs for printing them. *Griffiths v. Cretney*, 143 Wis. 143, 126 N. W. 875, 880; *Gerbis v. Bell*, 143 Wis.

157, 126 N. W. 871; *Skow v. Green Bay & Western R. Co.*, 141 Wis. 21, 123 N. W. 138; *Johanson v. Webster Mfg. Co.*, 139 Wis. 181, 120 N. W. 832.

Failure to set out in his abstract, instructions of court complained of, as required by rules of court, will preclude appellant on reversal from recovering costs for his brief. *Baker v. Allen*, 66 Ark. 271, 50 S. W. 511.

While the statute in Washington allows the necessary disbursements for the printing of briefs, the affidavit to the cost bill must show that the amount paid was "necessarily paid;" otherwise only 75 cents per page will be allowed as provided by the rule where no cost bill is filed. *Clark v. Eltinge*, 39 Wash. 696, 83 Pac. 901.

49. *Sommer v. Compton*, 53 Ore. 341, 100 Pac. 289.

In Minnesota the expense of printing is not to exceed one dollar per page. *Menzel v. Tubbs*, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815.

"Under the provisions of rule 6 of the rules of this court (32 Pac. vi), 40 pages of printed brief may be allowed and taxed as costs on appeal." *Young v. Extension Ditch Co.*, 14 Idaho 126, 93 Pac. 772.

50. *Kelly v. Oksall*, 17 S. D. 392, 97 N. W. 11.

51. *Crane v. Odegard*, 12 N. D. 135, 96 N. W. 326.

52. **Minn.**—*Wood v. Chicago, M. & St. P. R. Co.*, 66 Minn. 49, 68 N. W. 462. **N. Y.**—*Mann v. Hefter*, 128 N. Y. Supp. 663. **Wis.**—*Dufur v. Paulson*, 110 Wis. 281, 85 N. W. 965.

In like manner the appellee on af-

COSTS

In the federal courts the printing of briefs is in no case cost, except where there is a rule of court requiring the printed, or where there is a stipulation to the same effect.

Supplemental or Additional Briefs or Abstracts.—Costs of additional or supplemental brief,⁵⁴ abstract,⁵⁵ or transcript taxed by the successful party in the bill of costs if necessary sent the questions to an appellate court. But the cost an additional or supplemental brief or abstract that was must be paid by the party filing it.⁵⁷ And the cost of a

firmance will not be allowed costs against the appellant for the printing of discourteous and offensive language, uncalled for. *Snodgrass v. Savage*, 47 Wash. 701, 92 Pac. 409.

53. *Lee Injector Mfg. Co. v. Penberthy Injection Co.*, 109 Fed. 964, 48 C. C. A. 760; *Kurscheedt Mfg. Co. v. Naday*, 108 Fed. 918, 48 C. C. A. 140; *Luxfer Prism Patents Co. v. Elkins*, 99 Fed. 29; *Kelly v. Springfield R. Co.*, 83 Fed. 183; *Gird v. Oil Co.*, 60 Fed. 1011.

But the practice is not uniform in all the circuits with respect to these costs. In the circuit court for the district of California the printing of briefs and the record is not chargeable. *Spaulding v. Tucker*, 2 Sawy. 50, 22 Fed. Cas. No. 13,221. But in the second circuit such items are chargeable. *Dennis v. Eddy*, 12 Blatchf. 195, 7 Fed. Cas. No. 3,793; *Hake v. Brown*, 44 Fed. 283.

And under the conformity act if this item is taxable under the state practice it may be taxed in a federal court. *Neff v. Pennoyer*, 3 Sawy. 335, 17 Fed. Cas. No. 10,084.

54. *Emery v. Raleigh, etc. R. Co.*, 105 N. C. 44, 11 S. E. 162.

The lower court after remittitur from the appellate court has been filed cannot disallow an item charged for a supplemental brief filed by the defendant after the appeal had been argued and submitted. The appellate court must be its own judge as to whether any brief is necessary, and if the adverse party desires to object to the filing of a supplemental brief in the appellate court, the objection must be presented to and determined by that court. *Montana Ore Purchasing Co. v. Boston Min., etc. Co.*, 33 Mont. 400, 84 Pac. 706.

55. *National Life Ins. Co. v. Donovan*, 238 Ill. 283, 87 N. E. 356; *Manufacturers Fuel Co. v. White*, 228 Ill.

187, 81 N. E. 841; *Glos v. Ill.* 517, 70 N. E. 1045.

Rood, 209 Mo. 662, 108 S. *Huston v. Benjamin*, 2113 N. W. 459; *Sorenson*: 12 S. D. 204, 80 N. W. *v. Christopherson*, 10 S. D. 96; *In re Smelker*, 10 S. W. 96. **Utah.**—*Munns v. Utah* 250, 49 Pac. 743.

The cost of an additional abstract made to the incompleteness of the abstract, may be taxed against the appellant and in favor of *Manufacturers Fuel Co.* Ill. 187, 81 N. E. 841; *sen*, 123 Iowa 421, 99 N. *v. Town of Iowa Falls*, 81 N. W. 33.

If an appellee by leaving additional abstract, which to cure a mistake against appellant's abstract, then order the appellant to pay of such additional abstracts *Harris*, 156 Ill. App. 331 *Halstead*, 152 Ill. App.

Costs of an additional not be taxed against the affirmance, where courts conform to the rule of fining his additional abstracts omitted from the original. *Rago v. Veneziano*, 155 Ill.

The costs of an amendment supplying omissions in the abstract and affording the chance in arriving at its conclusion not be taxed against affirmance. *Wilkie v. Sass* 421, 99 N. W. 124.

56. *In re Bell's Est.* 528, 108 Pac. 497.

57. **Ill.**—*Warner v. Ill.* 448, 85 N. E. 630; 235 Ill. 396, 85 N. E. 6 *Union Drainage Dist.*, N

abstract may be taxed against the appellant on reversal, where the defectiveness of his own abstract necessitated the additional abstract.⁵⁸

4. Attorneys' Fees.—The unsuccessful party on appeal may be taxed with a reasonable attorney's fee in some states as provided by statute or rule of court.⁵⁹ And statutes allowing attorneys' fees in

- 575, 51 N. E. 857; *Keeley Brew. Co. v. Mason*, 116 Ill. App. 603. **Ia.**—*Huntley & Son v. Chicago, etc. R. Co.*, 142 Iowa 697, 121 N. W. 377, 378; *Blumenthal v. Union Elec. Co.*, 129 Iowa 322, 105 N. W. 588; *Wissler v. City of Atlantic*, 123 Iowa 11, 98 N. W. 131. **Ore.** *Oregon Electric R. Co. v. Terwilliger Land Co.*, 51 Ore. 107, 93 Pac. 930. **S. D.**—*Swenson v. Christopherson*, 10 S. D. 342, 73 N. W. 96; *In re Smelker*, 10 S. D. 342, 73 N. W. 96. **Utah.**—*Gimnich F. Mfg. Co. v. Sorensen*, 34 Utah 109, 96 Pac. 121. **Wis.**—*Hankwitz v. Barrett*, 143 Wis. 639, 128 N. W. 430; *Hamann v. Milwaukee Bridge Co.*, 136 Wis. 39, 116 N. W. 854; *Dodge v. O'Dell's Estate*, 106 Wis. 296, 82 N. W. 135.

The cost of printing an unnecessarily prolix amended abstract (*Warren v. Miller* (Iowa), 99 N. W. 127), or an abstract that contains matter sufficiently appearing in the appellant's abstract (*Newberry v. Newberry*, 114 Iowa 704, 87 N. W. 658), will be taxed to the appellant on affirmance.

The mere fact of repetition in an amended abstract does not deprive the successful party of his right to costs thereof. *Bowsher v. Chicago, B. & Q. R. Co.*, 113 Iowa 16, 84 N. W. 958.

58. *Bonato v. Peabody Coal Co.*, 143 Ill. App. 163.

59. **Ky.**—*Marion Co. v. Spaulding*, 143 Ky. 289, 136 S. W. 235. **Mich.** *Woodworth v. Old Second Nat. Bk.*, 154 Mich. 459, 117 N. W. 893; 118 N. W. 581; *Hannah, etc. Merc. Co. v. Mosser*, 105 Mich. 18, 62 N. W. 1120; *Galbraith v. McCollum*, 98 Mich. 219, 57 N. W. 115. **Mo.**—*Padgett v. Smith*, 207 Mo. 235, 105 S. W. 742. **N. D.** *Crane v. Odegard*, 12 N. D. 135, 96 N. W. 326. **Wash.**—*In re City of Seattle*, 40 Wash. 450, 82 Pac. 740. **W. Va.** *Workman v. Doran*, 34 W. Va. 604, 12 S. E. 770. **Wyo.**—*Syndicate Imp. Co. v. Bradley*, 6 Wyo. 171, 43 Pac. 79, 44 Pac. 60, requires lack of reasonable cause for appellate proceeding.

The unsuccessful appellants, who ap-

peal from an order overruling a frivolous demurrer, may be taxed with double attorney's fees. *Sprague v. Maxey*, 122 Wis. 502, 100 N. W. 832.

Where upon showing made the appellate court grants additional time to the appellants to serve and file briefs, attorneys' fees for the adverse party occasioned thereby will not be taxed against the appellants as costs upon motion afterwards filed. *Omaha Loan, etc. Assn. v. Hendee*, 82 Neb. 24, 116 N. W. 862.

In Wisconsin if "The printed case was not served within the time fixed by rule 16, and therefore no attorney's fees in this court will be allowed to the appellant as provided by rule 46, but the appellant's recovery of costs shall be limited to clerk's fees and disbursements." *Christiansen v. Kriesel*, 133 Wis. 508, 113 N. W. 980.

Amendment To Allow.—Where the question of good faith of defendant in an action of trespass is made one of the issues on appeal by defendant in the answer to the appeal, in which amendment of the judgment is asked, and the bad faith charged is not sustained, the judgment will not be amended to allow attorney's fees. *Richard v. Perrodin*, 116 La. 440, 40 So. 789.

In awarding an attorney's fee the party against whom it is awarded should be given notice and an opportunity to be heard on the reasonableness of the fee. *Combs v. Combs*, 26 Ky. L. Rep. 617, 82 S. W. 298.

Under the Federal Commerce Act. The petitioner in a suit against a carrier to compel compliance with an order for the payment of money, if he prevails, may be allowed a reasonable attorney's fee on account of the appellate proceedings, in addition to the allowance made by the circuit court. *Louisville, etc. R. Co. v. Dickerson*, 191 Fed. 705, *distinguishing* *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. ed. 167, 31 L. R. A. (N. S.) 7.

the appellate court apply as well to original proceedings in the court, as to cases brought there on appeal.⁶⁰ But in the absence of statute authorizing it in plain terms, no such fee can be taxed in an appellate court.⁶¹

Docket Fees.—In some jurisdictions a docket fee is taxable in favor of the attorney of the prevailing party as part of the costs.⁶²

5. Stenographer's Fees and Clerk's Fees.—Reasonable fees paid a stenographer for making a transcript of the record for use on appeal may be taxed by the successful party as a part of the costs on appeal, if authorized by statute or rule of court.⁶³ But an item of

60. *State ex rel. Spokane Terminal Co. v. Superior Court*, 40 Wash. 453, 82 Pac. 878.

61. *Dak.*—*Kirkpatrick v. Dakota Cent. R. Co.*, 4 Dak. 481, 33 N. W. 103, appeals from justice's court. *Ill.* *Kingsbury v. Powers*, 26 Ill. App. 574. *Ia.*—*Kitterman v. Board of Supervisors*, 145 Iowa 22, 123 N. W. 740; *Plank v. Hertha*, 132 Iowa 213, 109 N. W. 732. *Kan.*—*State v. Thomas*, 76 Kan. 447, 92 Pac. 557. *Mo.*—*Wilson v. Ruthrauff*, 87 Mo. App. 226.

Where a ten per cent. attorney's fee is provided for in a note or mortgage to be awarded to the plaintiff upon recovery of judgment, no power is granted the appellate court to enlarge such award upon affirming the judgment on appeal. *Sedgwick v. Dixon*, 18 Neb. 545, 26 N. W. 247.

On cross appeal no attorney's fee can be taxed. *Marion Co. v. Spaulding*, 143 Ky. 289, 136 S. W. 235.

Additional allowance not made for attorney's fees in the appellate court in action to foreclose a mechanic's lien. *Lavanway v. Cannon*, 37 Wash. 593, 79 Pac. 1117.

62. *Ex parte Hughes*, 114 U. S. 548, 5 Sup. Ct. 1008, 29 L. ed. 281; *Shillito Co. v. McClurg*, 66 Fed. 22, 13 C. C. A. 284; *Kansas City, etc. R. Co. v. McDonald*, 60 Fed. 522, 9 C. C. A. 129; *Louisville, etc. R. Co. v. Francis*, 65 Ind. 39; *Cassady v. Reid*, 4 Blackf. (Ind.) 178.

The test in determining who shall be considered the "losing party" under the statute is the manner of disposing of the case on appeal. *Stafford v. Conwell*, 36 Ind. App. 313, 75 N. E. 600.

63. *Dak.*—*First Nat. Bank v. North*, 6 Dak. 136, 50 N. W. 621, 41 N. W. 736. *Idaho.*—*Keane v. Pittsburg Leading Min. Co.*, 18 Idaho 711, 112 Pac.

214, 215. *Mich.*—*Turner v. Muskegon Mach., etc. Co.*, 97 Mich. 634, 57 N. W. 192. *Ore.*—*Young v. Hughes*, 39 Ore. 586, 66 Pac. 272, 65 Pac. 987. *S. D.*

Novotny v. Danforth, 9 S. D. 412, 69 N. W. 585; *Ellis v. Wait*, 4 S. D. 504, 57 N. W. 232. *Wash.*—*Clark v. Ettinge*, 39 Wash. 696, 83 Pac. 901. *Wyo.*—*Rock Springs Nat. Bank v. Luman*, 47 Pac. 73.

The statute provides that when shorthand notes have been taken by an official reporter, if a party requests a transcript thereof, the reporter shall have it made, and the fee therefor shall be paid forthwith by the party for whose benefit it was ordered, and the expense thereof shall be taxed as other costs. B. & C. Comp. §906. In construing this enactment, it has been determined that in this court such costs are not proper disbursements in a law action, and that, in order to secure the payment of the sum paid to the official reporter for such service, the party entitled thereto must have such costs taxed in the lower court. *McGee v. Beckley*, 54 Ore. 250, 103 Pac. 61, 102 Pac. 303; *Sommer v. Compton*, 53 Ore. 341, 100 Pac. 289; *Allen v. Standard Box & Lumb. Co.*, 53 Ore. 10, 98 Pac. 509, 96 Pac. 1109, 97 Pac. 555.

"Under the rules of this court and the provisions of section 5 of an act providing for the appointment of stenographic reporters of the district court, approved February 9, 1899 (Sess. Laws 1899, p. 163), the statutory fee paid by a party to an action to the reporter for a transcript of the evidence to be used on motion for a new trial and appeal may be taxed as costs against the party finally defeated on appeal." *Young v. Extension Ditch Co.*, 14 Idaho 126, 93 Pac. 772.

In Nevada, the respondent upon reversal of the judgment below may be

expense for a stenographer's services cannot be allowed in the absence of statute,⁶⁴ or in a case where no such transcript is required for the appeal.⁶⁵

The clerk is usually awarded fees for services performed in filing papers, for preparing, certifying and sending up the record, and other like services, provided they are reasonable in amount and number,⁶⁶ and are performed under authority of some statute or rule of court.⁶⁷

6. Transcript or Copy of Record.—In some jurisdictions the cost of a transcript or copy of the record is allowable to the successful party on appeal,⁶⁸ if he complies with the statutes or rules of court

taxed with the reporter's fee for transcribing notes or the record on appeal. *Brandon v. West*, 28 Nev. 500, 83 Pac. 327.

Manner of Estimating the Fees. In taxing stenographer's fees for making a transcript of the evidence, the clerk may make his estimate by counting a number of pages of the transcript and taking the average of these as an average for the whole. *Nelson v. McLellan*, 34 Wash. 181, 75 Pac. 635.

64. *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644, 33 Pac. 1055 (preparation of statement of facts). *Brown v. Winehill*, 4 Wash. 98, 29 Pac. 927 (item for stenographer's minutes of the trial).

In Oregon an item for "transcribing testimony to incorporate in a bill of exceptions" is no part of the disbursements on appeal. *Allen v. Standard Box, etc. Co.*, 53 Ore. 10, 96 Pac. 1109, 97 Pac. 555, 98 Pac. 509, following *Ferguson v. Byers*, 40 Ore. 463, 67 Pac. 1115, 69 Pac. 32.

Either party to an action may have the stenographer's notes extended into longhand, and the expense thereof taxed in the lower court, and when such transcript is filed, it becomes a part of the record, and may be used in preparing a bill of exceptions, but the cost of copying it for such purpose constitutes no part of the disbursements." *De Vall v. De Vall*, 57 Ore. 128, 110 Pac. 705, 109 Pac. 755; *McGee v. Beckley*, 54 Ore. 250, 255, 103 Pac. 61, 102 Pac. 303; *Sommer v. Compton*, 53 Ore. 341, 100 Pac. 289; *Allen v. Standard Box, etc. Co.*, 53 Ore. 10, 96 Pac. 1109, 97 Pac. 555, 98 Pac. 509.

65. *Ray County Sav. Bank v. Hutton*, 226 Mo. 713, 127 S. W. 59; *Sorenson v. Donahoe*, 12 S. D. 204, 80 N. W. 179.

66. *Shanks v. Pinkstone* (Okla.), 112 Pac. 757; *Clark v. Eltinge*, 39 Wash. 696, 83 Pac. 901.

In Missouri the statute allows the clerk only five cents for filing a bill of exceptions. *Buckman v. Missouri, etc. R. Co.*, 121 Mo. App. 299, 98 S. W. 820.

The Kentucky statute, which allows the clerk fifteen cents for filing a paper, refers to papers which are to remain in the record. Accordingly it does not cover copies of the brief or petition for rehearing, which are merely intended for distribution among the judges, but do not remain in the record. *Marion County v. Spaulding*, 143 Ky. 289, 136 S. W. 235.

Fees paid to the clerk of a United States circuit court for citation, writ of error, and for certifying the transcript of the record, are as much "costs of the appeal" as are the fees of the clerk of the appellate court, and should be taxed as such. *Berthold v. Burton*, 169 Fed. 495.

67. *Soules v. McLean*, 7 Wash. 451, 35 Pac. 364, 1082, denying clerk's fee for approving appeal bonds.

68. U. S.—*Caldwell v. Jackson*, 7 Cranch 276, 3 L. ed. 341, holding that the party who requests the copy must pay the clerk for it. See *Pine River Logging & Imp. Co. v. United States*, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. ed. 1164; *Wistfeldt v. North Carolina Min. Co.*, 177 Fed. 132, 100 C. C. A. 552; *Lee Injector Mfg. Co. v. Penberthy Injector Co.*, 109 Fed. 964, 48 C. C. A. 760. Cal.—*In re Bell's Estate*, 157 Cal. 528, 108 Pac. 497. Ga.—*Summerville Road Co. v. Baker*, 70 Ga. 513. Ind.—*Monnett v. Hemphill*, 110 Ind. 299, 11 N. E. 230. Ia.—*Palmer v. Palmer*, 97 Iowa 454, 66 N. W. 734. Ky.—*Owsley v. Owsley*, 119 Ky. 517, 84 S. W. 534. Mont.—*Montana Pur-*

in regard to making and printing the transcript.⁶⁰ If the appellee is

chasing Co. v. Montana, etc. Min. Co., 33 Mont. 400, 84 Pac. 706. Neb.—Pet-tis v. Green River Asphalt Co., 71 Neb. 513, 101 N. W. 333, 99 N. W. 235. N. C.—Smith v. Cashie, etc. Lumber Co., 148 N. C. 334, 62 S. E. 416. S. D. Ellis v. Wait, 4 S. D. 504, 57 N. W. 232. Wash.—Soules v. McLean, 7 Wash. 451, 35 Pac. 1082. Wyo.—Rock Springs Nat. Bank v. Luman, 47 Pac. 73.

In Wisconsin the unsuccessful party in the appellate court cannot be taxed for an item paid the reporter for three copies of the reporter's minutes. Owsley v. Owsley, 119 Ky. 517, 84 S. W. 534; Buehler v. Standenmayer (Wis.), 131 N. W. 986.

In North Carolina "while the costs of making the transcript and certificate of record on appeal are not a part of the costs of the Supreme Court, they are a part of the necessary costs of the appeal, and not strictly costs of the superior court incident to the trial and procedure in that court. Hence the successful appellant who has paid them is entitled to recover them from the appellee." Dobson & Whitley v. Southern R. Co., 133 N. C. 624, 45 S. E. 958, following Roberts v. Lewald, 108 N. C. 405, 12 S. E. 1028.

Not Transcript Used on Former Appeal.—Pine River Logging, etc. Co. v. United States, 186 U. S. 279, 297, 22 Sup. Ct. 920, 46 L. ed. 1164.

For loan of original transcript the clerk may charge. Shackelford v. Phillips, 112 Ky. 563, 66 S. W. 419, 68 S. W. 441.

The unnecessary expense of copying a statement of facts into the record, when only the original statement need be filed, will be taxed against the party guilty of the fault. Greenville Water Co. v. Beckham (Tex. Civ. App.), 121 S. W. 709.

"Where separate appeals are filed in the district court and the cases are consolidated, the costs of the several transcripts are properly taxed against the losing party, since each transcript is necessary to the appeal." In re Etmund's Estate, 83 Neb. 151, 119 N. W. 239. See Nixon v. Malone, 100 Tex. 250, 98 S. W. 380, 99 S. W. 403.

Charge for a carbon copy is not proper. Litherland v. S. Morton Cohn Real Estate Co., 54 Ore. 71, 102 Pac. 303, 100 Pac. 1.

A charge for indexing transcript will be disallowed if the appellate court is unable to determine from an inspection of the transcript that such service was performed. Boothe v. Farmers, etc. Bank, 53 Ore. 576, 98 Pac. 503, 101 Pac. 390.

Amount Taxable.—While the amount that may be recovered by the successful party for making a transcript on appeal cannot exceed the authorized limit, still if the amount paid or incurred is less than the limit only the amount may be recovered. Clark v. Eltinge, 39 Wash. 696, 83 Pac. 901; Nelson v. McLellan, 34 Wash. 181, 75 Pac. 635; Tingley v. Bellingham Bay Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055.

In Clark v. Eltinge, 39 Wash. 696, 83 Pac. 901, it is held that where it does not appear from the cost bill or from the affidavit thereto that the sum charged in the cost bill for the transcript constitutes the clerk's fees for printing, certifying and sending up the record only five cents a folio will be allowed for the transcript.

The amendments embodied in chapters 117, 118 and 119 of the 1911 Session Laws (1911 Sess. Laws, pp. 375-381), with reference to the prosecution of appeals to the supreme court, do not prohibit or forbid the printing of transcripts on appeal, and the appellate court will allow costs to be taxed for a printed transcript at the same rate that has heretofore been allowed under the rules of the supreme court. Ulbright v. Baslington, 20 Idaho 539, 119 Pac. 292.

Costs Advanced for Transcript.—The new Code (§§574 and 576, Gen. St. 1909, §§6169, 6171) makes the district court the custodian of the record, and authorizes the court or judge to amend and correct the transcript of the evidence before the same is filed and made a part of the record. In order to recover costs advanced for the transcript, the party ordering it must perfect his appeal. After the appeal is perfected, this is the only court authorized to direct which party shall pay the costs of the transcript. Gordon v. Munn, 83 Kan. 642, 112 Pac. 615.

69. Ark.—Central Coal & Coke Co. v. John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49. Idaho.—Thiessen v.

compelled to have additional parts of the record copied in order to make a complete transcript of the record on appeal, this additional cost may be taxed against the appellant on affirmance.⁷⁰

But a party though successful on appeal must pay the costs of a transcript or abstract that is unnecessarily prolix, or which contains unnecessary and immaterial matters,⁷¹ and he cannot charge for any

Riggs, 5 Idaho 487, 51 Pac. 107. **Ill.** Bowman v. Kroft, 81 Ill. App. 92. **Ia.** Kiburz v. Jacobs, 104 Iowa 580, 73 N. W. 1069. **Kan.**—McAfee v. Walker, 82 Kan. 355, 108 Pac. 79. **Md.**—Boyce v. McLeod, 107 Md. 1, 68 Atl. 135. **Mich.**—Davidson v. Bennett, 84 Mich. 614, 48 N. W. 279. **Mo.**—Spratt v. Early, 169 Mo. 357, 69 S. W. 13. **Wis.** Crouse v. Chicago & N. W. R. Co., 102 Wis. 196, 78 N. W. 446.

The plaintiff in error will be allowed no costs for a printed abstract that does not conform to the requirements prescribed in the court's rule, although the judgment of the lower court is reversed in his favor. Rueckheim Bros. v. Servis Ice Cream Co., 146 Ill. App. 607; Hills v. Allison, 79 Kan. 617, 100 Pac. 651.

When a party procures a typewritten copy of the stenographic record to be used in the preparation of his bill of exceptions, or statement of the case, and intends to have the cost thereof taxed as costs in the case on appeal, he must serve the copy of the stenographic record upon the adverse party when he serves his proposed bill or statement, so that the adverse party may have the benefit of it in preparing amendments, or in ascertaining whether the proposed bill or statement is correct. Keane v. Pittsburg Lead Min. Co., 18 Idaho 711, 112 Pac. 214.

The rules as to preparing transcripts in narrative must be complied with, otherwise the costs of procuring the record will not be allowed. Keane v. Pittsburg Lead Min. Co., 18 Idaho 711, 112 Pac. 214; Routledge v. Elmendorf, 54 Tex. Civ. App. 174, 116 S. W. 156.

70. Manion v. Manion, 120 Ky. 1, 85 S. W. 197.

71. **Ala.**—Bessemer Coal, etc. Co. v. Doak, 152 Ala. 166, 44 So. 627; Halsey v. Murray, 112 Ala. 185, 20 So. 575. **Fla.**—West v. State, 53 Fla. 77, 43 So. 445. **Ga.**—Weaver v. Stoner, 114 Ga. 165, 39 S. E. 847; Cochran v. Hudson, 110 Ga. 762, 36 S. E. 71; Pullman Palace Car Co. v. Martin, 95 Ga. 314,

22 S. E. 700; Higginbotham v. Campbell, 85 Ga. 638, 11 S. E. 1027. **Ill.** Bauer v. Glos, 244 Ill. 627, 91 N. E. 701. **Ind.**—Todd v. Howell (Ind. App.), 96 N. E. 618. **Ia.**—Hawk v. Day, 148 Iowa 47, 126 N. W. 955; Goll Frank Co. v. Miller, 87 Iowa 426, 54 N. W. 443. **Mich.**—Ruttle v. Foss, 161 Mich. 132, 125 N. W. 790; Ruttle v. What Cheer Coal Min. Co., 161 Mich. 150, 125 N. W. 787. **Neb.**—Streitz v. Hartman, 35 Neb. 406, 53 N. W. 215. **N. C.** Asheville Supply, etc. Co. v. Machin, 150 N. C. 738, 64 S. E. 887. **Tex.**—McLennan County v. Graves, 94 Tex. 635, 639, 64 S. W. 861, reversing 26 Tex. Civ. App. 49, 62 S. W. 122; Baum v. McAfee (Tex. Civ. App.), 125 S. W. 384; Missouri, etc. R. Co. v. Williams (Tex. Civ. App.), 96 S. W. 1087; Houston, etc. R. Co. v. Granberry, 16 Tex. Civ. App. 391, 40 S. W. 1062; Hamm v. Stone & Sons, etc. Co., 13 Tex. Civ. App. 414, 35 S. W. 427. **Wash.**—Soules v. McLean, 7 Wash. 451, 35 Pac. 1032. **Wis.** Willey v. Lewis, 113 Wis. 618, 88 N. W. 1021.

Where matters are improperly incorporated in a transcript on a writ of error, the cost thereof will be taxed against the party requiring it to be included in the transcript. Seaboard Air Line R. Co. v. Rentz (Fla.), 57 So. 612.

A party who places redundant matter in the record may be required to pay costs. Ely & Jellico Coal Co. v. Matthews, 144 Ky. 531, 139 S. W. 796.

And in those jurisdictions in which the appellate courts have discretion in awarding costs, the appellants on reversal will not be allowed to recover against the appellees the costs of such parts of the transcript as relate to irrelevant matters. Samples v. Rogers, 32 Ky. L. Rep. 784, 107 S. W. 222.

Thus "where a case was dismissed on demurrer, and the bill of exceptions to such ruling did not specify the answers of the defendants, and they were not directed to be sent to this court, but were voluntarily included by the clerk

disbursements not actually made.⁷² If, however, there is a conflict as to who is responsible for the prolixity of the transcript, the court will order no deduction of costs on that account.⁷³

In like manner, the expense of bringing up a transcript or parts thereof unnecessarily cannot be taxed as costs against the unsuccessful party.⁷⁴

of the trial court in the transcript of the record, the cost taxed will not include the making of the transcript of such answers." *Riley v. Wrightsville & T. R. Co.*, 133 Ga. 413, 65 S. E. 890.

If the appellant's abstract or record on appeal is unnecessarily prolix, and by proper condensation its size could have been reduced, the court may reduce the costs claimed by the appellants. *Haughton v. Bilson*, 84 Kan. 880, 117 Pac. 387; *Spang v. Robinson*, 24 W. Va. 327.

That part of the costs of a transcript that would have been saved had the appellant complied with the rules of court, will be taxed against him on reversal. *Wallace v. Reed Bros.*, 54 Tex. Civ. App. 457, 117 S. W. 1019.

But the appellate court will not tax costs against appellee for the insertion upon his direction by the clerk of the circuit court in the transcript of the record of papers which have a material bearing upon the questions presented here and having relation to the order or decree appealed from. *Reid v. Southern Develop. Co.*, 52 Fla. 595, 42 So. 206.

Instances of Unnecessary Matter. Printing motion for new trial when such motion not reviewable. *Nederland Life Ins. Co. v. Hall*, 86 Fed. 741, 30 C. C. A. 363.

Testimony of witnesses of which no question was raised in court below. *Geo. W. Roby Lumb. Co. v. Gray*, 73 Mich. 363, 42 N. W. 839. See *Hancock v. Norfolk W. R. Co.*, 124 N. C. 222, 32 S. E. 679.

Where an original answer is rendered nugatory by the filing of an amended answer, the cost of including such original answer in the abstract on appeal will be taxed to the appellant. *Hammer v. Downing*, 39 Ore. 504, 640, 651, 65 Pac. 17, 67 Pac. 30, 64 Pac. 657.

Where appellants, by their appeal, "prevailed only to the extent of se-

curing a reversal of the judgment in so far as it awarded appellees a foreclosure of the liens in question and attorney's fees thereon," and appellees prevailed by defeating a reversal of the judgment so far as it awarded a recovery of money in their favor other than attorney's fees, and in order to obtain the relief which was awarded to applicants, it was not necessary for them to bring up the evidence given upon the trial below, the appellees must pay the costs of bringing up the evidence. *Indianapolis, etc. Traction Co. v. Brennan (Ind.)*, 90 N. E. 68.

Apportionment.—Where the transcript on appeal has been unnecessarily extended by the appellants, the court, on reversal, may on motion of appellee, require the costs of printing the transcript to be equally shared by the parties. **U. S.**—*Ball & Socket Fastener Co. v. Kreetzer*, 150 U. S. 111, 14 Sup. Ct. 48, 37 L. ed. 1019. **D. C.**—*Brown v. Commercial Fire Ins. Co.*, 21 App. Cas. 325. **Ky.**—*Hoskins' Admx. v. Morton*, 27 Ky. L. Rep. 529, 85 S. W. 742. **Mo.**—*Holloway v. Holloway*, 103 Mo. 274, 15 S. W. 536. But see *Hess v. Great Northern R. Co.*, 98 Minn. 198, 108 N. W. 7, 803.

72. Necessity That Disbursements Be Promised or Paid.—"It is only such legal charges as have been paid or promised to the clerk for the labor necessitated in preparing a transcript on appeal that may be recovered as a disbursement. . . . If plaintiff's counsel undertook the work on his own account, all expenses thereby saved, in case he were defeated, inure to the benefit of the adverse party." *De Vall v. De Vall*, 57 Ore. 128, 110 Pac. 705, 109 Pac. 755.

73. *De Long v. Muskegon Booming Co.*, 88 Mich. 282, 50 N. W. 297.

74. *Sandy River C. Coal Co. v. White House C. Coal Co.*, 125 Ky. 273, 101 S. W. 313, 102 S. W. 320; *Harrison v. Lane*, 2 Munf. (Va.) 495.

These statutes or rules usually prescribe the rate per page or so much per hundred words that may be charged by the successful party for a transcript, and this limits his right of recovery, regardless of what he actually paid.⁷⁵

C. JUDGMENT FOR COSTS.—As a general rule, the judgment of an appellate court need not, in so many words, adjudge costs to the successful party, but the judgment itself carries the costs as an incident thereto,⁷⁶ unless costs are in the discretion of the court, in which case no costs follow the decision of the court unless awarded by it.⁷⁷ And

75. *Crowe v. Taylor*, 134 Ill. App. 355.

76. Cal.—*Crittenden v. San Francisco Sav. Union*, 157 Cal. 201, 107 Pac. 103; *Hathaway v. Davis*, 33 Cal. 161. Mont.—*State v. District Court*, 27 Mont. 40, 69 Pac. 244. S. C.—*Bratton v. Massey*, 18 S. C. 555. Tex.—*Summerhill v. Darrow*, 62 S. W. 1054. Wash.—*State v. Hatch*, 36 Wash. 164, 73 Pac. 796.

If nothing is said about them, they are adjudged to him by implication. *Bliss v. Little's Estate*, 64 Vt. 133, 23 Atl. 725.

In Michigan costs will follow where "judgment is reversed and a new trial granted," without more. *Jarrait v. Peters*, 151 Mich. 99, 114 N. W. 870; *McGilvray v. Manistee Circuit Judge*, 146 Mich. 480, 109 N. W. 852.

"While section 11,271, Comp. Laws, leaves the costs within the discretion of the court in a case where a new trial is ordered, by general direction to the clerk the journal entry always includes an award of costs in case of reversal or affirmance, unless direction to the contrary be given in the opinion." *Jarrait v. Peters*, 151 Mich. 99, 114 N. W. 870.

But in Florida, when costs are allowed on appeal, the amount must be entered in the body of the judgment or order. *McGourin v. Town of De Funiak Springs*, 52 Fla. 556, 42 So. 187.

Appeals From Intermediate Appellate Courts.—Although a judgment of the highest state court on appeal from an intermediate appellate court does not in so many words, adjudge that the defendant in error recover the costs of that court yet if it affirms the judgment of that court, this amounts to an award of costs against the plaintiff

in error. *Summerhill v. Darrow* (Tex.), 62 S. W. 1054.

Form of Judgment.—The following is a sufficient judgment in favor of the appellant and against the appellee on reversal for the appellant's costs in the appellate court: "The decree of the circuit court in this cause be reversed with costs and the cause remanded to the circuit court with directions to dismiss the bill." *Santa Clara Val. Mill, etc. Co. v. Prescott*, 127 Ill. App. 644; *State ex rel. Boye*, 18 La. Ann. 102.

77. D. C.—*Columbia Nat. Dredging Co. v. Morton*, 28 App. Cas. 288. Ma.—*Mather v. Cunningham*, 107 Me. 242, 78 Atl. 102. N. Y.—*In re Protestant Episcopal Church*, 86 N. Y. 396. S. C.—See *Cauthen v. Cauthen*, 81 S. C. 313, 62 S. E. 319.

In Minnesota the costs and disbursements of the prevailing party, in a cause in the supreme court, are recoverable only in that cause, in the manner prescribed by the rules of court. By neglect to have the costs taxed and inserted in the judgment, the adverse party may cause judgment to be entered, under rule 30, without provision being made for costs, and the right to recover the same is forfeited. *Osborne & Co. v. Paulson*, 37 Minn. 46, 33 N. W. 12.

Filing in Blank for Costs.—The clerk may insert in the decree the amount of the costs and disbursements, even after application has been made for a mandate. *Richardson v. Orth*, 40 Ore. 252, 66 Pac. 925, 69 Pac. 455.

Motion for Costs After Amendment Curing Defect.—After a complaint and the record is amended subsequent to the issuance of a writ of error, which cures the error, a motion for allowance of appeal costs is too late. *Toledo P. & W. R. Co. v. Butler*, 53 Ill. 323.

this judgment must recite in whose favor or against whom the costs are adjudged.⁷⁸

Construction of Judgment.—A judgment of an appellate court awarding costs will be given a reasonable construction.⁷⁹

The legal effect of a judgment on appeal, which provides that "appellants recover of appellee all costs in this behalf expended" is to include all costs of appeal in both the trial and appellate courts.⁸⁰ But it is only where the appellate court makes a final determination of the case that the judgment for costs includes costs in the trial court, as well as the costs of appeal.⁸¹

A judgment of an appellate court disposing of a case "with costs," includes disbursements whether mentioned or not.⁸²

Costs To Abide the Event.—Where a judgment is reversed and a new trial awarded costs to "abide the event," the party to whom costs are awarded becomes entitled thereto on the termination of the second trial in his favor.⁸³ But such a judgment for costs on reversal

78. *Santa Clara Val. Mill, etc. Co. v. Prescott*, 238 Ill. 625, 87 N. E. 851.

In an action on a judgment or decree for costs the existence of the decree must be determined by an inspection of the record alone where the plea is *nul tiel record*, and if the decree does not show that the unsuccessful party was adjudged to pay the costs, the action will fail. *Santa Clara Val. Mill, etc. Co. v. Prescott*, 238 Ill. 625, 87 N. E. 851.

79. *Crittenden v. San Francisco Sav. Union*, 157 Cal. 201, 107 Pac. 103.

80. *Bonner v. Wiggins*, 54 Tex. 149.

But it has been held that when a case is remanded for further proceedings, and costs are awarded in the appellate court in general terms, such award only includes the costs upon appeal, leaving the costs of the former trial to abide the event of the suit. *Gray v. Gray*, 11 Cal. 341.

A judgment of an appellate court prescribing that the costs of the cause in both the lower and appellate courts should be apportioned between the parties, means only the ordinary taxable costs of the litigation, and not such charges and expenses as the costs of a receivership and payments and allowances to receivers. *Kell v. Trenchard*, 146 Fed. 245, 76 C. C. A. 611.

"Where the Supreme Court reverses a decree of the trial court and remands the case with directions as to the decree to be entered, and the mandate is silent as to the costs in the trial court, then it must be presumed that the Supreme Court intended that the

trial court should exercise its discretion 'to award costs or not.' " *Brueggemann v. Young*, 128 Ill. App. 200, 204, quoting from *Murphy v. Loos*, 32 Ill. App. 595.

The phrase "costs in all courts" in the judgment of an appellate court awarding costs means the costs in every court in which the successful party has been obliged to appear to uphold his claim of right. *Jones v. Gould*, 143 App. Div. 244, 128 N. Y. Supp. 280, following *Merkel v. Lazard*, 139 App. Div. 624, 124 N. Y. Supp. 140.

81. *Sperry v. Hurd* (Mo. App.), 141 S. W. 469 (holding that the judgment of the appellate court does not include costs in trial court when a new trial is granted and nothing more); *Musser v. Harwood*, 23 Mo. App. 495.

82. *In re Perry*, 131 App. Div. 284, 115 N. Y. Supp. 744.

83. *Mossien v. Empire State Surety Co.*, 117 App. Div. 782, 102 N. Y. Supp. 1012 (entitled to costs of both trials); *Davis v. Reflex Camera Co.*, 114 App. Div. 814, 100 N. Y. Supp. 172; *Levine v. Klein*, 66 Misc. 571, 122 N. Y. Supp. 396; *Goldstein v. Godfrey Co.*, 126 N. Y. Supp. 620 (dismissal of complaint by the plaintiff); *La Rosa v. Wilner*, 104 N. Y. Supp. 952. See *Gray v. Gray*, 11 Cal. 341.

By the Municipal Court Act, Laws 1902, ch. 580, judgment may be reversed and a new trial ordered, costs to abide the event. And when the plaintiff prevails on the new trial, he may tax the costs of the appeal. *Buchanan v. Stout*,

falls with a reversal of a second favorable judgment in favor of such party obtained on a second trial.⁸⁴

Operation and Effect of Judgment.—After the judgment of the appellate court awarding costs is made the judgment of the court below, it is beyond the court below, regardless of the final result of the case.⁸⁵

D. TAXATION OF COSTS.—1. Application To Tax Costs.—If costs are discretionary with the appellate court, an application for their allowance must be made to that court;⁸⁶ the lower court has no power to tax the costs of an appeal.⁸⁷

2. Time of Taxation.—The costs are, perhaps, never in fact taxed until after the judgment is rendered; and in many cases, cannot be taxed until afterwards. And when this is the case, the amount ascertained is usually, under the direction of the court, entered *nunc pro tunc* as a part of the original judgment.⁸⁸

3. Notice of Taxation.—Taxation of costs on appeal must be on notice in some states; and in the absence of any specific provision, by statute or rule of court, as to the length of such notice, it must be a reasonable one.⁸⁹

4. Method of Taxation.—The method of taxing costs on appeal is usually governed by supreme court rules and by statutes,⁹⁰ but

139 App. Div. 204, 123 N. Y. Supp. 724; *Davis v. Reflex Camera Co.*, 114 App. Div. 814, 100 N. Y. Supp. 172.

84. *Pelgram v. Ehrenzweig*, 58 Misc. 198, 109 N. Y. Supp. 54. See *Taylor v. New York Life Ins. Co.*, 133 N. Y. Supp. 747.

85. *Scatcherd v. Love*, 166 Fed. 53, 91 C. C. A. 639.

86. In Vermont questions as to costs in the supreme court should be made while the case is before it, otherwise the court has no power in the matter. *Bliss v. Little's Estate*, 64 Vt. 133, 23 Atl. 725.

In Missouri, the motion for allowance of attorney's fees for services rendered in the supreme court should be made in the court that tried the case and not in the supreme court. *Padgett v. Smith*, 207 Mo. 235, 105 S. W. 742.

87. *Buchanan v. Parham*, 95 Ark. 81, 128 S. W. 563; *Berkey v. Thompson*, 126 Iowa 394, 102 N. W. 134.

The lower court has no jurisdiction over the costs of printing, or of the fees of the clerk of the appellate court. *Berkey v. Thompson*, 126 Iowa 394, 102 N. W. 134.

88. *Sizer v. Many*, 16 How. (U. S.) 98, 104, 14 L. ed. 861.

A motion to tax costs for printing an abstract comes too late after the term at which the cause was decided, because the allowance and taxation of

costs is a judicial act. *Winn v. Modern Woodmen*, 146 Mo. App. 69, 123 S. W. 59; *Roberts v. Modern Woodmen*, 146 Mo. App. 70, 123 S. W. 60.

Taxation Nunc Pro Tunc.—It is proper for circuit courts to allow costs to be taxed *nunc pro tunc*, after the receipt of the mandate from the court. *Sizer v. Many*, 16 How. (U. S.) 98, 14 L. ed. 861.

Where a judgment is affirmed, costs may be taxed after the court adjourns. *Strong v. Hobbs*, 20 Vt. 192.

In Wisconsin the statute places no time limit upon the taxation of costs in the supreme court. Hence they may be taxed after the record is remitted to the trial court. *Bouchier v. Hammer*, 142 Wis. 527, 126 N. W. 15.

After Remand.—Where through no fault or lack of diligence on the part of counsel but because no notice of a decision on rehearing was received before the case was remanded, parties are deprived of an opportunity to have the costs and disbursements provided for in the judgment of the supreme court taxed before the original record is returned to the lower court, the record may be recalled in order to tax defendant's costs and disbursements in the appellate court. *Clark v. Lawrence County*, 24 S. D. 442, 123 N. W. 868.

89. *Akerly v. Vilas*, 23 Wis. 628.

90. Conn.—*Beach v. Travelers' Ins.*

this service is usually performed by the clerk of the court.⁹¹

5. Cost Bill or Memorandum.—*a. In General.*—By statute or rule of court in the various jurisdictions an itemized memorandum or bill of costs is required of the party to whom costs are awarded by an appellate court;⁹² it must be filed in the time and with the officer designated,⁹³ and must be served on the adverse party, though the

Co., 73 Conn. 475, 47 Atl. 754. *Ia.* Berkey v. Thompson, 126 Iowa 394, 102 N. W. 134. *La.*—State *ex rel.* Johnson v. Judges of Court of Appeals, 107 La. 69, 31 So. 645. *Nev.*—Chandler v. Washow Lake Reservoir, etc. Co., 28 Nev. 422, 82 Pac. 458, *modifying* 28 Nev. 151, 80 Pac. 751. *Ore.*—Hammer v. Downing, 39 Ore. 504, 64 Pac. 657, 65 Pac. 17, 67 Pac. 30.

Where several appeals are based on a single notice, costs should be taxed as on a single appeal. *State v. Common Council*, 104 Wis. 622, 80 N. W. 942, citing *Nash v. Meggett*, 89 Wis. 486, 497, 61 N. W. 283.

Apportionment.—Under a statute giving an appellate court discretion in the apportionment and taxation of costs, it has been held that where there are thirty appeals filed, the clerk may charge to the unsuccessful party in each case one-thirtieth of the whole cost. *Peter v. Wilson*, 32 Ky. L. Rep. 538, 105 S. W. 980.

91. *Kelly v. Plum*, 50 How. Pr. (N. Y.) 236; *Margulies v. Damrosch*, 23 Misc. 833, 51 N. Y. Supp. 833; *Hammer v. Downing*, 39 Ore. 504, 64 Pac. 651, 65 Pac. 17, 67 Pac. 30.

92. *Mont.*—State *ex rel.* Hurley v. District Court, 27 Mont. 40, 69 Pac. 244. *Ore.*—Zeuske v. Zeuske, 55 Ore. 65, 103 Pac. 648, 105 Pac. 249 (in this state the cost bill must be filed before mandate issues); *Heywood Bros. v. Doernbecher Mfg. Co.*, 48 Ore. 359, 86 Pac. 357, 87 Pac. 530; *Hammer v. Downing*, 39 Ore. 504, 64 Pac. 651, 65 Pac. 17, 67 Pac. 30. *Wash.*—Clark v. Eltinge, 39 Wash. 696, 83 Pac. 901 (giving form of cost bill). Consult also statutes and rules of court in the various jurisdictions.

"It is the duty of the parties to a cause in the Supreme Court to file in each case a statement of the items of costs they are entitled to recover in the cause; and upon failure to do so the court will not, after the expiration of the term in which the cause is disposed of, order a retaxation of

the costs that have been taxed and entered in the decree disposing of an appeal, so as to include items not shown by the record or files in the cause at the time the costs were taxed to have been erroneously omitted from the costs as taxed and entered in the decree of the court disposing of the cause." *McGourin v. Town of De Funiak Springs*, 52 Fla. 556, 42 So. 187.

But in California in *Gray v. Gray*, 11 Cal. 341, it was said: "If we were to require a bill of costs to be filed in this court, the result could be exceedingly oppressive upon members of the bar."

Contents of Memorandum.—This memorandum should not contain any items of costs incurred upon the trial in the court below. *State ex rel. Hurley v. District Court*, 27 Mont. 40, 69 Pac. 244.

Effect of Failure To File Bill of Costs.—But from the fact that there was no itemized bill of costs sent up by the magistrate upon an appeal from his decision, is no good ground for dismissing the appeal. The only effect of such a failure, unless secured before final judgment in the superior court, would be to cause the loss of the costs to the appellants, if he obtained a verdict in his favor in the superior court. *Pearce v. Renfro*, 68 Ga. 194.

93. *Candler v. Washoe Lake Reservoir, etc. Co.*, 28 Nev. 422, 82 Pac. 458.

Time of Filing.—But statutes merely prescribing the time in which a cost bill or statement of disbursements must be filed does not apply to the taxation of costs in the supreme court. *Gray v. Gray*, 11 Cal. 341; *Sommer v. Compton*, 53 Ore. 341, 100 Pac. 239; *Allen v. Standard Box, etc. Co.*, 53 Ore. 10, 96 Pac. 1109, 97 Pac. 555, 98 Pac. 509; *Heywood v. Doernbecher Mfg. Co.*, 48 Ore. 359, 86 Pac. 357, 87 Pac. 530.

In California, if the memorandum of costs is filed three days after the filing of the remittitur it is filed in due

statute contains no direction to that effect.⁹⁴ The memorandum of costs may be filed, however, without any order of court.⁹⁵ But some statutes which provide in general terms for the filing of cost bills or statements of disbursements, and regulating the time for filing and how objections to items shall be raised, do not apply to appellate courts unless they are included expressly or by necessary implication.⁹⁶ If the cost bill is not filed within the time required, it will be stricken out on motion.⁹⁷

b. *Single or Separate Bill of Costs.*—If there is only one appeal from different parts of the same order,⁹⁸ or if separate appeals are

time. *Mabb v. Stewart*, 143 Cal. xviii, 77 Pac. 402.

In *Nevada* a memorandum of costs must be filed within two days after the entry of the decree. *Brandon v. West*, 28 Nev. 500, 83 Pac. 327.

In *Kansas*, under rule 21 (104 Pac. ix), which reads: "The amount paid for the transcript of the record or case-made, for the stenographer's transcript of the evidence, or for the printing of the abstract, shall be taxed as costs only when a statement thereof shall be filed with the clerk not later than ten days after a cause is decided," a day's delay was held to be fatal. *McAfee v. Walker*, 82 Kan. 355, 108 Pac. 79.

In *Montana* the successful party must within thirty days after the remittitur is filed with the clerk, deliver to such clerk a memorandum of his costs. *State ex rel. Hurley v. District Court*, 27 Mont. 40, 69 Pac. 244.

In *Washington* the cost bill must be filed within ten days from the filing of the opinion. *Clark v. Eltinge*, 39 Wash. 696, 83 Pac. 901.

By rule of court in *Oregon* it is provided that no costs shall be taxed unless the cost bill therefor shall be filed before the mandate issues. It was held under this rule that as twenty days must elapse in every case between the rendering of judgment and the issuing of the mandate, which is ample time to cover any emergency in filing cost bills, a motion to recall a mandate for the purpose of taxing costs in the appellate court will be denied. *Zeuske v. Zeuske*, 55 Ore. 65, 105 Pac. 249, 103 Pac. 648.

If a motion for a rehearing is made, the time for filing the cost bill does not begin to run until the motion is

disposed of. *Richardson v. Orth*, 40 Ore. 252, 66 Pac. 925, 69 Pac. 455.

⁹⁴ *State v. District Court*, 27 Mont. 40, 69 Pac. 244, in this state the memorandum must be verified.

⁹⁵ *Mabb v. Stewart*, 143 Cal. xviii, 77 Pac. 402.

⁹⁶ *Zeuske v. Zeuske*, 55 Ore. 65, 103 Pac. 648, 105 Pac. 249; *Heywood v. Doernbecher Mfg. Co.*, 48 Ore. 359, 86 Pac. 357, 87 Pac. 530.

But a statute prescribing the time and manner of filing a verified statement of the costs and disbursements necessarily incurred in the trial of a suit or action in the lower court is often adopted as a rule of procedure in the appellate court in taxing the costs of that court. *Hammer v. Downing*, 39 Ore. 504, 64 Pac. 651, 65 Pac. 17, 67 Pac. 30; *Rader v. Barr*, 37 Ore. 453, 61 Pac. 1027.

Verification of Cost Bill.—Although there is no statute or rule of court requiring a cost bill in the supreme court to be verified, manifestly they should be verified; otherwise an exception to some statement in the cost bill which is verified will necessarily control. *Clark v. Eltinge*, 39 Wash. 696, 83 Pac. 901.

⁹⁷ *Candler v. Washoe Lake Reservoir, etc. Co.*, 28 Nev. 422, 82 Pac. 458.

In the absence of an agreement by counsel, made in open court or by stipulation filed, the provisions relative to the time of filing cost bills must be complied with to entitle a party to recover those costs which are required to be embraced within a cost bill. *Candler v. Washoe Lake Reservoir, etc. Co.*, 28 Nev. 422, 82 Pac. 458.

⁹⁸ *Winninghoff v. Wittig*, 64 Wis. 180, 24 N. W. 912. See *Ellis v. Barron County*, 111 Wis. 576, 87 N. W. 552.

unnecessarily taken, when one would suffice," only one bill of costs will be taxed.¹

c. *Objections.*—A party complaining of items contained in the memorandum of costs must interpose seasonable objections thereto,² specifying the items objected to.³ But where the items taxed are illegal, no formal objection is necessary to secure the exclusion thereof.⁴

99. *Harrison Mach. Wks. v. Hosig*, 73 Wis. 184, 41 N. W. 70.

Several appeals being based on a single notice, costs should be taxed as on a single appeal. *State v. Oconomowac*, 104 Wis. 622, 80 N. W. 942, citing *Nash v. Meggett*, 89 Wis. 486, 497, 61 N. W. 283.

The clerk may charge for only one copy of the transcript, though both the appellant and appellee use it. *Union Cent. Life Ins. Co. v. Spinks*, 27 Ky. L. Rep. 453, 85 S. W. 719.

When a brief is filed which is the party's brief both on the original and the cross-appeal, the service of filing it should only be taxed once. *Marion County v. Spaulding*, 143 Ky. 289, 136 S. W. 235.

One attorney's fee only will be taxed in the appellate court, where only one record is presented in the appellate court, and but one brief filed. *Hannah, etc. Co. v. Mosser*, 105 Mich. 18, 62 N. W. 1120; *In re Seattle*, 40 Wash. 450, 82 Pac. 740.

1. The general rule is well settled, at least in equity cases, that the words "with costs" in the remittitur or mandate of an appellate court, where there are several appellees, means only one bill of costs, for in such an action the parties on one side are usually united in interest; or they have a common interest in contesting the claim of the opposite party. *Van Gelder v. Van Gelder*, 84 N. Y. 658; *Isola v. Weber*, 12 App. Div. 267, 42 N. Y. Supp. 615; *In re Pine's Stream*, 114 N. Y. Supp. 681; *In re New York, etc. R. Co.*, 28 Hun 505.

But this rule does not apply to a case of condemnation proceedings in which the rights of several owners of separate parcels entirely distinct in ownership are involved. *In re Pine's Stream*, 114 N. Y. Supp. 681.

And where several appellants secure a reversal on appeal each is entitled to his costs, notwithstanding all are represented by the same counsel, and the decision of one case is necessarily de-

cisive of all, no agreement being made that all the cases shall abide the result in one of them. *Kelly v. Oksall*, 17 S. D. 392, 97 N. W. 11.

In the United States circuit court of appeals separate bills of costs will be taxed in favor of several appellees who appear separately and file separate briefs. *Augusta Trust Co. v. Federal Trust Co.*, 140 Fed. 930.

2. *State ex rel. Hurley v. District Court*, 27 Mont. 40, 69 Pac. 244.

By filing a counter affidavit in response to objections interposed to their cost bill, the affiants thereby waived the right to insist that such objections were not filed in time. *Hammer v. Downing*, 39 Ore. 504, 64 Pac. 651, 65 Pac. 17, 67 Pac. 30.

3. *Hefferen v. Northern Pac. R. Co.*, 45 Minn. 471, 48 N. W. 526.

4. *Boothe v. Farmers' Bank*, 53 Ore. 576, 98 Pac. 509, 101 Pac. 390; *Sommer v. Compton*, 53 Ore. 341, 100 Pac. 289. See *Heywood v. Doernbecher Mfg. Co.*, 48 Ore. 359, 86 Pac. 357, 87 Pac. 530.

Statutes providing for the manner of taxing costs and the raising of objections to the cost bill do not apply to appellate courts unless expressly included. But such courts often follow the practice prescribed in these statutes as affording a convenient rule of procedure. *Heywood v. Doernbecher*, 48 Ore. 359, 86 Pac. 357, 87 Pac. 530.

Necessity for Objections.—When a bill for costs has been filed in the supreme court of Oregon, "containing items for which charges are made in excess of the sums established by law, it is the duty of our clerk to disallow the excess, though no objections have been filed. Where, however, a cost bill has been served and filed, containing items of disbursement, for the recovery of which the statute or rules of this court prescribe maximum sums, and no written objections are interposed, our clerk is not permitted to disallow any part of the items charged, if it appear that all the charges are

Not only must exceptions to items in the cost bill be specific, but attorneys filing such exceptions must bear in mind that if they raise a question of fact by their exceptions the burden of proof is upon them.⁵

6. Correction of Erroneous Taxation.—The usual method of correcting an erroneous taxation of costs in an appellate court is by motion to retax,⁶ which must be filed in due time,⁷ pointing out spe-

within the rate specified. *Hammer v. Downing*, 39 Ore. 504, 526, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30." *Sommer v. Compton*, 53 Ore. 341, 100 Pac. 289.

Verification of Objections.—"When the right to recover an item of disbursement (on appeal, such as for example, items for printing, an additional abstract and brief) is practically admitted by the adverse party who disputes the reasonableness of the charge, the objection interposed ought to state that not more than the specified sum of money should be allowed; and it would seem that in such case the objection should be verified. . . . When, however, an entire item is challenged on the ground that the charge is unwarranted, the exception is in the nature of a demurrer," which presents the legal question and is sufficient without a verification. *Oregon Elec. R. Co. v. Terwilliger Land Co.*, 51 Ore. 107, 93 Pac. 930. See *Heywood v. Doernbecher Mfg. Co.*, 48 Ore. 359, 86 Pac. 357, 87 Pac. 530.

5. An exception to the taxation of the costs of a transcript as containing "irrelevant, redundant and immaterial matter" not necessary nor used by the court in determining the issues, will be overruled where the irrelevant and redundant matter is not pointed out, because the clerk will not attempt to go over the entire case simply for the purpose of determining what, if any, part of the record is irrelevant and redundant. *Clark v. Eltinge*, 39 Wash. 696, 83 Pac. 904.

6. *U. S.*—*Sully v. American Nat. Bank*, 179 U. S. 68, 21 Sup. Ct. 29, 45 L. ed. 89. *Ind.*—*Green v. Felton*, 44 Ind. App. 321, 89 N. E. 320. *Id.* *Berkey v. Thompson*, 126 Iowa 394, 102 N. W. 134. *Mich.*—*Arnold v. Bright*, 41 Mich. 416, 50 N. W. 392. *Ore.* *Portland Iron Wks. v. Willett*, 49 Ore. 245, 89 Pac. 421, 90 Pac. 1000 (issue on motion to retax costs of printing abstract and brief); *Hammer v. Down-*

ing, 39 Ore. 504, 64 Pac. 651, 65 Pac. 17, 67 Pac. 30. *Wash.*—*Bellingham Bay, etc. Co. v. Strand*, 5 Wash. 807, 32 Pac. 782; *Huntington v. Blakeney*, 1 Wash. Ter. 111.

The ruling of the clerk on objections to the allowance of disbursements for printing "cases" and briefs may be renewed on motion to retax (*Crouse v. Chicago, etc. R. Co.*, 102 Wis. 196, 78 N. W. 446, 778; *Beker v. City of Madison*, 62 Wis. 137, 22 N. W. 141, 583), except where the court gives the clerk no directions as to how to tax, and he follows what was impliedly the decision of the court as to the allowance of costs. In such case the error can be reached only by a motion for a review of the taxation and not by motion to retax, because the error is the court's and not the clerk's (*Collins v. City of Janesville*, 111 Wis. 348).

These remedies may be concurrent and cumulative, however. And a plea of *res adjudicata* will not bar a motion to retax after a motion to vacate the judgment, if the motion to retax was not involved in the motion to vacate. *Hammer v. Downing*, 39 Ore. 504, 64 Pac. 651, 65 Pac. 17, 67 Pac. 30.

If one of several appellees believes a reason exists why he should escape liability for costs, he can make it known to the court before the cause is submitted, and thus obtain a discrimination in his favor, and should he neglect to do this, and a judgment be rendered against him for costs, he must have it corrected by a petition for rehearing filed within the time prescribed by law. *Buckler v. Rogers*, 6 Ky. L. Rep. 737.

7. A motion for retaxation of costs will not be entertained by an appellate court where nearly eight months have elapsed since the opinion was rendered and nearly six months since the execution was issued. *Bellingham Bay, etc. Co. v. Strand*, 5 Wash. 807, 32 Pac. 782.

cifically and in detail the items to which objection has been made.⁸

Hearing of Motion.—On the hearing of a motion before an appellate court to retax costs, no question can be considered except as to such costs as may be lawfully taxed in that court. None of the costs taxed or taxable in the trial court are in any way involved in the proceeding.⁹ But on such hearing it will be presumed that the original taxation was correct, unless the contrary is shown.¹⁰

Objections.—The taxation of costs on appeal will not be reviewed unless the objections are first taken before the clerk in conformity with the statutes or rules of court on the subject.¹¹ In the absence of

8. *Summerhill v. Darrow* (Tex.), 62 S. W. 1054.

A motion to retax costs will be refused by an appellate court where it is so indefinite that the opposite party has no notice of what particular items of costs are objected to. *Bellingham Bay, etc. Co. v. Strand*, 5 Wash. 807, 32 Pac. 782.

Unnecessary Matter in Transcript. On motion to retax costs because of inserting unnecessary matter in the transcript, the matter must be specifically pointed out. *Brownlee v. Hewitt*, 1 Mo. App. 604. See also *Bruner v. Kansas Moline Plow Co.*, 24 Okla. 158, 103 Pac. 673.

And on a claim for the register's fees in the lower court they must be itemized. *Dickinson v. Seaver*, 44 Mich. 624, 7 N. W. 182.

A motion to retax printing costs on the ground that they are excessive must point out specifically wherein the cost for the printing is excessive. *Bruner v. Kansas Moline Plow Co.*, 24 Okla. 158, 103 Pac. 673.

9. *Terminal Railroad Assn. v. Larkins*, 127 Ill. App. 80.

On a motion in the appellate court to retax certain fees of clerks not fixed by law, it is the duty of that court to pass upon the reasonableness of such charge and fix a reasonable fee for the services rendered. And in order to determine the reasonableness of the various items of charge the court may consider the fees charged for like services by the clerks of the supreme courts of other states. *Shanks v. Pinkston* (Okla.), 112 Pac. 757.

But the lower court can consider a motion to retax only in so far as it relates to items of costs in that court; it cannot pass on a motion to retax costs in an appellate court. If the motion is separable, relating partly to

items over which it has jurisdiction, and partly to items of costs on appeal, it may be considered *pro tanto*. *Berkey v. Thompson*, 126 Iowa 394, 102 N. W. 134.

10. *Boothe v. Farmers', etc. Bank*, 53 Ore. 576, 98 Pac. 509, 101 Pac. 390.

11. *Heywood v. Doernbecher Mfg. Co.*, 48 Ore. 359, 86 Pac. 357, 87 Pac. 530; *Akerly v. Vilas*, 23 Wis. 628.

Place of Objecting.—The objection to a taxation of costs by an appellate court should be made to that court and not to the clerk of the court below. *Hill v. Muller*, 53 Misc. 262, 10 N. Y. Supp. 96.

Time for Raising Objections.—When a bill of costs is taxed by the clerk under the order of the court, either party may file exceptions; but if both parties, by written agreement, waive all exceptions, and the court confirms the report it is too late to object; therefore a motion to file a bill of review upon a subject of costs, and also for a retaxation of them will be overruled. *Pennsylvania v. Wheeling, etc. Bridge Co.*, 18 How. (U. S.) 460, 15 L. ed. 449.

Rule in South Dakota.—While under the Rev. Code Civ. Proc. 1903, §416, the question whether proper items and amounts of costs and disbursements have been taxed by the clerk of the supreme court should be raised by an appeal from his taxation, however, though no such appeal is taken, the supreme court of South Dakota has inherent power to review the official acts of its clerk whenever attention is called to them by parties interested therein, and it is the duty of the court to correct errors of the clerk, regardless of the manner in which they are presented for review. *Kelly v. Oksall*, 17 S. D. 392, 97 N. W. 11, citing Dalb-

a motion to strike out objectionable items, they will be deemed to have been waived.¹²

E. COLLECTION AND ENFORCEMENT.—The costs of an appellate court are usually enforced by execution, even though there is no formal entry of judgment for such costs.¹³ The filing of the memorandum with the clerk, subject to the right to strike out disputed items, has the same effect as a formal entry of judgment.¹⁴ In a few states costs are enforced by applying to the clerk for a fee bill which has the force and effect of an execution.¹⁵

F. PAYMENT AND DISCHARGE.—The failure of the unsuccessful party to pay the costs assessed against him within the time limited does not make the order final or exhaust the court's discretion to modify it.¹⁶

kermeyer v. Scholtes, 3 S. D. 183, 52 N. W. 871.

12. *State v. District Court*, 27 Mont. 40, 69 Pac. 244.

13. *Mont.*—*State v. District Court*, 27 Mont. 40, 69 Pac. 244. *N. C.*—*Dobson v. Southern R. Co.*, 133 N. C. 624, 45 S. E. 958. *Wash.*—*State v. Hatch*, 36 Wash. 164, 78 Pac. 796.

By Code Civ. Proc., §1869, a clerk is required to issue execution upon delivery to him by party to whom appellate court has awarded costs within thirty days after the remittitur is filed with the clerk below, a memorandum of his costs properly verified. *State v. District Court of Second Judicial District*, 27 Mont. 40, 69 Pac. 244.

Under a judgment that "appellants recover of appellee all costs in this behalf expended" a clerk of the supreme court may issue execution for the costs incurred on appeal in that court, and the costs of transcript and other costs of appeal incurred in the district court are collected by execution from that court. *Bonner v. Wiggins*, 54 Tex. 149. See also *Henson v. Byrne*, 91 Tex. 625, 45 S. W. 382; *Gulf, etc. R. Co. v. Hume* (Tex.), 30 S. W. 863; *Bonner v. Wiggins*, 54 Tex. 149, 150; *De La Garza v. Carolan*, 31 Tex. 387; *Ames Iron Works v. Chinn*, 20 Tex. Civ. App. 382, 384, 49 S. W. 665 (see 93 Tex. 635, no op.).

By statute in the state of Washington the judgment of the appellate court in awarding costs in that court directs that execution shall issue for the costs. *State v. Hatch*, 36 Wash. 164, 78 Pac. 796.

A clerk's remedy for the collection of his fee for making the transcript

on appeal is by enforcement of the judgment of the appellate court by execution or fee bill. *Buchanan v. Parham*, 95 Ark. 81, 128 S. W. 563.

Under the circuit court of appeals practice the bill of costs as taxed by the clerk is annexed to the mandate, and may be enforced below by execution. *Corn Products Ref. Co. v. Chicago Real Estate Loan, etc. Co.*, 185 Fed. 63, 107 C. C. A. 283.

In Wisconsin the judgment of an appellate court for costs must be enforced by execution issued out of that court and must be satisfied there. *Bouchier v. Hammer*, 142 Wis. 527, 126 N. W. 15.

Compelling Issuance of Execution. If the lower court refuses to carry out the direction of the appellate court in its judgment, viz., that the lower court shall cause execution to issue for the collection of the costs on appeal, a writ of mandate is the proper remedy because the remedy by appeal is not as speedy and adequate. *Fla.*—*State v. Call*, 36 Fla. 305, 18 So. 77. *Idaho.* *American, etc. Placer Co. v. Rich*, 69 Pac. 280. *La.*—*State v. Judge*, 48 La. Ann. 667, 19 So. 666. *Neb.*—*State v. Thompson*, 69 Neb. 157, 95 N. W. 47; *State v. Dickinson*, 63 Neb. 869, 89 N. W. 431. *S. D.*—*Schnepper v. Whiting*, 18 S. D. 38, 99 N. W. 84. *Wash.* *State v. Hatch*, 36 Wash. 164, 78 Pac. 796.

14. *State v. District Court*, 27 Mont. 40, 69 Pac. 244.

15. *Buchanan v. Parham*, 95 Ark. 81, 128 S. W. 563.

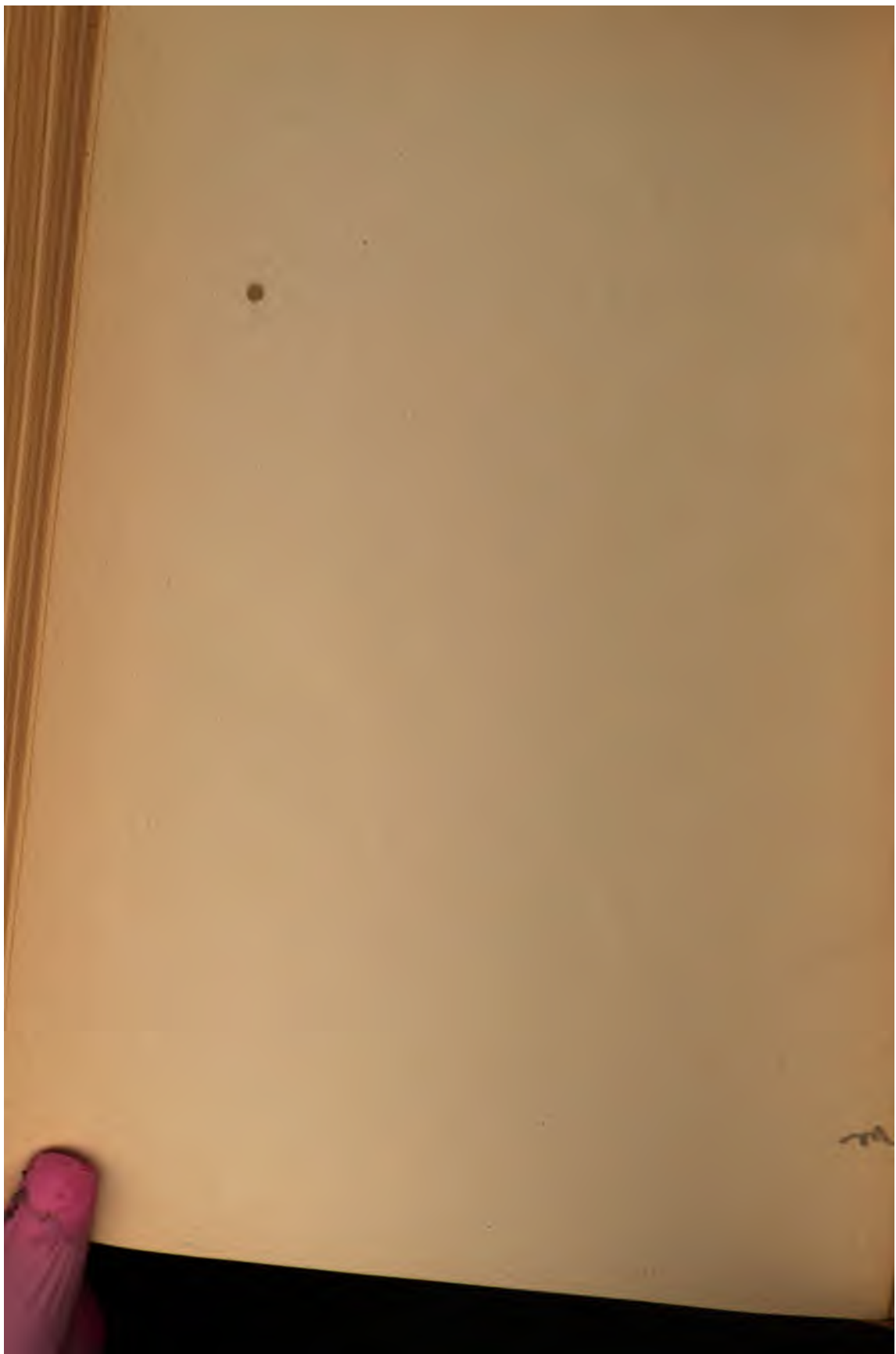
16. *Goldie v. Bay Circuit Judge*, 155 Mich. 424, 119 N. W. 430.

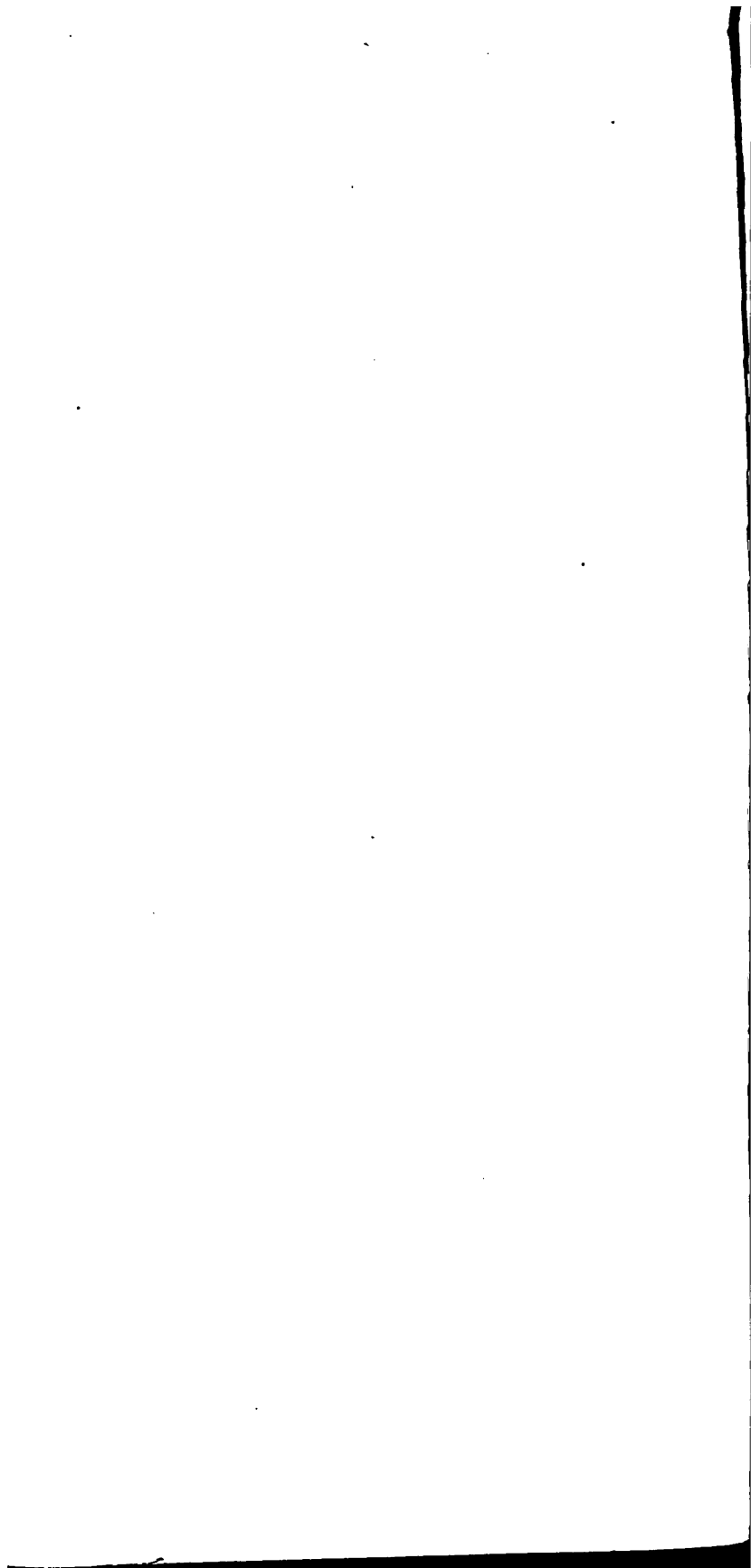
G. **RECOVERY OF COSTS.** — Where the party who is successful on appeal is compelled to pay the costs himself in order to procure the issuance of a mandate, he is entitled to judgment in the appellate court against the other party.¹⁷

17. *Summerhill v. Darrow* (Tex.), 62 S. W. 1054.

COUNTERCLAIM. — See **Set-Off** and **Counterclaim**.

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